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Constitutional Law—State Statute Punishing Wire Tapping Per Se, Not Pre-empted

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without restriction. *Hill v. Florida*,[92] involved the licensing of union agents, giving the state power to forbid the issuance of such license, for enumerated reasons.[93] This licensing power was held to interfere with the intention of Congress to grant full freedom to employees in choosing union representatives, and to substitute Florida's judgment for that of the workers.

The practical effect of Section 8 of the New York Act, is to require the International Union to dismiss the union representative with a felony record, or function without dues. It is futile to elect one with such a debility, since a dismissal is certain. The Court of Appeals cites no cases allowing states to impose such restrictions on union officials. There is serious doubt that the state may impose such restrictions in the light of *Hill v. Florida*.[94]

The Labor Management Reform Act,[95] passed this year, sets up a comprehensive scheme to exclude convicted felons from union office. It would seem that Congress is now occupying this field, if it has not in the past. This case is presently on the Supreme Court docket, but the significance of any decision will be affected by the new labor bill.

STATE STATUTE PUNISHING WIRE-TAPPING PER SE, NOT PRE-EMPTED

The New York Penal Law, Section 1423(6), provides, that it is a felony to "unlawfully and willfully cut, break, tap or make any connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner, any message, communication, or report passing over it in this state."

The Federal Communications Act, Section 605 provides in part, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence . . . of such intercepted communication to any person." A violation of this section is punishable under Section 501 of the same act, by a fine of not more than $10,000, or imprisonment not exceeding one year, or both.

Whether the latter federal provision had pre-empted the New York statute, was seriously questioned in the case of *People v. Broady*,[96] where the Court of Appeals upheld a conviction under Section 1423(6), holding that the validity of that section was unaltered by the federal statute.

Initially, the Court was faced with the contention that the word "willfully," as used in Section 1423(6), must be construed as meaning maliciously or spitefully, and as the jury had not been charged on this element, defendant's conviction was erroneous as a matter of law. If thus construed, reasoned the defendant, the statute would be saved from pre-emption by Section 605, since it would be regarded as a malicious mischief provision, preventing local

92. 325 U.S. 538 (1943).
93. Must be a citizen of the United States for ten years, no felony convictions, and must be a person of good moral character.
94. See also, Hotel Employees Union v. Sax Enterprises, *supra* note 85.
95. PUB. L. No. 86, 86th Cong., 1st Sess. § 504(a).
96. 5 N.Y.2d 500, 186 N.Y.S.2d 230 (1959).

harm to property, and as such would be a valid exercise of the State's police power. If interpreted as intended to protect the privacy of telephone conversations, the State provision would allegedly be pre-empted by Section 605.

Recent legislative activity in the area,[97] placing Section 1423(6) in a new article and section of the Penal Law,[98] and thus segregating it from other provisions of that section requiring malice, was viewed by the Court as placing primary emphasis on the crime of wire-tapping as an invasion of personal privacy, and as such, the word "willfully" meant a conscious act, consciously done.

Whether the New York statute, thus interpreted, conflicted with the federal scheme of regulating telephonic communication, was the most difficult problem before the Court. They indicated that, in their opinion, Section 1423(6) did not interfere with federal constitutional jurisdiction under the commerce clause, since it was merely a local police measure to protect state residents from invasions of their privacy, rather than a purported regulation of telephonic communications. At to whether there was an interference with federal criminal jurisdiction, the Court's answer was more difficult to articulate, since the nature of the offense punishable by Section 605 was not clear. If both an interception and a divulgence were requisites of a federal violation, the New York provision punishing the act of interception alone, would not appear to conflict. If, however, a federal violation resulted from the solitary act of interception, the conflict between the two statutes is readily apparent. The Court adopted the former construction, although their reasoning is not free from doubt.[99]

The Court assumed, however, that a conflict in regard to federal criminal jurisdiction existed, in order to analyze whether, by enacting the Federal Communications Act, including Section 605, Congress manifested an intention to occupy the field to the exclusion of state legislation on the same subject. If Congress had done so, state legislation could not stand, whether it conflicted with or merely supplemented the federal scheme.[1]

The criteria enunciated in *Pennsylvania v. Nelson*,[2] were found by the Court to be determinative in a situation where Congress has not specifically indicated an intention to occupy a field of legislation. In that case, the court indicated that a state criminal statute is superseded where the federal scheme is so pervasive it leaves no room for supplementary state laws, where the area is one of such a dominant federal interest that state legislation is precluded,

97. See N.Y. LEGIS. DOC., 1957, No. 29, p. 13 *et seq.*
98. N.Y. PEN. LAW § 738.
99. The question of whether both elements were necessary under Section 605, was specifically left unanswered in *Benanti v. United States*, 355 U.S. 96 (1957). However, since the statute read "interception and divulgence," the Court adopted the canon of construction that will strictly construe a criminal statute. See Yates v. United States, 354 U.S. 298, 304-305 (1956).

1. Pennsylvania v. Nelson, 350 U.S. 497 (1955); Southern Ry. Co. v. Railroad Comm., 236 U.S. 439 (1914).
2. Pennsylvania v. Nelson, *supra.*

or where there is danger of a state enforcement conflicting with the administration of the federal program.

