Journal of Criminal Law and Criminology

Volume 68
Issue 4 *December*

Article 3

Winter 1977

Federal Law--Wiretaps

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
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Vol. 68, No. 4
Printed in U.S.A.

FEDERAL LAW—WIRETAPS

United States v. Donavan, 429 U.S. 413.

The Supreme Court in *United States v. Donovan*[1] examined the wiretap identification and notice requirements of Title III of the *Omnibus Crime Control and Safe Streets Act* of 1968.[2] The act sets out a detailed procedure for the judicial authorization of wiretaps and other forms of electronic surveillance designed to meet the fourth amendment standards of *Berger v. New York*[3] and *Katz v. United States*.[4] The Court clarified the duty imposed on the Government to identify those who are not named in the original authorization but whose intercepted conversations give the Government probable cause to believe them guilty of a crime. The Court also decided that the Government has an implied statutory duty to provide more complete information to the issuing judge concerning unnamed but overheard individuals so that he may excercise informed discretion in notifying such parties as required by the act. Prior cases interpreting Title III have developed a unique analytical model which separates the issue of statutory violation from the issue of suppression of evidence under the Act. *Donovan* refines and entrenches that model.

In November of 1972 a special agent of the FBI applied for authorization to intercept telephone conversations on four telephones in two Ohio cities. The application was supported by an affidavit fully complying with the procedural provisions of Title III[5] and showing that the Government had probable cause to believe that the telephones were being used to conduct an illegal gambling operation. Title III requires that a Government application indicate "the identity of the person, if known, committing the offense and whose communications are to be intercepted."[6] Accordingly, six individuals and "others as yet unknown" were named in the application as subjects of the wiretap.

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[1] 429 U.S. 413 (1977).

[2] 18 U.S.C. §§ 2510–20 (1970) [hereinafter cited as Title III].

[3] 388 U.S. 41 (1967).

[4] 389 U.S. 347 (1967).

[5] 18 U.S.C. § 2518. *Donovan* interprets §§ 2518(1)(b)(iv) and 2518(8)(d). The full text of these provisions follows:

> § 2518. **Procedure for interception of wire or oral communications**
>
> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> . . . .
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to jusify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
>
> . . . .
>
> [8](d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—
>
> (1) the fact of the entry of the order or the application;
>
> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
>
> (3) the fact that during the period wire or oral communications were or were not intercepted.
>
> The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by his subsection may be postponed.

[6] 18 U.S.C. § 2518(1)(b)(iv).

Donovan and two of the other respondents were unknown to the government at that time and were not identified. The district court authorized a fifteen day interception. During this period the Government intercepted conversations of three of the respondents—Donovan, Robbins and Buzzaco—indicating that they were a part of the gambling operation. At the conclusion of the fifteen day period, the Government requested and received authorization for a fifteen day extension of the wiretaps. The application for the extension named several individuals and "others as yet unknown." Although the Government had probable cause to believe that Donovan, Robbins and Buzzaco were involved in the gambling operation, they were not identified.[7]

Title III also requires that the judge issuing the authorization order cause an inventory giving notice of the interception to be served on "the persons named in the order or application, and such other parties to intercepted communications as the judge may determine in his discretion that [*sic*] is in the interest of justice."[8]

These inventories are to be served no later than ninety days after the termination of the wiretap.[9] In February of 1973, the Government submitted a proposed order to the district court giving the required notice of interception to thirty-seven persons, among them Donovan, Robbins and Buzzaco. The Government believed this to be a complete list of all identifiable persons whose communications had been intercepted. In fact, the proposed order was not complete and although two names were later added to the list, no formal notice was ever given to two of the five respondents—Merlo and Lauer.[10]

In November of 1973 a grand jury returned indictments charging seventeen persons, among them Donovan, Robbins, Buzzaco, Merlo and Lauer, with conspiracy to conduct and conducting an illegal gambling operation. The five respondents made motions to suppress all taped conversations in which they had participated.[11] The district court granted the motions and the government appealed. A divided panel of the Sixth Circuit Court of Appeals affirmed.[12] The circuit court found that the Government's failure to identify Donovan, Robbins and Buzzaco on the application for extension when it had probable cause to believe they were a part of the conspiracy violated section 2518(1)(b)(iv) of the act and required suppression. The court also held that the failure to provide the names of Merlo and Lauer to the issuing judge and the resulting failure to notify them required suppression.[13] The Supreme Court granted certiorari[14] and reversed, holding that although the Act had been violated,

[7] 429 U.S. at 416–22.

[8] 18 U.S.C. § 2518(8)(d).

[9] *Id.* On a showing of good cause the 90 day limit may be extended.

