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Protection Against Invasion Of Privacy In Communications: The Olmstead Case Sustained

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not be disturbed or dispensed with. But, of course, acts of Congress are to be interpreted by the courts, and the ruling of the court of highest resort is conclusive on the construction.

Since the whole problem is apparently reduced to the single question of what Congress intended, an inquiry into the reasons leading to the 1910 amendment should lead the courts to the opposite result from that which they have reached. Before 1910, the employee was subject to being put to great inconvenience and expense by having to travel to the district wherein the defendant was resident. Congress thought that this was unjust, and was thereby impelled to pass the 1910 amendment in an effort to end such oppression. It is submitted that it does our Legislature a great wrong to assign to it an intention so illogical and inconsistent as to pass a statute that would greatly accentuate the very kind of evil it was trying to abate.

WILLIAM M. MARTIN

PROTECTION AGAINST INVASION OF PRIVACY IN COMMUNICATIONS: THE OLMSTEAD CASE SUSTAINED

Since the very founding of the United States, one of the most important phases of the fight to preserve fundamental civil liberties has been the effort to protect the people of the nation from over-zealousness on the part of law enforcement agencies in obtaining evidence to secure convictions for law violations. The whole attempt to afford this protection has been complicated by the necessity of maintaining the delicate balance between the assurance to the people of the right of privacy and the obvious need of securing convictions for offenses against the law.

The Fourth and Fifth Amendments to the Constitution of the United States were included to establish a protection against such violations of civil liberties. The Fourth Amendment,[1] more specifically, affords protection against unreasonable search and seizure, while the Fifth[2] prohibits the forcing of one to testify against himself. It has been

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submitted that a more desirable situation would have resulted if both cases had been decided the other way.

[1]U. S. Const., Amend. IV. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, "

[2]U. S. Const., Amend. V. "No person . shall be compelled in any criminal case to be witness against himself, . ."

said that the two amendments are closely related and should be read and interpreted together, for as a rule the unlawful search and seizure is made with the purpose of forcing one to testify against himself,[3] thus involving both of the amendments. A number of states have felt the need of including similar provisions in their constitutions.[4]

I

In recent years a practice undreamed of by the framers of the Constitution has arisen—the use of wire tapping to obtain evidence. This practice has elicited storms of protest both from the public and members of Congress. Recently, the President of the United States declared in a letter to Congressman Thomas Eliot: "The use of wire tapping to aid law-enforcement officers raises squarely the most delicate problem in the field of democratic statesmanship. It is more than desirable, it is necessary that criminals be detected and prosecuted vigilantly as possible. It is more necessary that the citizens of democracy be protected in their rights of privacy from unwarranted snooping. As an instrument for oppression of free citizens, I can think of none worse than indiscriminate wire tapping."[5]

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[3]Boyd v. United States, 116 U. S. 616, 633. 6 S. Ct. 524, 534, 29 L. ed. 746 (1886) where it is said of these amendments: "They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment."

For the persons protected by these amendments, see In re Tri-State Coal and Coke Co. et al., 253 Fed. 605 (W. D. Pa. 1918); United States v. Wong Quong Wong, 94 Fed. 832 (D. Vt. 1899); Colyer v. Skeffington, 265 Fed. 17 (D. Mass. 1920), rev'd on other grounds, Skeffington v. Katzeff, 277 Fed. 129 (C. C. A. 1st, 1922). A more extensive list of cases will be found in U. S. C. A. Constitution, vol. 2 (Supp. 1941) p. 162.

As to the premises protected, see United States v. McBride, 287 Fed. 214 (S. D. Ala. 1922), Aff'd., 284 Fed. 416 (C. C. A. 5th, 1922); United States v. Slusser, 270 Fed. 818 (S. D. Ohio 1921). See also U. S. C. A. Constitution vol. 2 (1928) p. 463 and (Supp. 1941) p. 165.

[4]For example: Fla. Const. of 1885, Art. I, § 22; Ill. Const. of 1870, Art. II, § 6; Kan. Const. of 1859, Bill of Rights § 15; Tenn. Const. of 1870, Art. I, § 7; Tex. Const. of 1876, Art. I, § 9; Va. Const. of 1902, Art. I, § 10; W Va. Const. of 1872, Art. III, § 6; Wis. Const., Art. I, § 11.

