Washington Law Review

Volume 36 | Number 1

3-1-1961

# Recent Federal Case

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**Wiretapped Evidence—Suit in Federal Court to Enjoin Testimony in State Proceeding.** During the present Term, the Supreme Court of the United States will hear appellate arguments on another facet of a much-debated problem: The admissibility of evidence obtained by wiretapping. The appeal comes from a decision by the Court of Appeals of the Second Circuit, *Pugach v. Dollinger*,[1] which held that its equity power should not be exercised to enjoin state officials in a state criminal proceeding from divulging information obtained by wiretapping, even if the divulgence in court would constitute a federal crime under section 605 of the Federal Communications Act. Justification for this conclusion was found in the policy of the federal judiciary to refrain from intervention in state criminal proceedings, with special reliance upon *Stefanelli v. Minard*,[2] which was decided against the background of the fourth amendment.

The pertinent facts in *Pugach* are these: Plaintiff, approximately two weeks prior to his trial in a New York county court for alleged burglary, brought suit in federal district court to enjoin both the county district attorney and the police commissioner of New York City from using evidence obtained directly by and through wiretapping. His motion for a preliminary injunction was dismissed, and on plaintiff's further motion, the court of appeals granted a stay, pending hearing of the appeal.[3] On that appeal, the order of the district court was affirmed.

These facts raise complex issues which involve federal-state relationships in criminal law enforcement; legislative intention lying behind section 605 of the Federal Communications Act; proper applications of constitutional search and seizure concepts to an evolving statutory approach to the wiretapping problem, as well as the power of federal courts to enjoin the prospective commission of a crime by intervening in state criminal proceedings.

To appreciate fully the significance of the *Pugach* case, and to lay a foundation for discerning the present judicial atmosphere with regard to wiretapping problems, it is necessary to summarize and tie together the Supreme Court's prior decisions relevant to the issues.

*Olmstead v. United States*,[4] the Court's first encounter with wiretapping, placed the device outside the protective scope of the fourth amendment, finding it to be neither a search nor a seizure. Ten years after this announcement Congress incorporated section 605[5] into the Federal Communi-

[1] 277 F.2d 739 (2d Cir. 1960), *cert. granted*, 80 Sup. Ct. 1614 (1960). For other lower court cases handling similar fact patterns, see Burack v. Liquor Auth., 160 F. Supp. 161 (E.D. N.Y. 1958); Voci v. Farkas, 144 F. Supp. 103 (E.D. Pa. 1956); McGuire v. Amrein, 101 F. Supp. 414 (D.Md. 1951).

[2] 342 U.S. 117 (1951).

[3] 275 F.2d 503 (2d Cir. 1960).

[4] 277 U.S. 438 (1928).

[5] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952); "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person. . . ."

cations Act. It came before the Court in *Nardone v. United States.*[6] That case saw wiretapped evidence procured by federal officers held inadmissible in a federal criminal proceeding. The second *Nardone* case[7] developed the "fruit of the poisonous tree" doctrine[8] and extended the scope of the exclusion to proferred evidence which was obtained through information procured by wiretapping. In both of the *Nardone* cases, the Court drew support from decisions in the constitutional search and seizure area, *i.e.,* using analogous fourth amendment concepts to broaden the effect of section 605.

*Schwartz v. Texas*[9] directed the Court's attention to the issue of whether wiretapped evidence obtained by state officers must be excluded from state criminal proceedings because of section 605. Again, the Court accepted a fourth amendment analogy, drawn from *Wolf v. Colorado,*[10] and held that Congress did not intend to impose a rule of evidence upon state courts. The Court further recognized that the divulgence of evidence in a state courtroom by a state officer would be a violation of section 605.[11] However, this fact was viewed as just another consideration for the state court when devising its own rules of evidence. The *Schwartz* decision completely eliminated any chance of arguing that Mr. Justice Roberts' opinion in the first *Nardone* case meant that, as well as a prohibition of conduct, Congress was setting forth an evidentiary rule of exclusion applicable to both federal and state courts.[12]

The Supreme Court's most recent pronouncement in this area came in *Benanti v. United States.*[13] Wiretapped evidence was procured by state officers and had been admitted in a federal criminal proceeding. On appeal, Chief Justice Warren, writing for a unanimous court, rejected an analogy to the "silver platter doctrine"[14] and held that the exclusionary rule should have been followed even though federal officers had no part in obtaining the evidence.