The Court devoted the weight of its opinion to an analysis of the first criterion above, whether the federal scheme of legislation, such as present here, is so pervasive that state legislation cannot stand. *Benanti v. United States*,[3] is pointed to as indicating a strong public policy evinced by Section 605, prohibiting the interception and divulgence of communications, and that "Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would *contradict that section and that policy*."[4] (Emphasis by the Court of Appeals in the instant case.)[5] Without defining "that policy" any further, the Court felt that *Benanti* did not suggest a pervasiveness that would prohibit a state statute *punishing* wire-tapping. If a statute such as Section 1423(6) is not precluded under *Benanti*, what state legislation is forbidden? Since the context of the above quotation was the New York legislation *authorizing* wire-tapping, it may be assumed that such legislation is now of doubtful constitutional validity, and the Court in the instant case is apparently willing to concede this fact. Thus, absent a comprehensive scheme of regulation, such as was present in the *Nelson* case,[6] the Court was unwilling to view the single clause of Section 605 as evincing a Congressional plan to exclude the states from supplemental legislation on wire-tapping.

Under the second *Nelson* criterion, the Court did not deem the federal interest present in the Federal Communications Act, *i.e.*, in regard to the regulation of telephonic communications, to be of the dominant nature that would render ineffective the state's exercise of its police power, in an effort to protect the privacy of its citizens.

The lack of any apparent federal program punishing wire-tapping *per se*, as indicated by a relative lack of prosecutions under Section 605, would seem to render negligible any degree of possible interference with such a program.[7] In this regard, it is perhaps relevant to note that the applicability of Section 605 has been largely confined to questions of admissibility, in state and federal courts, of evidence obtained in violation of the provision.[8]

In thus holding Section 1423(6) unaltered by the federal statute, the fact that successive state and federal prosecutions may ensue from the same acts, does not render the state prosecution invalid,[9] nor is the state prosecution

3. 355 U.S. 96 (1957).

4. *Id.* at 105.

5. *Supra* note 96 at 512, 186 N.Y.S.2d 240 (1959).

6. The statutes there involved were the Smith Act, 54 Stat. 670, 18 U.S.C. §§ 2385, 2387 (1940); Communist Control Act, 68 Stat. 775, 50 U.S.C. § 781 *et seq.* (1950).

7. The infrequent exercise of federal jurisdiction under a statute of wide potential application, has been held significant in finding a non-pre-emptive Congressional intent. Atlantic Coast Ry. Co. v. Georgia, 234 U.S. 280 (1914).

8. Benanti v. United States, *supra* note 3; Schwartz v. Texas, 344 U.S. 199 (1952); Weiss v. United States, 308 U.S. 321 (1939); Nardone v. United States, 308 U.S. 338 (1939).

9. Bartkus v. Illinois, 359 U.S. 121 (1959); Fox v. Ohio, 46 U.S. 410 (1847).

a bar to a federal conviction,[10] since the interests vindicated by each are not the same.

The strained and often elusive analysis by the Court in the instant case, indicates the relative difficulty present in a case involving the pre-emption issue. This difficulty is in part due to the lack, even in the United States Supreme Court, of any constant analytical approach to the solution of such questions. The *Nelson* case has been viewed as a landmark case in the area, but even the approach used there has been subject to criticism.[11] The Court, in using the *Nelson* approach in the case at bar, finds it relatively easy to distinguish on the facts here present. The State has, of necessity, a strong interest in upholding the validity of its statutory provisions, and is consequently loath to overturn them absent a strong and persuasive argument to the contrary.

There are several questions left unanswered by the opinion, which will apparently remain unanswered for the present at least, since the United States Supreme Court, in denying *certiorari,* has approved of the New York Court's finding as to the validity of Section 1423(6). However, the New York Court has by implication agreed with *Benanti,* that state legislation authorizing wire-tapping is a contradiction of Section 605 policy. This tacit acquiescence, places New York Constitution Article I, Section 12, and New York Code of Criminal Procedure, Section 813-a, which authorize state officers to tap phones pursuant to a court order, on very tenuous footing. The future of these provisions would appear to be uncertain.[12]

CONSTITUTIONAL RIGHT TO COUNSEL: ADJOURNMENT TO SECURE

In the case of *People v. Banner,*[13] seventeen defendants were charged with disorderly conduct. Although, the City Court Judge properly advised them of their right to be represented by counsel, he failed to adequately advise them of their additional right to a postponement in the proceedings to enable them to obtain counsel, as required by the Code of Criminal Procedure, Section 699.[14] The *per curiam* opinion of the Court of Appeals held, that in order to make the above statute "meaningful and effective," this additional right must be made clear to the defendants by the presiding judge. Therefore, the judgment below was reversed and a new trial was ordered.

10. Abbate v. United States, 359 U.S. 187 (1959). Cranton, *Pennsylvania v. Nelson: A Case Study of Federal Pre-emption,* 26 U. CHI. L. REV. 85 (1958).

11. Broady v. New York, 28 U.S.L. WEEK 3100 (U.S. Oct. 13, 1959).

12. See in this regard, *In re Telephone Communications,* 9 Misc.2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958), where Samuel H. Hofstader, J., stated that while he sat on the bench in that session of Court, no orders under the Code of Criminal Procedure, authorizing wire-tapping, would issue, since such orders were illegal under Benanti.

13. 5 N.Y.2d 109, 180 N.Y.S.2d 292 (1958).

14. N.Y. CODE CRIM. PROC. § 699;

> "1. In cases in which the courts of special sessions or police courts have jurisdiction, when the defendant is brought before the magistrate, the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.
>
> 2. The magistrate must allow the defendant a reasonable time to send for counsel and adjourn the proceedings for that purpose."