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Confessions constitute a sensitive and hard problem for law enforcement agencies and for the courts. Without a confession in evidence juries will be forced to determine guilt on a factual reconstruction of the act and not on the basis of what an accused said. Confessions would still be useful in the process of gathering the basic fact foundation but would have less an impact on the trial. If the judge decides before trial to exclude the confession then the efficiencies of the joint trial can be retained. Another way to look at this factor would be to consider how seriously would it prejudice the prosecutor's case to exclude the confession from evidence. This would highlight the basic decision being made: balancing the interests of fairness for the codefendant against the state's interest in using a confession in a joint trial.

The three aforementioned factors which were relied upon in *Delli Paoli* are still relevant and effective indicia of possible prejudice to the codefendant if used the way here suggested. The two other *Delli Paoli* factors—that the separate interest of the defendant is repeatedly emphasized throughout trial, and that the record does not show confusion on the part of the jury—have little, if any, remaining weight. *Bruton* held that limiting instructions emphasizing the separate interests of the defendants are not enough to protect their rights. Indications of jury confusion

no longer would be relevant in the suggested pretrial procedure. Even during the trial the confusion and the source of the confusion would be hard to determine and would not be a good basis upon which to measure the extent of fairness in a joint trial.

This pretrial procedure would not be an added burden on the court's time when weighed against the time that would otherwise be taken up in numerous retrials of misjoined cases. If the defendant never makes a motion to sever until the trial starts, the burden would rest on him to show that the trial judge clearly abused his discretion under a rule such as Federal Rule 14 permitting the joint trial.

It is hard to foresee whether this plan would be viable and useful in all situations, but an attempt should be made to preserve the advantages of the joint trial. Law enforcement agencies are going to be forced to depend less on confessions and it would be over-ambitious and wasteful for the prosecutor to demand the inclusion of an unnecessary confession at the cost of the benefits of the joint trial. *Bruton* reflects the Court's continuing sensitivity towards the problems involved in securing and using confessions but it also develops an approach which will reduce the opportunity for both the state and the defendant to benefit through the use of the joint trial.

FEDERAL PROCEDURE FOR COURT ORDERED ELECTRONIC SURVEILLANCE: DOES IT MEET THE STANDARDS OF *BERGER AND KATZ*?

STEPHEN LINZER

Recent criminal law decisions of the United States Supreme Court have displayed a growing concern for the individual in society and for his right to be free from governmental intrusions upon his privacy.¹ At the same time, there has been an awareness on the part of individual members of the Court that crime, specifically organized crime, is growing rapidly and can only be controlled and limited by effective law enforcement procedures.²

¹The legal concept of a right to privacy was discussed by Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890). See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²See, e.g., *Berger v. New York*, 388 U.S. 41, 113-14 (1967), White, J., dissenting.

These two considerations—the right to privacy and the need to stop the growth of crime—are at conflict in the current controversy over the use of electronic surveillance³ to aid in the investigation of serious crime.

Because of the nature of their operations and the need for secrecy, criminal groups utilize a minimum of written communications. However, the diversity of their enterprises, the large number

³As used, electronic surveillance includes eavesdropping, wiretapping, and all techniques or devices by which a person is able to hear or record the communications of others. For a history of electronic surveillance see DASH, KNOWLTON, and SCHWARTZ, *THE EAVESDROPPERS*, 23-34 (1959).

of accomplices or employees, and the great distances between segments of the organization, make the telephone the main means of communication. As a result, electronic surveillance techniques, which include mechanical or electrical eavesdropping and wiretapping, may provide the evidence to convict members of organized criminal groups.⁴

The President, Congress, and the Supreme Court have recently taken positions on the subject of electronic surveillance in an attempt to create a consistent federal position on the law enforcement techniques to be employed in effectively controlling organized crime. The objective of this comment is to examine the recent activity of Congress and the Supreme Court with regard to electronic surveillance.

Since past Supreme Court decisions failed to provide an adequate standard to which law enforcement officials could conform, electronic surveillance techniques were used with uncertainty.⁵ In *Olmstead v. United States*,⁶ the first case to consider the status of wiretapping, the Supreme Court held that the tapping of telephone wires leading from the residences of the defendants was not a search within the meaning of the Fourth Amendment. In finding that the evidence obtained was admissible, the Court stated that the Constitution did not forbid such activities unless there had been an actual unlawful entry. In addition, the Court held that the Fourth Amendment applied only to "material" objects; therefore, a conversation passing over a telephone wire could not be seized within the meaning of that amendment.

⁴ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 201 (1967). See also WESTIN, *PRIVACY AND FREEDOM* 77 (1967):

Even though any reader of newspapers knows that wiretapping goes on in the United States, it is still almost impossible to conduct a business, engage in politics, participate in civic groups, or even run the Mafia without resorting to the telephone.

For a discussion of the extent to which members of organized criminal groups who attended the Appalachian meeting in 1957 correlated their activities by telephone, see SELECT COMMITTEE ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, S. REP. NO. 1139, 86th Cong., 2d Sess., pt. 2, 488 (1960). For a detailed description of the current devices and techniques, see WESTIN, *supra* at 73-78; DASH, *supra* note 3, at 305-79.

⁵ See Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165 (1952), and Note, *Eavesdropping, Wiretapping, and the Law of Search and Seizure: Some Implications of the Katz Decision*, 9 ARIZ. L. REV. 428 (1968).

⁶ 277 U.S. 438 (1928).