The *Pugach* case comes before the Court in a setting where the prior practice of applying fourth amendment concepts to section 605 cases has

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[6] 302 U.S. 379 (1937).

[7] 308 U.S. 338 (1939).

[8] The analogy was taken from Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), a case that involved an unreasonable search and seizure. "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." *Id.* at 392.

[9] 344 U.S. 199 (1952).

[10] 338 U.S. 25 (1949).

[11] "The problem under § 605 is somewhat different because the introduction of the intercepted communications would itself be a violation of the statute...." Schwartz v. Texas, 344 U.S. 199, 201 (1952).

[12] "To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids testimony seems to us unshaken by the government's arguments." Nardone v. United States, 302 U.S. 379, 382 (1937).

[13] 355 U.S. 96 (1957).

[14] "[It is] neither necessary nor appropriate to discuss by analogy distinctions suggested to be applicable to the fourth amendment." 355 U.S. at 102. The "silver platter doctrine," which had been an open question with the Court, was expressly rejected in Elkins v. United States, 364 U.S. 206 (1960). That case held that evidence obtained solely by state officers through an illegal search could not be admitted in a federal criminal proceeding.

been rejected by the Court's latest declaration on the matter. Whether or not *Benanti* was meant to be *ad hoc* is obviously of much consequence to the outcome of the *Pugach* case.

When these Supreme Court decisions are viewed in light of the legislative history surrounding section 605, one probably gets as good a look at judicial legislation as can be seen in any other area.

In the post *Olmstead* period, there were introduced in Congress at least seven bills[15] aimed at limiting the use of wiretapping. None passed. In 1934, the Federal Communications Act was enacted.[16] At that time, the commonly believed purpose was simply to transfer jurisdiction over radio communications to the Federal Communications Commission. The wording in section 605 is almost identical to the comparable provision of the previous act regulating communications.[17] There seems to be, therefore, no strong basis for contending that section 605 was intended as anti-wiretap legislation. Nevertheless, the Supreme Court, in the first *Nardone* case, was so convinced. The decisions that followed, while professing to be a reading of the intent of Congress in order to apply the measure, were actually writing into section 605 concepts which were drawn, by analogy, mostly from the fourth amendment area, at least until *Benanti*.[18] Because of the absence of any real congressional intent, as the Court attempts to discern the legislative policy behind section 605, one can readily understand why there is disagreement as to the exact nature of such policy. Nevertheless, the Court has outlined certain basic "policies" underlying the legislative rule, and these have much to do with shaping the scope of section 605.[19]

Chief Judge Lumbard wrote the majority opinion for the court of appeals, in *Pugach*, and it should be critically analyzed. His arguments will be contrasted with those of Judge Waterman, who concurred, and Judge Clark, who dissented.

The Chief Judge relied principally on the "concern for preservation of the balance between the states' administration of their laws and the use of federal equity power by restriction or withholding of the power of the federal courts."[20] Any appraisal of these general considerations must be viewed

[15] H.R. 4139, 71st Cong., 1st Sess. (1929); H.R. 5416, 71st Cong., 1st Sess. (1929); S. 6061, 71st Cong., 3d Sess. (1931); H.R. 23, 72nd Cong., 1st Sess. (1932); H.R. 5305, 72nd Cong., 1st Sess. (1932); H.R. 9893, 72nd Cong., 1st Sess. (1932); S. 1396, 72nd Cong., 1st Sess. (1932).

[16] 48 Stat. 1064-1105 (1934), as amended 50 Stat. 189 (1937), 47 U.S.C. §§ 151-609 (1952).