[10] 429 U.S. at 420–22.

[11] 429 U.S. at 421. The motions were made pursuant to 18 U.S.C. § 2518(10)(a) which authorizes proper parties to make such motions on specified grounds. See note 5 *supra*. The motions alleged that the wiretap evidence was "unlawfully intercepted" within the meaning of § 2518(10)(a)(i) due to government violations of §§ 2518(1)(b)(iv) and (8)(d), the identification and notice requirements.

[12] 513 F.2d 337 (6th Cir. 1975). The court of appeals concluded that the government's failure to identify Donovan, Robbins and Buzzaco was a violation of § 2518(1)(b)(iv) and that the resulting evidence was "unlawfully intercepted" and subject to a motion to suppress. *Id.* at 342. Suppression was also appropriate as to Merlo and Lauer. *Id.* at 344. It should be noted that the lower court utilized the preferred analytical model in reaching this conclusion. The court carefully considered two distinct issues. First, whether there was in fact a violation of the statute and, second, whether the provision violated is a sufficiently central part of the congressional scheme to limit unlawful wiretaps to warrant suppression. The court observed that, "[s]uppression is required if there is a breach of a Title III provision that 'directly and substantially implements' the congressional scheme to limit the use of electronic surveillance." *Id.* at 344. The Supreme Court applied the same analysis but came to the opposite conclusion. Given the Court's analytical model, it would seem that the Court will face many more cases where lower courts disagree as to what is a central provision of Title III.

Engle, J., concurred in the lower court opinion as to Donovan, Robbins and Buzzaco but dissented as to Merlo and Lauer. He concluded that since the notice provisions came into play only *after* the interception, they cannot be considered a part of the plan to limit the use of electronic surveillance. 513 F.2d at 345 (Engle, J., concurring). A different standard seemed appropriate for post intercept violations. Judge Engle would limit suppression to those "instances in which the government's violation was shown to be deliberate or where, if not deliberate, there is a showing of actual prejudice which cannot be cured by less drastic remedies. . . . " *Id.* at 346. Since Merlo and Lauer had actual, though not formal, notice suppression should not be required.

[13] See note 12 *supra*.

[14] 424 U.S. 907 (1976).

suppression was not required in this instance. Justice Powell, writing for the majority, applied the analytical model developed in prior cases arising under Title III. Suppression of wiretap evidence is required only when a provision of the statute is violated which is central to the congressional scheme to limit electronic surveillance. Since the identification and notice provisions are not so central, suppression is not required when they are inadvertently violated.

To understand the Court's puzzling conclusion requires an explication of the relevant provisions of the statute and the analytical model developed to deal with suppression questions. Title III includes a statutory version of the exclusionary rule long familiar in fourth amendment cases. Three sections are of interest: sections 2515, 2517(3) and 2518(10)(a). The first of these sections flatly excludes wiretapped conversations as evidence where that disclosure would be in violation of the statute:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.[15]

The Senate Report on S. 917, which was later enacted as the Omnibus Crime Control and Safe Streets Act of 1968, reveals that the drafters considered section 2515 a vital sanction. "Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter."[16] More importantly, section 2515 was conceived as a measure to protect the privacy of wire communications from unlawful interception:

> Such a suppression rule is necessary and proper to protect privacy. . . . The provision thus forms an intregral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications.[17]

Section 2515 is intended to embody the judicial exclusionary rule in statutory form. The section:

> largely reflects existing law. It applies to suppressed evidence directly or indirectly obtained in violation of the chapter. There is, however, no intention to change the attenuation rule. Nor generally to press the scope of the suppression role beyond present search and seizure law.[18]

Section 2517 defines the individuals authorized to disclose wiretap information gained in accordance with the provisions of the chapter. Section 2517(3) allows disclosure of the fruits of wiretaps as evidence in criminal prosecutions.[19]

[15] 18 U.S.C. § 2515. This flat prohibition has had a very broad impact. The Supreme Court has even held that a grand jury witness who has refused to testify about intercepted communications or in response to questions based on intercepted communications may assert the illegality of the wiretap under § 2515 as a defense to a contempt charge. *See* Gelbard v. United States, 408 U.S. 41 (1972). Even so, a motion to suppress is not available to a grand jury witness. *See* 18 U.S.C. § 2518(10)(a).

[16] S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE, CONG. & AD. NEWS 2112, 2184 [hereinafter cited as S. REP.] Subsequent Senate Report citations are to the U.S. CODE, CONG. & AD. NEWS reprint.

[17] *Id.* at 2185.