At the time the *Olmstead* case was decided there was no federal law specifically aimed at wiretapping. In 1934, however, when the Federal Communications Act was passed by Congress, section 605 provided that:

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 . . .⁷

Several years after the enactment of the Federal Communications Act, the Supreme Court, in *Nardone v. United States*,⁸ interpreted section 605 to prohibit interception and divulgence of telephone conversations, and any evidence obtained thereby was inadmissible in federal courts. The decision was not founded on constitutional grounds, but rather on the Court's supervisory powers over federal courts and officers. In the second *Nardone* case,⁹ the Supreme Court went further and held that section 605 barred not only evidence obtained directly by wiretapping but also evidence obtained by use of leads secured by wiretapping. Other interpretations of section 605 extended its coverage to interception and divulgence of intrastate as well as interstate calls,¹⁰ to state law enforcement officers,¹¹ and, more recently, to suppression in state courts.¹²

In the area of electronic or mechanical eavesdropping ("bugging"), as distinguished from wiretapping, the Supreme Court established the doctrine that evidence procured by electronic eavesdropping devices became inadmissible only when there had been an unauthorized physical invasion of the defendant's premises. In *Goldman v. United States*,¹³ the Court found that the use of a telephone placed against the partition wall of the defendant's office in order to overhear conversations did not violate the Fourth Amendment since there was no physical intrusion into the office. The

⁷ 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1964). This general language was taken from the Radio Act of 1927 and was not intended to deal with the problems of telephone tapping. See the testimony of Professor Alan Westin at the Hearings Before the Subcommittee of Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., pt. 2 at 195, May 28, 1958.

⁸ 302 U.S. 379 (1937).

⁹ 308 U.S. 338 (1939).

¹⁰ *Weiss v. United States*, 308 U.S. 321 (1939).

¹¹ *Benanti v. United States*, 355 U.S. 96 (1957).

¹² *Lee v. Florida*, 392 U.S. 378 (1968).

¹³ 316 U.S. 129 (1942).

holding that a finding of no "trespass" foreclosed Fourth Amendment considerations was re-affirmed in *On Lee v. United States*¹⁴ when the Court decided that an informer could be wired for sound to transmit a suspect's statements to officers waiting with a receiver outside the building.

In 1961, in *Silverman v. United States*,¹⁵ the Court for the first time specifically held that eavesdropping accomplished by an unlawful invasion of a constitutionally protected area violated the Fourth Amendment. A "spike mike" was inserted into a heating duct to pick up conversations in other parts of the building. While emphasizing that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises, the Court also found that the scope of the Fourth Amendment reached "intangible" objects and that the interception of conversations could constitute a search and seizure.

Soon after, however, the Court showed indications that an actual physical penetration into a constitutionally protected area might not be determinative in the area of eavesdropping. In *Lopez v. United States*¹⁶ the Court held that there was no Fourth Amendment violation when an internal revenue agent, invited into the defendant's office, recorded a bribe offer on a small tape recorder concealed on his person. In the decision, the Court did not rely solely on the absence of a trespass as it had in *On Lee*, which involved a similar fact situation; rather, it found that there had been no eavesdropping in the proper sense of the term as the agent could have heard the conversation without the aid of the listening device. The Court further emphasized that the defendant had assumed the risk that his conversation would be reproduced in court with or without the aid of the electronic device.

This was the state of the law when, recently, the controversy surrounding electronic surveillance was cast in a new perspective. In two cases, *Berger v. New York*¹⁷ and *Katz v. United States*,¹⁸ the Supreme Court departed from previous treatments and rewrote the law relating to electronic surveillance. *Berger*,¹⁹ which tested the validity of New York's eavesdrop statute,²⁰ concluded that the

statute was so broad that it allowed a trespassory intrusion into the constitutionally protected area of privacy and thus was violative of the Fourth and Fourteenth Amendments.²¹

While stating that New York's statute, which required a court order, satisfied the Fourth Amendment's command that a neutral and detached authority be interposed between the police and the public,²² the Court found the statute deficient on its face in several respects. The statute failed to meet the Fourth Amendment standard that a warrant must describe with particularity "the place to be searched, and the persons or things to be seized."²³ It lacked a provision for a detailed description of the type of conversation sought, which is necessary for court ordered wiretapping in order to indicate the government's specific objectives and limit the officer executing the warrant.²⁴ Further, the Court stated that the order should authorize one limited intrusion rather than a series or continuous surveillance;²⁵ a new order must be issued when an officer seeks to resume a search.²⁶ Also, the officer must execute the order

Berger decision has since been enacted into law in New York. See 3 CRIM. L. REP. 2249; N.Y. CODE CRIM. PROC. §§ 814-25 (Supp. 1968).

²¹ 388 U.S. 41, at 44. In a case currently before the Court, *Kaiser v. New York*, 4 Cr. L. 4152-53, this same New York statute is involved. With regard to the retroactive effect of *Katz* and *Berger*, the Court is being asked to decide if the Fourth and Fourteenth Amendments bar admission at a state criminal trial of evidence gathered in accordance with a wiretap order issued under a statute subsequently declared unconstitutional.

²² 388 U.S. at 54, citing *Johnson v. United States*, 333 U.S. 10, 14 (1948).

²³ The Fourth Amendment of the United States Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Court quoted with approval the language in *Osborn v. United States*, 385 U.S. 323, 330 (1966), that allowed the admission into evidence of a recording obtained by eavesdropping because the authorization of the judges was "based upon a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice... for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations." 388 U.S. at 57.

²⁴ 388 U.S. at 57.

²⁵ *Id.* The Court also stated that the authorization for two months of eavesdropping is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. *Id.* at 59.

²⁶ *Id.* at 57, 59. The Court said that an extension must be based on a new and present determination of probable cause.

¹⁴ 343 U.S. 747 (1952).

¹⁵ 365 U.S. 505 (1961).

¹⁶ 373 U.S. 427 (1963).

¹⁷ 388 U.S. 41 (1967).

¹⁸ 389 U.S. 347 (1967).

¹⁹ For our purposes the facts are not important. They may be found at 388 U.S. 44-45.