[5]Hearing before Subcommittee No. 1. of the Committee on the Judiciary, House of Representatives, 77th Congress, First Session, on H. R. 2266 and H. R. 3099, p. 257. This reference is taken from a letter dated August 18, 1941, sent out by the Council for Civil Rights, 291 Broadway, New York, N. Y. The purpose of this letter

However, in 1928, in the case of *Olmstead v. United States*,[6] the Supreme Court specifically held that wire tapping was *not* an unlawful search and seizure and hence no violation of the Constitution. In this case, Olmstead was convicted as the chief participant in a conspiracy to violate the National Prohibition Act, by possessing, transporting and selling intoxicating liquors. A large part of the business done by the defendants necessitated the use of the telephone. The information leading to the discovery of the conspiracy was largely obtained by the interception of these phone messages by the use of wire tapping. However, the wire tapping was done off the premises used by the defendants, so that no trespass was committed in the process. The evidence obtained in this manner was instrumental in securing the conviction of the defendants.

Chief Justice Taft delivered the opinion of the majority in a five-to-four decision which held that there was neither "search" nor "seizure" involved. Since there had been no entry into the houses or offices of the defendants, said the Court, there had been no trespass committed in the wire tapping process, and in no case has a violation of the Fourth Amendment been found unless there had been an actual physical search of the defendant's person or effects or an invasion of his property. [7] Four justices entered vigorous dissents, favoring a broader interpretation of the constitutional safeguards to include protection against unwarranted intrusions on private conversations.

In order to fill this gap left in the protection of these civil liberties, Congress, in effect, nullified the *Olmstead* case by passage of the Communications Act of 1934.[8] This Act prohibits anyone who receives or assists in receiving messages in interstate or foreign commerce, from

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was to create interest in the case of United States v. Goldman, see note 16, infra, at the time when the Supreme Court was about to consider a motion for a rehearing of the accused's petition for certiorari.

[6] 277 U. S. 438, 48 S. Ct. 564, 72 L. ed. 944, 66 A. L. R. 376 (1928). Also, Foley v. United States, 64 F. (2d) 1 (C. C. A. 5th, 1933), cert. denied, 289 U. S. 762, 53 S. Ct. 796, 77 L. ed. 1505 (1933); Kerns v. United States, 50 F. (2d) 602 (C. C. A. 6th, 1931).

[7] It was said that there was no basis for a charge of violation of the Fifth Amendment except in connection with the alleged search and seizure, because the defendants' conversations were all carried on freely and voluntarily.

[8] 48 Stat. 1103, June 19, 1934, c. 652, § 605, 47 U. S. C. A. § 605 (Supp. 1941). Chief Justice Taft in the Olmstead decision provided Congress with its cue for this legislation: "Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence." 277 U. S. 438, 465-6, 48 S. Ct. 564, 568, 72 L. ed. 944, 66 A. L. R. 376, 384 (1928).

publishing or divulging the contents of such messages to any person other than the addressee or his authorized agent.[9]

In enforcing this Act, the Supreme Court in *Nardone v. United States*[10] held that its provisions applied to federal agents so as to prevent them from testifying as to the content of messages intercepted by wire tapping. In the language of the Court, "Taken at face value the phase 'no person' comprehends federal agents, and the ban on communication to 'any person' bars testimony to the content of an intercepted message."[11] The Court was not faced with the necessity of overruling the *Olmstead* case, since it only had to apply the statute to the

[9]There seems to be very little, if any, legislative action on the part of the several states, which is comparable to this federal statute. Illinois has a statute, however, which protects news dispatches in a similar way. See Ill. Rev. Stat. (1941) c. 134, § 16. A New York statute makes wire tapping a criminal act. N. Y. Penal law § 1423 (6), Laws of N. Y. (Thompson, 1939) p. 1909. There are a number of statutes prohibiting employees of telephone companies from divulging the contents of telephone messages: Md. Code Pub. Gen. Laws, Art. 27, § 580; Pa. Stat. (Purdon, 1936) tit. 18, §§ 2011-2014. In Maryland the courts have been called upon to pass on the admissibility of evidence obtained by wire tapping, in at least three instances. Hitzelberger v. State, 174 Md. 152, 197 Atl. 605 (1938) is the most significant of these decisions. A Maryland statute (Code Pub. Gen. Laws, Supp. 1934, Art. 35, § 4A) prohibits the admission, in misdemeanor trials, of evidence procured through illegal search or seizure. Accused contended that this statute prevented the prosecution from introducing evidence of his telephone conservations which had been overheard by wire tapping. The Maryland court accepted the Supreme Court's view in the Olmstead case that wire tapping is not a search or seizure, and therefore held that the statute did not protect the accused. This position was reaffirmed in Hubin v. State, 23 (2d) 706 (Md. 1942). In both the latter case and in Rowan v. State, 175 Md. 547, 3 A. (2d) 753, 134 A. L. R. 615 (1939) it was held that the Federal Communications Act does not affect the power of state courts to determine, in cases tried before them, the admissibility of evidence obtained by wire tapping.