[17] 44 Stat. 1172 (1927). See S. Rep. No. 781, 73d Cong., 2d Sess. 11 (1934) for legislative history of section 605.

[18] In Goldstein v. United States, 316 U.S. 114 (1942) the "privilege" concept of the fourth amendment was blended into section 605. Compare, however, the statement in Goldman v. United States, 316 U.S. 129, 133 (1942), that "[t]he protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation." The second *Nardone* case and the *Schwartz* case also applied fourth amendment concepts.

[19] "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very *methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'*" (Emphasis added.) Nardone v. United States, 308 U.S. 338, 340 (1939).

[20] 277 F.2d 739, 742 (2d Cir. 1960).

carefully in light of the New York constitutional provision[21] and statute[22] permitting wiretapping under certain conditions. In *Benanti,* the New York law had been declared to be in conflict with section 605, and therefore invalid under the supremacy clause.[23]

The crux of the matter is whether a state's power to define its evidentiary rule that admits illegally obtained information, and incidentally indorses a violation of federal law in doing so, is essential to the administration of state law. In resolving the issue, the majority of the court placed much reliance on *Stefanelli v. Minard.*[24] In that case an injunction was sought to prevent New Jersey police, in a state criminal proceeding, from using evidence obtained through an illegal search and seizure. The opinion, written by Mr. Justice Frankfurter, denied the injunction primarily on two grounds: (1) the impropriety of federal court intervention with state criminal processes, and (2) the existence of an adequate remedy, by way of appeal from a conviction. With respect to the second ground, it was somewhat paradoxical for the majority in *Stefanelli* to offer the defendant the hope of having *Wolf v. Colorado* overruled as an alternative adequate remedy, and then in the same breath, state that the appeal route is adequate because a conviction based upon the evidence complained of will not cause irreparable injury. The admission of the evidence, the Court said, would not deprive the defendant of due process of law (obviously, relying on the *Wolf* case for this last proposition).

Another factor that led Chief Judge Lumbard to a denial of relief for Pugach was "that a court should not enjoin the commission of a crime." Before embarking on a discussion of the major issues raised in the case, it is convenient to treat this latter point now. The quoted phrase simply is not a full and accurate statement of equity policy. As early as *In re Debs,*[25] the Supreme Court held that equity is not without jurisdiction merely because the threatened conduct is criminal. If other remedies are not as adequate to redress the wrong to plaintiff, equity has jurisdiction to grant relief, even though the commission of a crime be enjoined. That the legal right of the plaintiff does not have to be a property right in the traditional sense is amply illustrated by *Rea v. United States,*[26] which involved a state criminal prosecution for the possession of narcotics. No more of a "property" right, as a basis for relief was present there than is present in the *Pugach* case. This particular point did not even merit discussion by either the concurring or dissenting opinions.

In answer to the majority's position as to federal intervention, Judge

[21] N.Y. CONST. art. 1, § 12, para. 2 (1938); "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, ... and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

[22] N.Y. CODE CRIM. PROC. § 813-A (1942), sets forth the procedural detail pursuant to the constitutional provision.

[23] Benanti v. United States, 355 U.S. 96, 103-05 (1957).

[24] 342 U.S. 117 (1951).

[25] 158 U.S. 564 (1895).

[26] 350 U.S. 214 (1956).

Waterman, in his concurring opinion, refused to accord *Stefanelli v. Minard* any application to the instant situation. The case was distinguished in that the federal crime, if any, in *Stefanelli* "had been fully committed before the federal court was importuned to interfere with the State court proceedings."[27] In *Pugach,* "the threatened commission of federal crime is sought to be prevented by an application for relief to a federal court in advance of the occurrence."[28]

The distinction between the two cases may be stated in another way. At the time injunctive relief was sought in *Stefanelli,* the violation of the defendant's civil right had already occurred and the use of the evidence in court would not be a transgression of the due process requirement. It can be said that there very well may have been no threatened wrong facing the defendant by the use of the evidence. Whether section 43 of the Civil Rights Act, which was the basis for the suit in *Stefanelli,* would support a claim due to the use, or threatened use, of the evidence was expressly left open by the Court. The case was decided on an "assuming-for-the-sake-of-argument-only basis," and rested on the Court's discretionary determination not to grant the injunction. *Pugach,* on the other hand, presents a situation where not only will a crime surely be committed, but the same act will give rise to a civil claim for damages.[29] Looked at in this manner, the issue in *Pugach* is reduced to whether there is an available alternative remedy as adequate as an injunction, taking into consideration the public policy complication arising from federal intervention in the state criminal process.