²⁰ N.Y. CODE CRIM. PROC. § 813-a (1957). A new eavesdropping statute written to conform to the

with dispatch²⁷ and make a return on it, indicating the manner of execution and the materials seized.²⁸ Finally, there must be a showing of exigent circumstances in order to avoid the requirement of notice to the subject of the search.²⁹ As a result of these unalterable standards, Mr. Justice Black, dissenting, stated that "it seems obvious . . . that the Court's holding by creating obstacles that cannot be overcome, makes it completely impossible for the State or Federal Government ever to have a valid eavesdropping statute."³⁰

Justice Black's fears were partially abated by the Court's subsequent decision in *Katz v. United States*³¹ which implied that a narrowly drawn electronic surveillance statute could be constitutional if the requirements of the Fourth Amendment were met.³² In *Katz*, the defendant was convicted for transmitting wagering information by telephone across state lines in violation of 18 U.S.C. § 1084. The defendant's end of the conversation was overheard by F.B.I. agents who had attached an electronic listening and recording device to the outside of the public telephone booth. Evidence of his conversation was introduced at trial. The Supreme Court, in reversing the decision of the Court of Appeals,³³ specifically rejected the test of a "constitutionally protected area" which it had employed in the past³⁴ and stated that "the Fourth Amendment protects

people, not places."³⁵ It then redefined the applicable Fourth Amendment standard:

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.³⁶

Therefore, the Court concluded, the government's surveillance violated the privacy upon which the defendant had relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.³⁷ As a result, the activities of the government had to be considered within Fourth Amendment standards. The Court reemphasized the *Berger* guidelines and presented a coherent package of requirements for the admissibility of evidence resulting from electronic surveillance.³⁸

In reaffirming the requirement for judicial authorization, the Court stated that a constitutional authorization for electronic surveillance could be obtained.³⁹

It is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure the Government asserts in fact took place.⁴⁰

²⁷ *Id.* at 57, 59-60. With regard to execution, the Court found the New York statute defective in not providing for termination of the eavesdrop once the conversation sought was seized.

²⁸ *Id.* at 57.

²⁹ *Id.* at 60.

³⁰ *Id.* at 71.

³¹ 389 U.S. 347 (1967).

³² This position is not shared by several writers who have reviewed the *Katz* decision. See, e.g., Schwartz, *Electronic Eavesdropping—What the Supreme Court Did Not Do*, 4 CRIM. L. BULL. 83, 89 (1968).

"The Supreme Court often moves in mysterious ways. Because policy-making on a case by case basis restricts the Court to the particular facts of the case before it, its decisions are often merely suggestive rather than definitive, settling only the obviously immediate, while unsettling the obviously imminent. . . . The only legal effect of the two decisions is to do what the Court has done many times before: to piece out on a case by case basis, the implications of certain basic principles. In the area of electronic eavesdropping, that principal remains after *Katz* what it was before and after *Berger*: the Fourth Amendment permits only a narrowly circumscribed search and seizure of specific items."

³³ 369 F.2d 130 (9th Cir. 1966).

³⁴ See *Silverman v. United States*, 365 U.S. 505, 510, 512 (1961), *Lopez v. United States*, 373 U.S. 427, 438-39 (1963), *Berger v. New York*, 388 U.S. 41, 57 (1967).

³⁵ 389 U.S. at 351. Preceding this statement, the Court had said that the Fourth Amendment could not be translated into a general constitutional right to privacy. That Amendment protects individual privacy against certain types of governmental intrusion, but its protections go further and often have nothing to do with privacy at all. *Id.* at 350.

³⁶ 389 U.S. at 351-52.

³⁷ *Id.* at 353.

³⁸ Evidence illegally obtained can not be used in federal court, *Boyd v. United States*, 116 U.S. 616 (1886), or in state court, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

³⁹ Compare *supra* note 32.

⁴⁰ 389 U.S. at 354. This portion of the decision has resulted in much controversy. Advocates of electronic surveillance point to it as an expression of approval for a narrowly circumscribed, court ordered search. However, critics of electronic surveillance cite this sentence as a limiting factor—suggesting that a search so limited as in *Katz* was the only acceptable kind:

"*Katz* thus permits eavesdropping in one of the rare situations where it can be limited—a bug on one side

However, since the government agents in *Katz* failed to secure a court order and failed to make a return on their interceptions, the Court would not sustain their actions.⁴¹ In the important qualification of the need for notice—an element which had previously been considered a necessity in the issuance of search warrants⁴²—the Court recognized that while a conventional warrant ordinarily notifies the suspect of the search, this requirement may be omitted in an authorized electronic surveillance when the announcement would allow the escape of the suspect or the destruction of critical evidence.⁴³ Since electronic surveillance is successful only when the suspect is deprived of notice, this qualification was necessary.

Even though the *Berger* and *Katz* decisions provided a constitutional outline of the safeguards necessary to conduct a legitimate Fourth Amendment search and seizure, they did not enunciate a uniform procedure for federal agencies to follow in eavesdropping and wiretapping. The push for effective legislation⁴⁴ in this area culminated in June, 1968, when Congress, after much deliberation and discussion, passed the "Omnibus Crime Control and Safe-Streets Act of 1968" containing eleven principal sections (Titles).⁴⁵ Title III,⁴⁶

of conversations which take place in a sporadically used place that cannot be easily used by more than one person, and where the bug is limited to the occasions that the suspect actually uses the bugged premises."

Schwartz, *supra* note 32, at 83.

⁴¹ 389 U.S. at 356-57.

⁴² See Donnelly, *Electronic Eavesdropping*, 38 NOTRE DAME LAW. 667, 679 (1963).

⁴³ 389 U.S. at 355 citing *Ker v. California*, 374 U.S. 23, 37-41 (1964).

⁴⁴ Prior to the Supreme Court's decision in *Berger*, June 12, 1967, the Federal Wire Interception Act (S. 675) had been introduced by Senator McClellan on January 25, 1967. On February 8, 1967, President Johnson had sent to Congress his Right of Privacy Act (S. 928) which outlawed electronic surveillance except in national security cases. After *Berger* was decided, Senator Hruska introduced the Electronic Surveillance Control Act of 1967 (S. 2050).

⁴⁵ Pub. L. No. 90-351, 90th Cong., 82 Stat. 197 (June, 1968). The eleven titles are:

Title I—Law Enforcement Assistance

Title II—Admissibility of Confessions, Reviewability of Admission in Evidence of Confessions in State Cases, Admissibility in Evidence of Eye Witness Testimony, and Procedure in Obtaining Writs of Habeas Corpus

Title III—Wiretapping and Electronic Surveillance

Title IV—State Firearms Control Assistance

Title V—Disqualification For Engaging in Riots and Civil Disorders

Title VI—Confirmation of the Director of the Federal Bureau of Investigation.