The absence of state legislation in the nature of the Federal Communications Act takes on great significance when it is remembered that the federal courts permit federal prosecution authorities to use evidence illegally obtained by state officers acting independently and not in collusion with federal officers. Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914); Edgmon v. United States, 87 F. (2d) 13 (C. C. A. 10th, 1936); United States v. Goldstein, 120 F. (2d) 485 (C. C. A. 2d, 1941).

[10]302 U. S. 379, 58 S. Ct. 275, 82 L. ed. 314 (1937). On later appeal, 308 U. S. 338, 60 S. Ct. 266, 84 L. ed. 307 (1939).

[11]302 U. S. 379, 381, 58 S. Ct. 275, 276, 82 L. ed. 314 (1937). See also United States v. Polakoff, 112 F. (2d) 888 (C. C. A. 2d, 1940), cert. denied, 311 U. S. 653, 61 S. Ct. 41, 85 L. ed. 418 (1940) where a telephone message of accused was taken down by a recording machine attached to an extension phone by government agents. The court held this to be an "interception," which Judge Learned Hand defined thus: " . . anyone intercepts a message to whose intervention as listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts." 112 F. (2d) 888, 889. To the same effect, United States v. Fallon, 112 F. (2d) 894 (C. C. A. 2d, 1940).

situation at bar, and did not have to decide the case on the basis of the Fourth and Fifth Amendments as was done in the *Olmstead* decision. In *Diamond v. United States*[12] the scope of the Communications Act was extended by a lower federal court beyond the effect given to it in the *Nardone* case. It was held that federal agents could not testify as to intercepted messages of interstate *or intrastate* nature. It was reasoned that unless intrastate messages were also covered by the Act, that privacy which was intended to be made secure would still be threatened. This position was later sustained by the Supreme Court in *Weiss v. United States.*[13]

This steady tendency toward construing the Act as broadly as possible seems to have been interrupted in the case of *Goldstein v. United States,*[14] very recently decided by the Supreme Court. By tap-

[12]108 F. (2d) 859 (C. C. A. 6th, 1938). See also Sablowsky v. United States, 101 F. (2d) 183 (C. C. A. 3rd, 1938). Contra: Valli v. United States, 94 F. (2d) 687 (C. C. A. 1st, 1938); Smith v. United States, 91 F. (2d) 556 (App. D. C., 1937).

[13] 308 U. S. 321 at 327, 60 S. Ct. 269 at 271, 84 L. ed. 298 (1939), rev'g, 103 F. (2d) 348 (C. C. A. 2d, 1939). "Plainly the interdiction thus pronounced [by Sec. 605 of the Communications Act] is not limited to interstate or foreign communications. And, as Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions, there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications."

In this case, which has received renewed attention since the decision in Goldstein v. United States, see note 14, infra, the government agents intercepted messages between the various conspirators and transcribed them on phonograph records. Some of the conspirators were then informed of the interceptions and of the completely incriminating evidence which the government held against them, and by this means they were induced to become state's witnesses. At the trial these witnesses testified that they held certain conversations and read some of the intercepted messages which had been transcribed. The phonograph records and transcribed notes were admitted in evidence, and some of the records were played to the jury. The defendants, conspirators who had not confessed, objected to the evidence as a violation of the Communications Act, and the government countered by claiming that the Act did not apply because (1) the messages were intrastate, and (2) the disclosure of the messages were "authorized by the sender," within the words of the statute, inasmuch as the confessed conspirators had consented to testify for the prosecution. The Court had no difficulty in overruling both of these contentions, the first as explained above, and the second by pointing out that the "Act contemplates voluntary consent and not enforced agreement to publication." It was said that "the interdiction of the statute was intended to prevent such a method of procuring testimony."

[14]10 U. S. L. Week 4353, 62 S. Ct. 1000, April 27, 1942, affirming, United States v. Goldstein, 120 F. (2d) 485 (C. C. A. 2d, 1941), on practically the same reasoning as was employed by the lower court. This decision was handed down on the same day as that in Goldman v. United States, see note 16, infra. Mr. Justice Roberts wrote the opinion for the majority in both cases, but in the Goldstein case Mr. Chief Justice Stone and Mr. Justice Frankfurter joined Mr. Justice Murphy in dissent.