Language in the *Stefanelli* opinion sheds further light on the difference between it and *Pugach* with respect to the effect of federal intervention. The Supreme Court's reason, in the former case, for denying an injunction was based upon the undesirable probability that "every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court to determine the issue."[30] Such reasoning is not applicable to a case like *Pugach,* where the divulgence of the evidence in the courtroom is concededly a federal crime. There is not present the "far-flung and undefined range" of procedural due process of law. The fact that a legal right will be violated is already clear beyond argument. The fear of harassment maneuvers on the part of defendants lacks a realistic foundation. Again, the question comes down to whether it can be said that the possibility of *Schwartz v. Texas* being overturned on appeal from a conviction is sufficient to conclude that an alternative remedy exists as "adequate" as an injunction. Certainly, if *Schwartz* stands, the defendant will suffer irreparable injury from a conviction based on the wiretap evidence.

Looking at *Stefanelli* in a wider context, it appears to be even less in

[27] 277 F.2d 739, 746 (2d Cir. 1960).
[28] *Ibid.*
[29] Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947). (Opinion by L. Hand, J.).
[30] 342 U.S. 117, 123 (1951).

point with *Pugach*. The decision came soon after *Wolf v. Colorado* and may be seen as somewhat of a reaffirmation of that controversial holding. Indeed, if the opposite result had been reached in *Stefanelli, Wolf* would have been immediately deprived of its teeth. The Court has gradually, it seems, become disconcerted with the full scope of the *Wolf* rule and has been hacking at the foundation in preparation for its ultimate demise. It must also be remembered that the *Schwartz* case drew heavily on the *Wolf* rationale. With *Benanti's* rejection of the fourth amendment analogy in the near background, it may very well be that the Court is ready to show further dissatisfaction with the *Wolf-Schwartz* interpretation of the Constitution. If so, section 605 could be implemented by granting injunctive relief in *Pugach*.

The policy of federal courts not to intervene unnecessarily in state proceedings, as a consideration in whether to exercise equity power, ought to be applied on a case by case method. The fact of intervention ought not to be completely controlling. Yet, this is exactly what was held by the majority in *Pugach*. "[W]e do not think that a federal court should interfere with the prosecution of a state criminal proceeding in order to provide an additional means of vindicating any private rights created by (section) 605."[31]

Interference with state proceedings has always been an area where federal courts tread lightly, but the typical statement certainly is not as categorical as the one made by the majority of the Second Circuit. Interference with state proceedings does not necessarily preclude the granting of equitable relief by a federal court; this was clearly recognized in *Douglas v. City of Jeanette*.[32] In *Rea v. United States*,[33] injunctive relief was directed at a federal agent to prevent him in a state proceeding from giving evidence he obtained by an illegal search and seizure. Although the Court stated that the direction was not an attempt to disrupt a state forum, but only an exercise of control over a federal officer, the practical effect, of course, was to prevent the state court from allowing evidence admissible under its own rule of evidence.