Title VII—Unlawful Possession or Receipt of Firearms

the focus of this discussion, represents a permissive scheme of court ordered electronic surveillance while complying with the Supreme Court decisions in *Berger* and *Katz*. It has two fundamental purposes: protecting the privacy of wire and oral communications and delineating on a uniform basis the circumstances and conditions under which the interception of wire⁴⁷ and oral⁴⁸ communications may be authorized.⁴⁹

To assure the privacy of oral and wire communications, Title III expressly prohibits all wiretapping and other forms of electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation or prevention of specified types of crimes,⁵⁰ and allows law enforcement surveillance only after authorization of a court order obtained upon a showing and finding of probable cause.⁵¹ This prohibition is subject to four exceptions.⁵² Title III also bans the

Title VIII—Providing For An Appeal By the United States From Decisions Sustaining Motions To Suppress Evidence

Title IX—Additional Grounds For Issuing Warrant
Title X—Prohibiting Extortion and Threats In the District of Columbia

Title XI—General Provisions.

⁴⁶ Title III is essentially a combination of S. 675 and S. 2050 mentioned *supra* note 44.

⁴⁷ Wire communication means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier providing or operating such facilities for the transmission of interstate or foreign communications. 18 U.S.C. § 2510 (1).

⁴⁸ Oral communications means any oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. 18 U.S.C. § 2510 (2).

⁴⁹ S. REP. NO. 1097, 90th Cong., 2d Sess. (1968).

⁵⁰ 18 U.S.C. § 2511

⁵¹ 18 U.S.C. § 2518

⁵² The President may obtain information by such means as he may deem necessary to protect the nation from attack or hostile acts of a foreign power, to obtain intelligence information essential to the nation's security, and to protect the internal security of the United States from those who advocate its overthrow by force or other unlawful means. 18 U.S.C. § 2511 (3). Employees of the Federal Communications Commission may, in the normal course of employment, intercept and disclose wire communications in the discharge of the monitoring responsibilities discharged by the Commission in the enforcement of Chapter 5 of Title 47 of the United States Code. 18 U.S.C. § 2511 (2)(b). Communication common carriers may intercept and disclose wire communications in the normal course of their employment while engaged in any activity necessary to the rendition of service, or protection of the rights or property of the carrier of such communication. 18 U.S.C. § 2511 (2)(a). Persons acting under

manufacture, distribution, sale, possession, and advertising of wiretapping and eavesdropping devices.⁵³

Significantly, the legislative program for electronic surveillance has amended section 605 of the Federal Communications Act of 1934.⁵⁴ The amendment provides an exemption from the traditional prohibitions for persons authorized or permitted by Title III to tap and thus removes the serious statutory obstacle of section 605.⁵⁵ Yet, it still leaves for consideration the question of how the Congressional drafters have conformed to the Supreme Court decisions as they relate to a procedure for authorizing the interception of wire or oral communications.⁵⁶ An examination of the relevant provisions demonstrates the attempt which was made to insure constitutionality.

Section 2518 of Title III establishes strict legislative requirements which must be followed by law enforcement agencies in applying for court authorization to intercept wire and oral communications. These provisions reflect both Congress' interpretation of the recent Supreme Court decisions on electronic surveillance and safeguards which Congress felt were necessary to provide for valid and effective law enforcement.

An application must be made in writing upon oath or affirmation to a "judge of competent jurisdiction" ⁵⁷ stating the applicant's authority to

color of law may intercept wire or oral communications where such a person(s) is a party to the conversation or has been given prior consent to such interception. 18 U.S.C. § 2511 (2)(c). See *Lopez v. United States*, 373 U.S. 427 (1963), *Rathbun v. United States*, 355 U.S. 107(1957), *On Lee v. United States*, 343 U.S. 747 (1952), *Greenawalt, The Consent Problem in Wiretapping and Eavesdropping*, 68 COLUM. L. REV. 189 (1968).

⁵³ 18 U.S.C. § 2512 (1)(a), (b), (c). Exempted are the actions of a communications common carrier and its employees or persons under contract with a communications common carrier in the normal course of its business, and any law enforcement officer of the United States, a State, or a political subdivision of a state in the normal course of its activities. 18 U.S.C. § 2512 (2)(a), (b).

⁵⁴ See *supra* note 7.

⁵⁵ 47 U.S.C. § 605 as amended by § 803 of the Act.

⁵⁶ Focus will be on section 2518 of Chapter 119, Title 18 of the United States Code which outlines the procedure for the interception of wire or oral communications. Well written and very similar statutory schemes along with explanatory notes may be found in *Blakey and Hancock, A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAW. 657 (1968), A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE (Tentative Draft, 1968).

⁵⁷ With regard to federal practice, a "judge of competent jurisdiction" means a judge of a United States District Court or a United States Court of Appeals. See 18 U.S.C. § 2510 (9)(a).

make such an application. The need for antecedent justification before a magistrate is central to the Fourth Amendment and serves as a precondition to lawful electronic surveillance.⁵⁸ The Fourth Amendment requires only that warrants "be supported by oath or affirmation."⁵⁹ Even though it makes no mention of the necessity for writing, it has become a statutory requirement in present federal warrant practice.⁶⁰

Congress has interpreted the *Berger* and *Katz* decisions to require that specific information be contained in each application. This information is an affirmative test of the propriety of the investigation in light of traditional Fourth Amendment principles of search and seizure. Every application must include the identity of both the investigative or law enforcement officer making the application and the officer authorizing the application.⁶¹ This assessment of responsibility is advantageous since it centralizes in a publicly responsible official the formulation of law enforcement policy on the use of electronic surveillance which will avoid the development of divergent practices. If abuses do result, the lines of responsibility may be traced to an identifiable person.⁶²

In addition, the application is required to include a complete statement of the facts and circumstances upon which the applicant justifies his belief that the judge should issue the *ex parte* order.