ping telephone conversations of certain alleged conspirators, federal officers obtained some strongly incriminating evidence. The officers then confronted these members of the conspiracy with the fact that their communications had been intercepted, thereby persuading them to confess and turn state's evidence. At the prosecution of the other conspirators, the defendants objected to the admission of the testimony of their confessed colleagues, on the ground that such evidence was excluded by the Communications Act. The Supreme Court upheld the lower court's ruling that the testimony should be admitted, for the reason that the Act conferred only a personal privilege on the parties to the conversations intercepted, and since these defendants were not the senders or receivers of the messages tapped, they were not protected. This was declared to be the nature of the protection provided by the Fourth Amendment against actual searches and seizures, and the Communications Act was viewed as providing the same type of protection against wire tapping. Also stressed by the Court was the fact that the testimony of the confessed conspirators at the trial did not refer to any of the intercepted messages or to their contents. It is not clear, however, whether this condition was necessary to the decision reached, for the holding appears to have turned on the other consideration.[15]

Since the *Olmstead* case has never been overruled, the rule still stands that wire tapping is not an unlawful search or seizure and not a violation of the Fourth and Fifth Amendments of the Constitution. However, the passage of the Communications Act and its broad application by the courts have served to afford a protection against wire tapping which, even considering the rule adopted in the *Goldstein* case, is at least as broad as that which is given by the Fourth Amendment. To this extent the unsatisfactory consequences of the *Olmstead* decision have been overcome.

However, it now appears that neither the Fourth and Fifth Amendments nor the Act of 1934 is adequate to protect the right of persons

[15]The Court relied on this fact of the defendants' not being parties to the intercepted conversations, as a means of distinguishing the Weiss case and the Nardone case. The dissenting justices, Stone, Murphy and Frankfurter, argued that this factor did not make for a difference in legal result, and that to give it the effect accorded by the majority was to "defeat or substantially impair the underlying policy and purpose" of the Act. They further declared that the prohibitions of the Act and the Fourth Amendment were not the same in scope, and that the majority's ruling involved "a direct repudiation" of both the Weiss and Nardone cases, so that the Court must either "ignore or silently overrule" those decisions to maintain its present holding.

to enjoy privacy in their communications. The case of *United States v. Goldman*,[16] which very recently culminated in the Supreme Court's affirmance of the lower court's decision, presents a situation of novel incidence in which such civil liberties have been invaded but for which invasion there is no remedy under the present state of the law.[17]

The defendants, attorneys at law, were indicted for a conspiracy to violate the Bankruptcy Act by receiving, or attempting to obtain, money for acting, or forbearing to act, in a bankruptcy proceeding. The facts of the case were exceedingly involved but the interesting portion concerns the method by which evidence was obtained to be used against the defendants. Two agents of the Federal Bureau of Investigation went to the building where one of the defendants had his law office, and obtained entrance to defendant's office and to an adjoining vacant office. Through an opening around a steam pipe they passed a wire to which they attached a small microphone. This microphone was then drawn back into the aperture until it was out of sight. They then departed but later returned to the vacant office to listen in on a conference between the defendants. Finding that the microphone would not work because of noises in the steam pipe, the agents placed a detectaphone against the wall in the vacant office and thereby listened in on the conversation in the adjoining office. The detectaphone is a very sensitive device which can pick up sounds through even a stone wall. Its use requires no wire tapping, and it is not even necessary that a microphone be "planted" in the room where the conversation is carried on. At the trial of the defendants, the court refused to suppress the evidence obtained by the use of the detectaphone. The Circuit Court of Appeals for the Second Circuit upheld this ruling, saying that "no communication by wire or radio was intercepted to make applicable the provisions of sec. 605 of the communications act of 1934 ., as construed in *Nardone v. United States.*

"[18] The Supreme Court thereafter denied certiorari in this case, but

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[16] 118 F. (2d) 310 (C. C. A. 2d, 1941), aff'd, as Goldman v. United States, April 27, 1942, 10 U. S. L. Week 4357, 62 S. Ct. 993.

[17] One of Justice Brandeis' observations in his dissent in the Olmstead case seems to embody a prophecy of the occurrence of the Goldman case situation. "But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." 277 U. S. 438, 473, 48 S. Ct. 564, 570, 72 L. ed. 944, 66 A. L. R. 376, 388 (1928).

[18] 118 F. (2d) 310, 314 (C. C. A. 2d, 1941).

that order was vacated on rehearing and certiorari was granted. After a long delay following the hearing of arguments, the Court announced its decision affirming the judgment below.[19] First disposed of was defendant's contention that the part of the intercepted communications which included remarks of one of the defendants made in a phone conversation with some outside party, was protected by the Communications Act. The Court denied that a communication comes within the statute's protection at the moment the speaker utters words with the intention of transmitting them over the telephone. Rather, "the protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation." And there was no "interception" because ". this word indicates the taking or seizure by the way or before arrival at the destined place." In the broader issue of whether the use of the detectaphone to overhear the conversations was a violation of the Fourth Amendment, the Court felt that the *Olmstead* case controlled and required a negative answer. The case under consideration was found to be indistinguishable from the *Olmstead* case, and the majority of the Court declared itself unwilling to overrule the precedent decision, but rather expressly accepted the reasoning therein employed. Thus, though Congress has by positive legislation protected persons from one form of unauthorized intrusions on private conversations and messages, there exists no means in the law to prevent the violation of privacy in communications by other devices than wire tapping, unless an actual physical search or seizure has taken place.