The concurring and dissenting opinions in *Pugach* were generally in accord with one another, except for a curious tributary which brought Judge Waterman to the same result reached by the majority. He assumed "that divulgence of information obtained by wiretap . . . will do Pugach irreparable injury;" but he was "not willing also to assume that a New York state trial judge will permit such evidence to be admitted over the objection of defense counsel."[34] The Court of Appeals of New York, in a recent case,[35] held it was not error for a trial court to admit wiretap evidence, basing its conclusion on *Schwartz*. It would seem then that Judge Waterman must also assume that a New York trial judge will commit

[31] 277 F.2d 739, 743 (2d Cir. 1960).
[32] 319 U.S. 157, 163 (1943).
[33] 350 U.S. 214 (1956).
[34] 277 F.2d 739, 745 (2d Cir. 1960). Interestingly enough, one New York trial judge expressly followed Judge Waterman's advice. See People v. O'Rourke, N.Y. Times, April 20, 1960, p. 34, Col. 2.
[35] People v. Variano, 5 N.Y. 2d 391, 157 N.E. 2d 857 (1959).

error by refusing to admit probative testimony not coming within any of the state's exclusionary rules of evidence.

It is next put forth in the concurring opinion that article VI, section 2 of the United States Constitution[36] requires that section 605 be given effect by a refusal to admit such evidence. If this is correct, there is an obvious inconsistency between it and the Supreme Court's statement in the *Schwartz* case that the crime of divulgence in court is only one consideration for a state court in formulating rules of evidence. Although the fact of the criminal act of divulgence ought to be highly persuasive in framing a state rule of evidence, the *Wolf* and *Schwartz* decisions make clear that the Supreme Court does not yet think that the Constitution requires the adoption of an exclusionary rule. On this particular point, the case of *Testa v. Katt*,[37] with its broad implications, merits mentioning.

In the *Testa* case the Court held that a state court must take jurisdiction in a suit brought on a claim arising under the Emergency Price Control Act. It was said in the opinion that the policy of the federal act is the prevailing policy in every state and the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide. As section 605 is violated, whether the tapper be a federal officer, state officer or an ordinary citizen, it is obvious that a state hinders its enforcement and effect when it does not apply the equivalent of the federal exclusionary rule. A judge is not forced to decide in a wiretapping situation whether certain action or non-action is "implicit in the concept of ordered liberty";[38] he need only note that Congress has set down a nation-wide policy in prohibiting "any person" from violating section 605, and that by virtue of the supremacy clause, a state's proper enforcement of such policy would seem to require the adoption of an exclusionary rule. This argument is directly applicable to a situation such as was presented in the *Schwartz* case. If relief is granted Pugach by its application, the basis for the holding in *Schwartz* will be swept away. Yet, it must be concluded that as the argument was not persuasive in *Schwartz*, there is no compelling reason to think the Court will "read" Congress' intent any differently when deciding *Pugach*.

It is interesting, also, to notice the dissenting argument of Justice Holmes in *Olmstead v. United States*.[39] He contended that *Weeks v. United States*[40] actually overthrew the common law that probative evidence is admissible although obtained illegally. Hence, his logical view of the *Weeks* doctrine necessarily results in excluding the evidence obtained in violation of a statute or the fourth amendment. Of course, the proposition is directly op-

[36] "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

[37] 330 U.S. 386 (1947).

[38] Justice Cardozo's approach to the due process requirement as set forth in Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[39] 277 U.S. 438, 469 (1928) (dissenting opinion).

[40] 232 U.S. 383 (1914).

posed to the rule of the *Wolf* case and makes *Pugach* appear to be a case for application of its logical extension. As the Supreme court seems to be less favorably disposed to *Wolf*, and if the current trend, as indicated by *Benanti*, is to broaden the effect and protective scope of section 605, while rejecting fourth amendment analogies, then Justice Holmes' argument may have the strength of a sleeping lion.

Judge Clark, in his dissenting opinion, proceeded upon the tacit assumption that at least a major part of the policy behind section 605 is a concern for the privacy of individuals. He also observed that regardless of all policy arguments, and notwithstanding what the law should be, "we are faced with repeated open and acknowledged violations of federal law which we are assured will be continued until and unless federal authorities intervene."[41] This he supported by the apparent fact that there exists only one successful federal prosecution for a violation of section 605.[42]

Certainly, the dissent's second thesis takes a broad view of the enforcement problem with respect to wiretaps, but probably goes beyond the immediate concern of the person presently seeking injunctive relief. Conviction and punishment of an officer for violation of section 605 will be of no help to one such as Pugach if wiretap evidence is properly admitted under state law. The lack of desire on the part of the federal authorities to prosecute public officers for violating the statute is only indicative of the need for legislative re-examination[43] and not reason, in itself, for a court to employ its equity power as a means of law enforcement—especially, criminal law enforcement.