⁵⁸ See *Berger v. New York*, 388 U.S. 41, 54 (1967), *Osborn v. United States*, 385 U.S. 323, 330 (1966), *Silverman v. United States*, 365 U.S. 505, 513 (Douglas, J. concurring) (1961). This requirement stems from the necessity of protecting the individual from impulsive police action:

In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible.

Trupiano v. United States, 334 U.S. 699, 705 (1948), *McDonald v. United States*, 335 U.S. 451, 455-56 (1948), *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

⁵⁹ *Supra* note 13. See *Dow v. Baird*, 389 F.2d. 882, 883(10th Cir. 1968): "There can be no doubt whatever that the search . . . was illegal . . . because it was not 'supported by oath or affirmation' as required by the Fourth Amendment. . . ."

⁶⁰ *Sparks v. United States*, 90 F.2d. 61 (6th Cir. 1937). *FED. R. CRIM. PROC.* 41.

⁶¹ Only the Attorney General, or any Assistant Attorney General designated by the Attorney General, may authorize an application for the interception of wire or oral communications. 18 U.S.C. § 2516.

⁶² With regard to fixing responsibility see *King v. United States*, 282 F.2d. 398 (4th Cir. 1960).

This statement must include four elements to be valid: (1) details as to the particular offense that has been, is being, or is about to be committed;⁶³ (2) a particular description of the place where, or the facilities from which, the communication is to be intercepted; (3) the identity of the persons, if known, committing the offense and whose communication is to be intercepted; and (4) a particular description of the type of communications sought to be intercepted.⁶⁴ This information is meant to provide the basis for a determination of probable cause by the examining judge.⁶⁵

Prior to *Berger* and *Katz* it had been suggested that an inherent problem in obtaining a valid court order for electronic surveillance was the inability to meet Fourth Amendment requirements of particularity.⁶⁶ However, the application procedure outlined by Congress is basically a compilation of those requirements which the Court had considered and discussed in *Berger* and *Katz*.⁶⁷

The applicant is also required to make a statement concerning the circumstances that necessitate resort to electronic surveillance. Appropriate considerations are whether other investigative procedures have been tried, whether they are unlikely to succeed if tried, and whether the alternatives may be too dangerous. By making this statement, the officer is meeting another firm requirement that the Court has enunciated. The purpose of this information is to establish that there exist the "exigent circumstances"⁶⁸ required in *Berger*⁶⁹ and

⁶³ Offenses for which an order may be obtained are set out in § 2516 (1). In *Berger*, the Court had said that a specific offense must be alleged. See *supra* note 23.

⁶⁴ In *Berger*, 388 U.S. at 57, the Court had said: "Among other safeguards, the order described the type of conversation sought with particularity, thus indicating the specific objective of the Government. . . ."

⁶⁵ Findings which are required by 18 U.S.C. § 2518 (3)(a), (b), (d).

⁶⁶ "It is doubtful . . . that a court order authorizing electronic eavesdropping can comply with the 'warrant clause' . . . The provision of the warrant clause which seems to defy compliance is the requirement that a search warrant must particularly describe the 'things to be seized.' A specific description of the conversation to be 'seized' in the future is impossible since the words have not yet come into existence. . . . Due to the nature of electronic eavesdropping, it seems apparent that a court order can not meet the particularization requirement of the warrant clause. . . ." Comment, *The Constitutionality of Electronic Eavesdropping*, 18 S.C.L. Rev. 835, 837 (1966).

⁶⁷ *Supra* notes 21-43.

⁶⁸ Mr. Justice Stewart, writing for the majority in *Katz*, stated that the magistrate should be properly notified of the "need" for such an investigation. 389 U.S. at 354. It would appear, therefore, that electronic surveillance should be a selective investigative tech-

*Katz*⁷⁰ to justify a search without notice. Traditionally, a subject is given notice by the warrant which announces both authority for the search and its purpose.⁷¹

The application must also state the period of time for which the interception is required to be maintained. This requirement must be read in light of later provisions which establish a thirty day maximum time period⁷² and allow for court supervision during the time of interception.⁷³ If the nature of the investigation is such that the interception should not be terminated when the described type⁷⁴ of communication has been first obtained, the applicant must provide a particular description of facts establishing probable cause that additional circumstances of the same type will occur.⁷⁵

Possible misuse of this process is guarded against by a provision that requires the application for the eavesdropping order to contain facts concerning all previous applications involving any of the same persons, facilities, or places specified in the application, and the action taken by earlier courts. Continuous observation resulting from repeated applications should be prevented by this safeguard. It will also enable the examining judge to question repeated applications and ascertain the need for interceptions if they have been fruitless in the past. Furthermore, the judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.⁷⁶

Since Congress appears to have codified effectively the requirements set out by the Supreme Court in *Berger* and *Katz*, constitutional objections to the application process should have little merit unless the procedure is abused. The restrictive standards which must be met by the applicant should effectively insure that there will not be indiscriminate use of electronic surveillance, while allowing valid interceptions if the appropriate procedure is followed.

nique, used only in cases of "need"—not as a standard investigative procedure.

⁶⁹ 388 U.S. at 60.

⁷⁰ 389 U.S. at 355-56 n. 16.

⁷¹ The exception is based upon *Ker v. California*, 374 U.S. 23, 37-41 (1963), a decision in which the Court found that prior notice would have resulted in the destruction of evidence subject to seizure. As a result, the Court held, as to this question, that notice was legitimately withheld.

⁷² 18 U.S.C. § 2518 (5).

⁷³ 18 U.S.C. § 2518 (6).

⁷⁴ 18 U.S.C. § 2518 (1)(b) (iii), *supra* note 64.

⁷⁵ Substantively this provision is very important and will be discussed in the examination of the time standards.

⁷⁶ 18 U.S.C. § 2518 (2).

Section 2518 of Title III grants the judge authority to enter an *ex parte* order for the interception of either wire or oral communications. The judge may deny the application or modify it if he wishes. Before the judge may approve the order, however, Congress has established required findings which he must make. Based on the information provided by the applicant and any *in camera* examination the judge may have held, the judge must initially find that there is probable cause⁷⁷ for belief that an individual is committing, has committed, or is about to commit a particular crime listed in Section 2516.⁷⁸ In addition, the judge must determine whether there is probable cause to believe that particular communications concerning the offense will be obtained through the interception. He must also find probable cause to believe that the facilities, or place, from which the wire or oral communications are to be intercepted are being used, or about to be used in connection with the commission of the listed offense. These findings of probable cause link the individual, the offense, and a particular place. This avoids the issuance of "blanket authority to conduct general searches"⁷⁹—a practice which the Constitution specifically rejects in the Fourth Amendment.