II

With the view of protecting the civil liberties here involved how are the practices of the *Goldman* case, and similar practices as yet untried, to be met?

Two methods seem possible. One course of action would necessitate the passage by Congress of a new statute to outlaw each specific

[19]Cert. denied, June 2, 1941, 313 U. S. 588, 61 S. Ct. 1111. Order vacated on rehearing and cert. granted, Oct. 20, 1941, 62 S. Ct. 119, 10 U. S. Law Week 3129. Case argued Feb. 5 and 6, 1942. Judgment affirmed, Goldman v. United States, 10 U. S. L. Week 4357, 62 S. Ct. 993, April 27, 1942. Mr. Justice Roberts delivered the opinion for the majority. Mr. Justice Murphy dissented and Mr. Justice Jackson took no part in the decision. Mr. Chief Justice Stone and Mr. Justice Frankfurter joined in this separate declaration of opinion: "Had a majority of the Court been willing at this time to overrule the *Olmstead* case, we should have been happy to join them. But as they have declined to do so, and as we think this case is indistinguishable in principle from *Olmstead's*, we have no occasion to repeat here the dissenting views in that case with which we agree." 10 U. S. L. Week 4358, 62 S. Ct. 996.

practice as it comes to be used. This is actually what happened when the Supreme Court handed down the decision in the *Olmstead* case, and Congress passed the Communications Act of 1934. Such a method is obviously cumbersome and illogical, and is further unsatisfactory because there is always present the danger that the legislature may fail to do its duty upon some occasion. Another objection to this solution of the problem is that it fails to help the first victim whose rights have become abridged. True, it would protect against future abuses, but the person against whom the practice is first employed cannot be restored to his former position.

Another, and far preferable solution to the whole problem is to change the doctrine laid down by the *Olmstead* case so that all such invasions of privacy are violations of the Constitution. This obviously calls for an overruling of the *Olmstead* case, but such action, though made a very remote possibility by the *Goldman* decision, seems necessary for the adequate protection of privacy of communications. Mr. Justice Brandeis, in his dissenting opinion in that case emphatically declared that wire tapping is within the scope and purpose of the Fourth and Fifth Amendments.[20] With this view Justices Holmes, Butler and Stone agreed, adding also short opinions of their own.[21] Brandeis argued that since the adoption of the Constitution, subtler and more far-reaching devices have been used to invade the right of privacy than were contemplated when our fundamental law came into being. He pointed out the need to include such practices within the meaning of the Fourth and Fifth Amendments and declared that the Court has never hesitated to construe those provisions in a liberal way. Such a liberal interpretation was given in *Boyd v. United States*[22] when the Supreme Court held an amendment to the revenue laws unconstitutional as repugnant to the Fourth and Fifth Amendments of the Constitution. This particular act allowed a federal court, in revenue

[20]See dissenting opinion, 277 U. S. 438, 478, 48 S. Ct. 564, 572, 72 L. ed. 944, 66 A. L. R. 376, 391 (1928).

[21]Justice Holmes emphasized the contention that, aside from the constitutional argument, the evidence should have been excluded because it was obtained by a means which was prohibited by statute in the state where the action took place. He felt that as a matter of ethics and principle, the government should not use evidence obtained by illegal means. Justice Brandeis also accepted this view as a supplement to the constitutional argument. Justice Stone approved of both grounds for excluding the evidence, while Justice Butler relied solely on the constitutional point, believing that procedural rules required the argument on certiorari to be limited to that consideration.

[22] 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746 (1886).

cases, upon motion of the government attorney to require a defendant to produce his private books and papers. It was held unconstitutional as applied to suits for penalties or in suits to establish a forfeiture of goods. In the language of the Court, "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure."[23] Again, in *Silverthorne Lumber Co. v. United States*[24] it was held that the Fourth Amendment protected a corporation from compulsory production of its books when the information upon which the subpoenas had been framed was obtained by an unconstitutional search and seizure. In *Gouled v. United States*[25] it was said that an unreasonable search and seizure did not necessarily involve the use of force or coercion but was committed when any agent of the government in the guise of friendship or a business call gained admission to the premises and made a search without the owner's consent. These cases were cited by Mr. Justice Brandeis in support of his position. By use of this persuasive reasoning, the protection of the Constitution could readily be extended to combat such pernicious practices of intruding on private communications as may arise in the future.[26] If wire tapping is within

[23] 116 U. S. 616, 622, 6 S. Ct. 524, 528, 29 L. ed. 746 (1886).