The *Pugach* case does not raise a constitutional question per se, nor does it really present a question of statutory interpretation. Nevertheless, the decision of the Supreme Court will, no doubt, reflect the present disposition of the Justices on the ethical and legal status of wiretap evidence. If the court of appeals is reversed and the injunction granted, the *Schwartz* case will be dealt a mortal blow. Perhaps, this would be just as well since *Schwartz* rests on the ill-conceived analogy to the *Wolf* case, and probably, if not actually, does not correctly read the intent of Congress. If the Court should affirm, it could do so on grounds which would leave its feelings on the more important questions open for mere speculation.

It is indeed regrettable that the *Benanti* case does not permit one to predict with assurance how the Court will swing on questions such as that raised in the *Pugach* case. At certain points in the opinion, Chief Justice Warren emphasized the factor of a *federal* conviction brought about by a *federal* crime committed in a *federal* courtroom. This would imply that a

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[41] 277 F.2d 739, 747 (2d Cir. 1960).

[42] United States v. Gris, 247 F.2d 860 (2d Cir. 1957). Other recent prosecutions under § 501 (the penal section of the Federal Communications Act) include the following: Massicot v. United States, 266 F.2d 955 (5th Cir. 1959); Lipinski v. United States, 251 F.2d 53 (10th Cir. 1958); Massengale v. United States, 240 F.2d 781 (6th Cir. 1957).

[43] See DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS (1959); *The Wiretapping-Eavesdropping Problem; Reflections on the Eavesdroppers, A Symposium*, 44 MINN. L. REV. 813 (1960); Westin, *The Wiretapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165 (1952).

state conviction would not so move the Court's concern, and this is supplemented by the Court's apparent approval of the *Schwartz* case. Yet, towards the end of his opinion the Chief Justice displayed an opposite mood. Regarding the contention that Congress did not intend to occupy the field and abrogate conflicting state laws allowing wiretapping, he recognized the right of privacy as a policy behind section 605. He stated that "congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."[44] The writer believes that this latter reasoning would lead one to a contrary result in a case such as *Schwartz* and to a reversal of the *Pugach* case. If conflicting state legislation is not permissible in the face of the prohibition, then conflicting or hindering state rules of evidence obviously should not be accorded a more favored position. These incongruous implications from *Benanti* prevent the prediction of the outcome in *Pugach* with any restful assurance.

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[EDITOR'S NOTE: Subsequent to the setting in type of the above article, the Supreme Court, on February 27, 1961, in a per curiam opinion, affirmed (7-2) the Second Circuit's decision. In a one-sentence opinion, the majority cited *Schwartz v. Texas* and *Stefanelli v. Minard* as authority.

Mr. Justice Douglas wrote a dissenting opinion, with which Mr. Chief Justice Warren concurred. The two dissenters accepted the implication from the *Benanti* case that the *Schwartz* rationale no longer could stand. Deeming a state exclusionary rule to be obligatory, an injunction was thought to be an appropriate remedy in a case such as *Pugach*. However, since the *Schwartz* case still holds the favor of the majority of the Court, it was reasoned that "this [the injunctive] remedy is the only one which is available to protect the federal right." The dissenting opinion contained no arguments to distinguish the *Stefanelli* case; instead, there was direct disagreement with the rationale of the case and its further application in *Pugach*.

Apparently, the Court is rather solidly behind *Schwartz* and will not allow a federal injunction to diminish its effect. Perhaps, the feeling among the majority is that if the widespread practice of section 605 violations, with its encouragement from state evidentiary rules, is so distasteful, proper recourse should be through legislative action.]

[44] 355 U.S. 96, 105 (1957).