To avoid the traditional need for notice to the subject of the search, the judge must also make a determination that "special facts" or "exigent circumstances" exist to obviate the requirement. Again this must be based on the information supplied in the application and additional evidence that the judge, in his discretion, may receive.⁸⁰

If the judge makes the required determinations and decides to grant the order, Congress has set out the form and inclusions for the order. The statutory provision is quite explicit as to the contents of the order:

- (a) the identity of the person, if known, whose communications are to be intercepted;
- (b) the nature and location of the communica-

⁷⁷ Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162 (1925), *Husty v. United States*, 282 U.S. 694, 700-01 (1931), *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

⁷⁸ See *supra* note 63. This list is criticized by Senator Hart in his separate views in SEN. REP. NO. 1097, *supra* note 49. Compare A.B.A. PROJECT FOR MINIMUM STANDARDS, *supra* note 56, at 141-42.

⁷⁹ 388 U.S. at 58, 389 U.S. at 355-56.

⁸⁰ See *supra* notes 68, 70.

- tions facilities as to which, or the place where, authority to intercept is granted;
- (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
- (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
- (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.⁸¹

These specifications are designed to insure that the order is sufficiently definite so that the executing officer can follow its directions.⁸²

The procedure for obtaining an *ex parte* order for electronic surveillance is subject to substantive limitations that reflect an attempt by Congress to conform to the Supreme Court's guidelines in *Berger* and *Katz*. Unfortunately, the Court has been unable to promulgate specific functional rules in the substantive aspects of wiretapping and eavesdropping. An excellent example of the legal confusion that results from this situation is the statutory provision for the time of an electronic surveillance.

Congress has provided that no order may authorize or approve the interception of wire or oral communications for any period of time longer than is necessary to achieve the objective of the order, and in no event longer than thirty days. Extensions may be obtained, but only if another application is properly filed and the judge makes the required findings.⁸³ The extension period must be no longer than the judge deems necessary to attain the objectives for which it was granted, and in no event, longer than thirty days. Congress has also required that every order and extension must be executed as soon as possible and conducted in such a way as to minimize the interception of communications not subject to interception under the order.

These provisions pose many problems from a con-

⁸¹ 18 U.S.C. § 2518 (4).

⁸² See *West v. Cabell*, 153 U.S. 78 (1894), *Steele v. United States* No. 1, 267 U.S. 498 (1925). Nothing should be left to the discretion of the officer. *Marron v. United States*, 275 U.S. 192, 196 (1927).

⁸³ New orders or extensions must rest upon a present finding of probable cause. See *supra* note 36, *Sgro v. United States*, 287 U.S. 206 (1932).

stitutional, as well as a policy, viewpoint. In *Berger*, the Supreme Court simply stated that "authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause."⁸⁴ The only affirmative test, appearing in *Berger* and *Katz*, is that there should be no greater invasion of privacy than is necessary under the circumstances.⁸⁵ Mr. Justice Harlan attempted to clarify this requirement in his *Berger* dissent when he stated that the electronic surveillance "must be confined in time precisely as the search for tangibles is confined in space."⁸⁶ By this standard, it is at least arguable that the Congress has conformed to this limitation by requiring that surveillance terminate when the objective is reached, or at the end of a period imposed by the issuing judge. However, if those who read *Katz* narrowly are correct in their interpretation, then the federal officer who uses the entire thirty day period to intercept communications of a suspect will have conducted a "general search" through an "indiscriminate dragnet."⁸⁷ He will have picked up all the conversations on the wire tapped or in the room bugged.

Strength for this view is gathered from the language of the Supreme Court in *Berger*. The Court stated that it had in the past, "under specific conditions and circumstances, sustained the use of eavesdropping devices."⁸⁸ For this proposition the Court cited four cases which involved very circumscribed eavesdropping.⁸⁹ In each of these four cases, as in *Katz*, the eavesdropping the Supreme Court approved was carefully circumscribed and limited to specific conversations which the eavesdropper knew would take place. The view of those who read *Katz* narrowly is, therefore, that there is no implied Court approval for a thirty day interception such as provided for in Title III.⁹⁰

⁸⁴ 388 U.S. at 59.

⁸⁵ 388 U.S. at 57, 389 U.S. at 355.

⁸⁶ 388 U.S. at 100.

⁸⁷ See 388 U.S. at 65 (Douglas, J. concurring).

⁸⁸ *Id.* at 63.

⁸⁹ *Goldman v. United States*, 316 U.S. 129 (1942), *On Lee v. United States*, 343 U.S. 747 (1952), *Osborn v. United States*, 385 U.S. 323 (1966), *Lopez v. United States*, 373 U.S. 427 (1963). In *Goldman* an F.B.I. detectaphone was installed to overhear four conversations to which an F.B.I. informer was a party. In *On Lee* an informer wore a radio transmitter for his conversation with a specific suspect. In *Lopez* and *Osborn*, the Supreme Court upheld the use of an eavesdropping device wired to an informer, and used to record the informer's conversations with a suspect.

⁹⁰ See, e.g., views of Senator Hart, SEN. REP. NO. 1097, *supra* note 49.

On the other hand, those arguing for the reasonableness of this provision cite the safeguards of the statute which require that the interception be terminated if the conversation sought is obtained.⁹¹ Any departure from this norm would constitute a violation of both the order and the law, making such interceptions inadmissible in court.⁹² Also, the purpose of the thirty day period is to establish a maximum period to prevent the staleness of the order, and to insure that the officer either terminates his activity at the maximum date or obtains an extension.⁹³ During this period, the Court may maintain supervision of the law enforcement officials' activities through the statutory provision relating to periodic returns on the order.⁹⁴ It has also been pointed out that, though eavesdropping by its nature involves the indiscriminate reception of all conversations, a search under a warrant is equally as indiscriminate in viewing personal effects and, under the "in plain view" rule, equally as damaging to the subject.⁹⁵ Thus, in theory, it is urged that there is no apparent difference between the two searches.