[18] *Id.* at 2185 (citations omitted). The report cites Walder v. United States, 347 U.S. 62 (1954), apparently as a statement of the scope of the exclusionary rule in "present search and seizure law." In *Walder*, illegally seized evidence of heroin trafficking excluded at the defendant's first trial was introduced for impeachment at a subsequent trial on similar charges. Justice Frankfurter, writing for the Court, upheld the use of such evidence for impeachment purposes. *Id.* at 65. In the course of the opinion, Justice Frankfurter gave this statement of the familiar judicial exclusionary rule: "The Government cannot violate the Fourth Amendment—in the only way in which the Government can do anything, namely through its agents—and use the fruits of such unlawful conduct to secure a conviction." *Id.* at 64-65 (footnote omitted). If this is the proposition for which *Walder* is cited, support is lent to the proposition that § 2515 is intended to operate against fourth amendment violations only.

[19] 18 U.S.C. § 2517(3) states:

> Any person who has received by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony

The final provision in the statutory suppression scheme is section 2518(10)(a). Section 2518 generally contains the procedural requirements of a valid wiretap authorization. Section 2518(10)(a) provides a remedy for the rights created in sections 2515 and 2517. An "aggrieved person"[20] may make a motion to suppress evidence in certain proceedings on any one of three grounds specified in the statute. A motion may be made on the ground that the evidence was "unlawfully intercepted," or that the authorization was insufficient on its face, or that the interception was not conducted in conformity to an otherwise valid order.[21]

An understanding of the interrelation of these three sections is vital to an effective understanding of the role of suppression under Title III. The legislative history discusses this interrelation. Section 2515 "must, of course, be read in the light of section 2518(10)(a) . . . which defines the class entitled to make a motion to suppress."[22] Further guidance is found in the Senate Report's discussion of 2518(10)(a). "This provision must be read in connection with sections 2515 and 2517 . . . which it limits. It provides a remedy for the right created by section 2515."[23]

The legislative history indicates that 2518(10)(a) was intended as a procedural requirement. It is a remedy for rights created in other sections of the statute.[24] A common sense interpretation of the interrelation of these three provisions would lead to the view that any infraction of the detailed procedural requirements of section 2518 would render the resulting evidence inadmissible under sections 2515 and 2517(3) on a motion to suppress made by a proper party. However, Court interpretations have rejected such a "common sense" view in favor of a more complex analytical model which requires suppression only when a provision of section 2518 central to the congressional scheme limiting the unlawful use of wiretaps is violated. The provisions of section 2518 are therefore enforced selectively through the exclusion of evidence.[25]

The leading cases establishing this analytical model are *United States v. Giordano*[26] and *United States v. Chavez*.[27] Title III requires that an application for a wiretap be authorized by the "Attorney General, or any assistant Attorney General specially designated by the Attorney General."[28] Prior to 1972, the Justice Department had adopted an administrative procedure

under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

[20] 18 U.S.C. § 2510(11): "'Aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

[21] Section 2518(10)(a) reads as follows:

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

[22] S. REP., *supra* note 16, at 2185.

[23] *Id.* at 2195.

[24] The Court often obscures the procedural character of this section by focusing on subparagraphs (i), (ii) and (iii) without reference to §§ 2515 and 2517. The latter sections create the right enforceable through the former section.

[25] This "common sense" view is evident in many cases. For example, United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972), construed the Act to require suppression of evidence obtained "in violation of" the wording of the statute "which implements the Fourth Amendment." *Id.* at 1063. The court in *Eastman* did not make any hard distinctions between statutory and constitutional violations. Since Title III "implements" the fourth amendment, a violation of the statute is also a violation of the defendant's "constitutional rights." *Id.* at 1064. *See also* United States v. Wolk, 466 F.2d. 1143 (8th Cir. 1972).

[26] 416 U.S. 505 (1974).

[27] 416 U.S. 562 (1974). Both *Chavez* and *Giordano* involved narcotics violations.

[28] 18 U.S.C. § 2516(1).

which routed all requests for electronic surveillance through the Attorney General's office. If the application was approved, the Attorney General would initial the application and direct an assistant Attorney General to send a form letter authorizing the application to the attorney in the field. This form letter falsely indicated that the asssitant Attorney General had personally reviewed the application. When the Attorney General was indisposed, his executive assistant assumed the duty of initialing wiretap requests and forwarding them to the assistant Attorney General.[29] In *Giordano*, the wiretap application was authorized by the executive assistant, though the authorization form letter stated that the assistant Attorney General had personally authorized the application. In *Chavez*, the application had been authorized by the Attorney General, though the form letter misidentified the authorizing official. Both Giordano and Chavez argued that this procedure was a violation of section 2516 and required suppression of the resulting evidence.