[24] 251 U. S. 385, 40 S. Ct. 182, 64 L. ed. 319, 24 A.L.R. 1426 (1920). The defendants were arrested in their homes. While they were being detained, federal officers went to their place of business and took all of their books and papers, this being done with no authority whatsoever. Upon application, the district court directed a return of the papers but it impounded photostats that had been made. Subpoenas to produce the originals were then issued. These were disobeyed and as a result the defendants were held in contempt. As has been stated, the Supreme Court held that defendants were not obliged to produce the papers.

[25] 255 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647 (1921). "It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers." 255 U. S. 298, 304, 41 S. Ct. 261, 263, 65 L. ed. 647 (1921).

[26] It is possible that the Court in the Olmstead case was influenced by the social conditions prevailing at the time. It will be noted that this case arose under the prohibition law and it is not inconceivable that the Court, in an effort to enforce prohibition policies, was persuaded to restrict the application of the Fourth and Fifth Amendments when it would not have done so in more normal times. However, writers to a large extent seem to approve of the majority opinion of the Court in the Olmstead case. See 8 Wigmore, Evidence (3d ed. 1940) § 2184b, pp. 50, 51.

the scope of the amendments, then it is only a short step to include such devices as the detectaphone. It is submitted that the Supreme Court in deciding the *Goldman* case has lamentably failed to take advantage of the perfect opportunity to overrule the *Olmstead* case and thereby to remedy the unsatisfactory situation which has resulted from that decision. Justices Stone, Frankfurter and Murphy argued that the Court should take this step, but the other five justices participating in the decision were unwilling to overthrow the precedent. Mr. Justice Murphy's dissent to the ruling of the Court stands as a worthy companion to the famous Brandeis dissent in the *Olmstead* case, as a plea for such liberal construction of the Fourth Amendment as would carry out the spirit of the protective provision.[27]

Even without restorting to the drastic action of repudiating its earlier decision, the Court might have decided that using a detectaphone to overhear communications is a violation of the Fourth Amendment, though wire tapping is not. A possibility of distinguishing the two cases arises from the fact that the use of the detectaphone is more objectionable than wire tapping, since even the most intimate conversations can be overheard by its use, whereas in the case of wire tapping one can perhaps refrain from using the telephone and thereby protect himself to that extent. In the case of the detectaphone, one must avoid all spoken communication in order to be assured that his remarks will not be overheard by others than the addressee. The Circuit Court of Appeals, however, failed to perceive any such distinction. Instead, it emphasized the absence of any trespass upon the person or property of defendants and the lack of any legal right to privacy from such intrusions on conversations, and considered these factors to be

[27]Mr. Justice Murphy conceded that the literal words of the Fourth Amendment do not cover the case involved, because there was no physical entry or search. "But it has not been the rule or practice of this Court to permit the scope and operation of broad principles ordained by the Constitution to be restricted, by a literal reading of its provisions, to those evils and phenomena that were contemporary with its framing. . It is our duty to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation. To this end we must give mind not merely to the exact words of the Amendment but also to its historic purpose, its high political character, and its modern social and legal implications. . The search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment. Surely the spirit motivating the framers of that Amendment would abhor these new devices no less." Goldman v. United States, 10 U. S. L. Week 4357, 4359, 62 S. Ct. 993, 997 (1942).

sufficient to bring the case under the *Olmstead* decision. It was asserted that: "Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided there is otherwise no trespass by the listener or violation of a statutory right to use a means of communication thus made immune from interception."[28] The Supreme Court approved this position, branding the argued distinction as " too nice for practical application of the Constitutional guarantee. . "[29] The possibility of finding the necessary trespass in the fact that the federal agents had entered defendant's office to install the microphone was also rejected, because that device was not actually used to overhear the conversations; and the trespass which occurred in connection with the microphone did not aid in the use of the detectaphone.

III

Even if the scope of the protection of the Fourth and Fifth Amendments is extended and the *Olmstead* case is overruled, one more problem remains: namely, assuming the evidence to have been illegally obtained, what are to be the consequences? In other words, what steps are to be taken as a means of enforcing the Fourth and Fifth Amendments?

Two methods of enforcement immediately appear. One is simply to make the offending officer liable to criminal prosecution and to civil liability in favor of the victim. If this method is adopted, there is nothing that would militate against admission of the evidence for the purpose for which it was obtained, so long as it is competent in other respects. This view has found favor in the greater number of the states and seems to be the rule in England as well.[30] Plainly, the outstanding

[28]Goldman v. United States, 118 F. (2d) 310, 314 (C. C. A. 2d, 1941).