The resolution of this issue by the Court will undoubtedly be influenced by the facts of the case before it. It is, therefore, essential that restraint and intelligent monitoring be exercised by law enforcement officials for the surveillance to be sustained. An "indiscriminate dragnet" will violate this permissive section.

Congress has also established a procedure for periodic judicial supervision during a period of surveillance. Whenever an order to intercept is granted, it may require reports to be made to the issuing judge showing what progress has been made toward achievement of the authorized objective and whether there is a continuing need for interception.⁹⁶

This requirement continues the judicial supervision in the area of electronic surveillance by pro-

⁹¹ 18 U.S.C. § 2518 (5) conforming to the standard set out in *Katz*, 389 U.S. at 354.

⁹² The difficulty in making such a proof in a motion to suppress is obvious—the law enforcement agents will be the only ones knowing of the violation. 18 U.S.C. § 2515 prohibits the use, as evidence, of intercepted communications when in violation of this Act.

⁹³ See generally, 100 ALR 2d 525 (1965). For an alternative time limit suggestion see *Westin*, *supra* note 4, at 391-92.

⁹⁴ 18 U.S.C. § 2518 (6)

⁹⁵ Comment, *Eavesdropping Orders And The Fourth Amendment*, 66 COLUM. L. REV. 355, 374 (1966).

⁹⁶ This relates to the requirement that a return be made on the order, *supra* note 28, and that the existence of a "need" be ascertained, *supra* note 68.

viding for active judicial participation.⁹⁷ When considered with the standards which the applicant must meet in providing information to the judge, this "review" would function as an added safeguard. Unfortunately, it is stated as a suggested, but not mandatory, provision.⁹⁸ The need for communication between the operator of the intercept and the issuing judge is seriously undermined by the failure to make this provision as strict as others that have been discussed.

In cases of emergency, Congress has created a procedure for interception of communications that by-passes the provisions that have been discussed. When a specially designated investigative or law enforcement officer determines:

- (a) that an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a communications interception before an order authorizing such interception can with due diligence be obtained, and
- (b) there are grounds upon which an order could be entered under this Act, he may intercept such communications if a proper application is made within forty eight hours after the interception has occurred, or begins to occur.⁹⁹

In such an emergency situation, the interception shall immediately terminate when the communication is obtained or when the application for authorization is denied. If the application is denied, or if the interception is terminated without an order having been issued, the contents of the interception shall be treated as having been obtained in violation of the Act, and an inventory served as provided for in a later provision.¹⁰⁰

The provisions of the emergency section relating to conspiratorial activities characteristic of organized crime would appear to be overly permis-

⁹⁷ "When a magistrate . . . acts as a mere rubber stamp for the police a basic constitutional protection with roots deep in our national history is reduced to so many empty words." *Dow v. Baird*, 389 F.2d 882, 884 (10th Cir. 1968).

⁹⁸ Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

18 U.S.C. § 2518 (6).

⁹⁹ 18 U.S.C. § 2518 (7).

¹⁰⁰ 18 U.S.C. 2518 (8)(d).

sive when read in light of *Berger* and *Katz*. Traditionally, searches conducted without warrants have been held unlawful even though the facts showed probable cause.¹⁰¹ The Constitution requires that an impartial judicial officer be interposed between the individual and the police.¹⁰² As a result, searches conducted outside the judicial process have been held unreasonable under the Fourth Amendment.¹⁰³

These general rules governing search and seizure are subject to a few specifically established exceptions, frequently referred to as emergency situations—the search of a person (and the area under his control) incidental to a valid arrest, and the search of a vehicle where there is probable cause to believe that the vehicle is being used to transport contraband.¹⁰⁴ Recognized as justifying the absence of a search warrant, these search situations still require a finding of probable cause.¹⁰⁵ The proponents of the emergency section believe that the statutory situations will fit within the coverage of the Court's decisions establishing these exceptions.¹⁰⁶ However, it would appear that the Court has foreclosed discussion of such a permissive provision by its language in *Katz*. The Court stated:¹⁰⁷

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" to that ar-

¹⁰¹ *Agnello v. United States*, 269 U.S. 20, 33 (1925).

¹⁰² *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

¹⁰³ See, e.g., *Jones v. United States*, 357 U.S. 493, 497-99 (1958); *Rios v. United States*, 364 U.S. 253, 261 (1960); *Chapman v. United States*, 365 U.S. 610, 613-15 (1961); *Stoner v. California*, 376 U.S. 483, 486-87 (1964).

¹⁰⁴ See, e.g., *Carroll v. United States*, 267 U.S. 132, 153, 156 (1925); *McDonald v. United States*, 335 U.S. 451, 454-56 (1948); *Brinegar v. United States*, 338 U.S. 160, 174-77 (1949); *Cooper v. California*, 386 U.S. 58 (1967); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967).

¹⁰⁵ "In cases where the securing of a warrant is reasonably practicable, it must be used. . . . In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." *Carroll v. United States*, 267 U.S. 132, 156 (1925).

¹⁰⁶ "There are exceptional circumstances in which, on balancing, the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." *Johnson v. United States*, 333 U.S. 10, 14-15 (1948).

¹⁰⁷ 389 U.S. at 357-58.

rest.¹⁰⁸ Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit'.¹⁰⁹

Note should be made of two recent decisions which recognize an "emergency situation" not requiring either probable cause or a search warrant: *Patrick v. State*¹¹⁰ and *Vauss v. United States*.¹¹¹ Both decisions rest upon a finding that the preservation of human life is paramount to the right of privacy protected by search and seizure laws and the accompanying constitutional guarantees. Thus, whenever the police have credible information that an unnatural death has, or may have, occurred they may enter and investigate without an accompanying intent either to seize or arrest.¹¹² A broad application of this doctrine could justify emergency electronic surveillance in cases where the "conspiratorial activities" may have resulted in an unnatural death, e.g. kidnapping, murder, and possibly narcotic violations. The statutory requirement, however, that there exist "grounds upon which an order could be entered" would still limit surveillance to situations based upon a finding of probable cause.