[29]Again Mr. Justice Murphy disagreed: "Whatever may be said of a wiretapping device that permits an outside conversation to be overheard, it can hardly be doubted that the application of a detectaphone to the walls of a home or a private office constitutes a direct invasion of the privacy of the occupant, and a search of his private quarters."

[30]An excellent summary of the states following this view will be found in Atkinson, "Prohibition and the Doctrine of the Weeks Case" (1925) 23 Mich. L. Rev. 748 at 770. According to Mr. Atkinson's survey, at least seventeen states follow this view and about an equal number follow it with modifications. Wigmore in his Treatise on Evidence (3d ed. 1940) § 2183 states as the majority rule: " . . admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence." The statement is sustained by twenty-five pages of cases cited in its support. The cases come from England as well as from Canada and more than 30 American states. Mr. Wigmore is strongly

and primary consideration of the courts adhering to this view is that the necessity for punishing crime outweighs any danger to civil liberties that threaten as a result of its adoption. Opposed to any advantages of this method of enforcement, are some serious disadvantages. One great weakness in imposing criminal responsibility lies in the fact that juries often tend to refuse to convict for such action on the part of law enforcement agencies. As a practical matter, juries may hesitate to reprimand an officer in this way, especially if the conviction of the victim has been obtained. The same consideration is involved in granting a *civil* remedy to the victim, and a further weakness of this process arises from the fact that officers are frequently impecunious and thus not able to pay the damages adjudged against them. A last difficulty is that the victim of the practice, if convicted, cannot be compensated for his jail sentence if one has been imposed.

The other method would seem logically to be a more powerful means of enforcing compliance with the Constitution. This method is to deny the admissibility of the evidence obtained in contravention of the Fourth and Fifth Amendments. Such is at present the federal rule.[31] The *Weeks* case[32] is the most outstanding and most oft cited case to this effect. In that case the defendant was arrested by a police officer, so far as the record shows, without a warrant. Other officers, having gone to the defendant's house, found the key, and entered and searched the defendant's room, taking away various papers and articles. Later in the day, police officers returned to the premises and searched again, this time carrying away other letters that they discovered. Defendant filed a petition asking for the return of the property so taken, but the demand was refused. At the trial the papers and letters as well as some lottery tickets, found by the officers, were put in evidence over the objection of the defendant. This was assigned as error. The Court, in deciding in the defendant's favor, placed the higher value on the right of personal security and liberty and private property. In the

in sympathy with this view, as are a number of law review writers. See: (1926) 11 Corn. L. Q. 250; (1926) 24 Mich. L. Rev. 509; Note (1931) 17 Va. L. Rev. 593.

[31]Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746 (1886); Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914); Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. ed. 319, 24 A. L. R. 1426 (1920); Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. ed. 647 (1921); Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. ed. 654 (1921); Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. ed. 145 (1925); Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. ed. 520 (1927); Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. ed. 231 (1927).

[32]Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914).

language of the Court, "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[33] As a means of enforcing the above mentioned rights the Court refused to admit the evidence. The primary consideration of this view is the protection of private rights. The punishment of criminality is secondary.

Of course, the strongest criticism of this attitude is that it hinders the prosecution of crime, which is obviously a very necessary function of the government. But in spite of the able criticisms of this view and of the *Weeks* case,[34] the position has much merit. Mr. Justice Holmes in his dissent to the *Olmstead* case said, "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."[35] It is submitted that this method of enforcement is the more practical and the more powerful one. Obviously, it will at once discourage such practices as wire tapping and the use of the detectaphone, since the evidence obtained in that way is of little use to law enforcement officers. Under the doctrine of the *Weeks* case the evidence itself is inadmissible when obtained in contravention of the Fourth and Fifth Amendments. And the Court has extended this rule further and held that such evidence cannot be used indirectly. Thus, if by the use of wire tapping or some analogous illegal practice the officers learn of the existence of other evidence, that other evidence is also inadmissible.[36] "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[37]

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[33] 232 U. S. 383, 392, 34 S. Ct. 341, 344, 58 L. ed. 652 (1914).

[34] Wigmore, Evidence (3d ed. 1940) § 2184. See also law review articles cited in note 30, supra.

[35] 277 U. S. 438, 470, 48 S. Ct. 564, 575, 72 L. ed. 944, 66 A. L. R. 376, 386 (1928).

[36] Nardone v. United States, 308 U. S. 338, 60 S. Ct. 226, 84 L. ed. 307 (1939); United States v. Weiss, 34 F. Supp. 99 (S. D. N. Y. 1940), aff'd, 103 F. (2d) 348 (C. C. A. 2d, 1939), rev'd on other grounds, as Weiss v. United States, 308 U. S. 321, 60 S. Ct. 269, 84 L. ed. 298 (1939), see note 13, supra.

[37] Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, 40 S. Ct. 182, 183, 64 L. ed. 319, 24 A. L. R. 1426, 1429 (1920). The Court further said, "If know-

It appears that the *Goldstein* decision has somewhat modified the positive nature of this rule, though to what extent it is difficult to surmise. Certainly, the Court in that decision countenanced the use of evidence which was obtained indirectly through an illegal wire tapping. The position adopted indicates that the prohibition of the Communications Act against the indirect use of evidence obtained by wire tapping is confined to situations in which the conversations of the defendants themselves were tapped.[38] And since the Court regarded the statute as analogous to the Fourth Amendment as to the nature of the protection afforded, this same limitation would seem to apply in cases involving illegal search or seizure. Inasmuch as very many of the cases in this field involve prosecutions for conspiracies in which several persons are implicated, the government will probably find numerous occasions to invoke the shield which is created by the *Goldstein* decision.

An additional obstacle in the paths of accused persons seeking to prevent the indirect use of evidence obtained in an illegal manner lies in the practical difficulty of determining just when the evidence introduced has been obtained by the use of other unlawfully secured evidence. It is naturally regarded as a burden of the accused to prove that the evidence sought to be used comes from an illegal source or was obtained by illegal means.[39]

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ledge of them [other facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed." 251 U. S. 385, 392, 40 S. Ct. 182, 183, 64 L. ed. 319, 24 A. L. R. 1426, 1429 (1920).

[38]Goldstein v. United States, 10 U. S. L. Week 4353, 62 S. Ct. 1000 (1942). It is submitted that the majority opinion is unpersuasive on this point, and that, conversely, here the arguments of the dissent are most compelling. This factor seems to be the basis for the dissent's assertion that the Weiss and Nardone cases are being repudiated by the majority. See note 15, supra. Undeniably, those decisions had been regarded as prohibiting indirect as well as direct use of evidence illegally obtained. And the facts of the Weiss case seem strikingly similar to those of the Goldstein case. See note 13, supra. The distinction relied on by the majority—that in the Goldstein case the defendants were not parties to the tapped conversations while in the previous cases the defendants' own messages were intercepted—admittedly presents a difference of facts; but it is not entirely clear how this difference bears with direct relevancy on the issue of whether the evidence illegally obtained as against the parties to the conversations can be indirectly used so as to secure other evidence against the defendants.

[39]"The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire tapping was unlawfully employed. Once that is established the trial court must give opportunity to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree." Nardone v. United States, 308 U. S. 338, 341, 60 S. Ct. 266, 268, 84 L. ed.

In the present day when civil liberties are endangered by the stress of war and there is a consequent need for greater vigilance in their protection, the overruling of the *Olmstead* case and adoption of the rule excluding evidence obtained in contravention of the Constitution would be most desirable.[40] The fact that the efforts of officers to obtain evidence are for the commendable and vital purpose of law enforcement does not make the infringements on personal rights any the less dangerous. "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[41]

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307 (1940). See United States v. Pillon, 36 F. Supp. 567 (E. D. N. Y. 1941); United States v. Gruber, 39 F. Supp. 291 (S. D. N. Y. 1941); United States v. Goldstein, 120 F. (2d) 485 (C. C. A. 2d, 1941), aff'd., 10 U. S. L. Week 4353, 62 S. Ct. 1000 (1942).

[40]"The benefits that accrue from this and other articles of the Bill of Rights are characteristic of democratic rule. They are among the amenities that distinguish a free society from one in which the rights and comforts of the individual are wholly subordinated to the interests of the state. We cherish and uphold them as necessary and salutary checks on the authority of government. They provide a standard of official conduct which the courts must enforce. At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadequate for the period in which we live." Mr. Justice Murphy, dissenting in Goldman v. United States, 10 U. S. L. Week 4357, 4360, 62 S. Ct. 993, 999 (1942).

In reaching its decision, the majority of the Court in the Goldman case may well have thought it necessary, in view of the current emergency situation, that the usual civil rights enjoyed in a democracy be curtailed to the extent necessary to enable the government to render its law enforcement efforts more efficient. This is mere speculation, however, for no hint of such a reaction is stated in the majority opinion.

[41]Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U. S. 438, 479, 48 S. Ct. 564, 572, 72 L. ed. 944, 66 A. L. R. 376, 391 (1928).

*Written in collaboration with the editors.