With the possible exception of cases involving unnatural deaths, it would seem that the Court through its language in *Katz* has indicated that the warrantless surveillance would be unreasonable under the Fourth Amendment. Though it was not faced with a Congressional expression of what constituted an emergency situation in *Katz*, both the breadth of the statute and the predisposition of majority of the Court imply rejection of this section of the Act.

The Court has been less forceful in dealing with the demands of national security as an exception

¹⁰⁸ In *Agnello v. United States*, 269 U.S. 20, 30 (1925), the Court stated:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

¹⁰⁹ Although "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," *Warden v. Hayden*, 387 U.S. 294, 298-99, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency. 389 U.S. at 358 n. 21.

¹¹⁰ 227 A.2d 486 (Del. 1967).

¹¹¹ 370 F.2d 250 (D.C. Cir. 1966).

¹¹² 227 A. 2d at 489.

to the warrant requirement. In *Katz*, the Court mentioned in a footnote¹¹³ that it did not reach the question whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving national security. The issue is raised in two different contexts in the Safe Streets Act. A prior section¹¹⁴ exempts from the Act the constitutional power of the President to take such measures as he deems necessary to protect the nation from specified acts of foreign powers or those presenting a clear and present danger to the government. But this section implicitly recognizes that the actions of the Executive are limited by the Constitution. Therefore, the requirements of the Fourth Amendment should apply to the President's actions, as well as to the lower level law enforcement officer.¹¹⁵

The provision for an emergency surveillance upon a finding that conspiratorial activities threaten the national security is subject to a similar argument. Mr. Justice Douglas, concurring in *Katz*, expressed the view that the Executive branch would not be disinterested or neutral in matters of national security. Rather, its proper function is to investigate and prevent breaches of national security—the President or the Attorney General functioning as an adversary in the enforcement process. They would, therefore, be unable to occupy the neutral position of a judge or magistrate. Mr. Justice Douglas further stated that there should be no distinction under the Fourth Amendment between types of crimes. As a result, national security cases would involve the same procedural approach as other crimes.¹¹⁶

Mr. Justice White, on the other hand, interpreted the Court's footnote as an acknowledgment that there are circumstances in which it is reasonable to search without a warrant. Therefore, the Court should not require the warrant procedure and a judge's intervention if the President or the Attorney General have considered the requirements of national security and authorized electronic sur-

¹¹³ 389 U.S. at 358 n. 23.

¹¹⁴ 18 U.S.C. § 2511 (3). See *supra*, note 52.

¹¹⁵ In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court was asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of most of the nation's steel mills. The Court held that the aggregate powers of the President, as Chief Executive and Commander of the Armed Forces, did not permit him to act in contravention of the Constitution's separation of powers notion.

¹¹⁶ 389 U.S. at 359-60.

veillance as reasonable.¹¹⁷ In his dissent in *Berger*, Mr. Justice White asked the crucial question:

If electronic surveillance is a 'general search', or if it must be circumscribed in the manner the Court now suggests, how can surreptitious electronic surveillance of a suspected Communist or a suspected saboteur escape the strictures of the Fourth Amendment?¹¹⁸

It is suggested that such surveillance can not escape the dictates of the Constitution unless the Court is prepared to create classifications of crimes for the purposes of the Fourth Amendment—a position apparently without legal precedent.¹¹⁹

As this comment has sought to emphasize the need for discriminating and narrowly circumscribed safeguards in any interception of wire and oral communications, it would appear that an even higher standard is necessary to conduct an electronic surveillance without an order in an emergency situation. There is good reason for this. The ability to intercept for forty eight hours without

¹¹⁷ *Id.* at 363–64.

¹¹⁸ 338 U.S. 116.

¹¹⁹ In a case currently before the Supreme Court, *Butenko v. United States*, 4 Cr.L. 4053, the oral argument revealed the issues involved in national security cases. To the Solicitor General's explanation that the new law [1968 Safe Streets Act] is written in very general terms and provides that a wiretap, in national security cases, may issue whenever authorized by the Attorney General, Mr. Justice Black inquired "Are you relying on a Congressional rule, and not the constitution?"

an order is overly permissive, for while any evidence obtained would be in violation of the Act and therefore excluded, its worth as an investigative tool for "leads" and corroborative information might justify misuse of this provision. It is difficult to envision situations in which such an "emergency" could exist without sufficient time to secure a court order.

CONCLUSION

The above examination of those parts of Section 2518 which relate to the Supreme Court decisions in *Berger* and *Katz* indicates that the validity of several provisions will depend on the restraint of investigative officials. The serious crime problem in this country demands that instruments necessary for law enforcement be fully employed. Nevertheless, the possible abuses inherent in such sophisticated practices as electronic surveillance require that specific limitations be imposed. Congress has sought to provide these standards by closely following the requirements set down by the Court in *Berger* and *Katz*. But serious constitutional questions are raised by those provisions allowing surveillance in emergency situations, issues about which the Court has given little direction.

Police abuse of the provisions of Section 2518, or irresponsibility in carrying out its procedural scheme, could lead the Court to establish more rigid and severe requirements for eavesdropping, a development that could spell the end of electronic surveillance as an effective law enforcement tool.

CASE NOTES

An editorial comment accompanying a Note represents the opinion of the student who prepared the Note and does not necessarily represent the viewpoint of any other member of the Editorial Board

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SEARCH AND SEIZURE

Exclusionary Rule Held Applicable To Civil Commitment Procedures For Narcotic Addicts—
People v. Moore, 446 P. 2d 800 (Calif. S.Ct. 1968). The defendant was arrested for possession of heroin. He was taken to a jail infirmary and

examined by a doctor. As a result of this examination, a petition was filed to commit him as a narcotic addict or as a person who is in imminent danger of becoming addicted to narcotics. At the trial he was found to be in imminent danger of becoming a narcotic addict and committed to a