The Supreme Court held that suppression was required as to Giordano, but not as to Chavez. The Court concluded after an examination of the legislative history that the requirement that specific politically responsive officials authorize applications is a central feature of the congressional scheme to regulate the interception of conversations.[30] Suppression was therefore required. But suppression was not required when the correct official authorized the application, even though he was misidentified.

At the outset, the Court noted that "[t]he issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendament rights, but upon the provisions of Title III."[31] The Government argued that even if section 2516 had been violated, the interception was not "unlawful" within the meaning of section 2518(10)(a)(i). The Court summarized the Government's argument: "the Government contends that approval by the wrong official is a statutory violation only and that paragraph [2518(10)(a)] (i) must be construed to reach constitutional, but not statutory, violations."[32] The Court conceded that this argument was substantial, but concluded that "unlawful" was intended to encompass constitutional violations and some statutory violations. "Unlawful" must refer to at least some constitutional violations. The Court said:

> Suppression for lack of probable cause, for example, is not provided for in so many words and must fall within paragraph (i) unless, as is most unlikely, the statutory suppression procedures were not intended to reach constitutional violations at all. On the other hand paragraphs (ii) and (iii) plainly reach some purely statutory defaults without constitutional overtones, and these omissions cannot be deemed unlawful interceptions under paragraph (i), else there would have been no necessity for paragraphs (ii) and (iii)—or to put the matter another way, if unlawful interceptions under paragraph (i) include purely statutory issues, paragraphs (ii) and (iii) are drained of all meaning and are surplusage.[33]

Subparagraphs (ii) and (iii) clearly reach statutory violations—facially insufficient orders and failures to conduct a wiretap in accordance with a facially sufficient order.[34] The Government argued that these paragraphs could be meaningful only if they referred to matters not "unlawful" within the meaning of subparagraph (i). "Unlawfully intercepted" must therefore refer only to violations of fourth amendment rights. The Court said:

> The conclusion of the argument is that if nonconstitutional omissions reached by paragraphs (ii) and (iii) are not unlawful interceptions under paragraph (i), then there is no basis for holding that "unlawful interceptions" include *any* such statutory matters; the *only* purely statutory transgressions warranting suppression are those falling within paragraph (ii) and (iii).[35]

The Court conceded that simultaneous effect cannot be given to all three subparagraphs

[29] See 416 U.S. at 510, 564–66 for a more detailed account of Justice Department procedures.

[30] 416 U.S. at 512–22. The Court concluded:

> To us, it appears wholly at odds with the scheme and history of the Act to construe § 2516(1) to permit the Attorney General to delegate his authority at will, whether it be to his Executive Assistant or to any officer in the Department other than an Assistant Attorney General.

416 U.S. at 523 (footnote omitted).

[31] *Id.* at 524.

[32] *Id.* at 525.

[33] *Id.* at 526.

[34] See note 21 *supra* for the full text of this section.

[35] 416 U.S. at 526.

unless some purely statutory violations are excluded from the scope of "unlawfully intercepted."[36] But the Government's argument proved too much. It does not follow that *all* statutory violations must be so excluded. The Court concluded:

> The words "unlawfully intercepted" are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.[37]

Since section 2516 is such a provision, a violation like that in *Giordano* will require suppression.

The legislative history indicates that Congress did not intend to "press the scope of the suppression role beyond current search and seizure law."[38] In *Giordano*, the Government put considerable emphasis on this language, but the Court was not impressed.[39]

Thus, two distinct issues must be considered in a Title III suppression question: (1) whether there was in fact a violation of the statute and (2) whether the provision violated "directly and substantially" furthered the congressional intention to limit the use of wiretaps. Where the statutory provision is not so central, governmental negligence will be allowed, though not encouraged.[40]

Chavez illustrates the selectivity of enforcement resulting from the analytical model established in *Giordano*. While section 2516 was not violated where the Attorney General actually approved the application,[41] sections 2518(1)(a) and (4)(d) were violated when the authorizing official was misidentified.[42] Yet since these provisions are not central to the congressional plan, violation will not require suppression:

> While adherence to the identification reporting requirements of §§ 2518 (1)(a) and (4)(d) thus can simplify the assurance that those whom Title III makes responsible for determining when and how wiretapping and electronic surveillance should be conducted have fulfilled their roles in each case, it does not establish a substantive role to be played in the regulatory system.[43]

Suppression was not required as to Chavez.[44]

[36] *Id.* at 527.

[37] *Id.*

[38] S. REP., *supra* note 16, at 2185.

[39] 416 U.S. at 528.

[40] *Chavez* concludes with the suggestion that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." 416 U.S. at 580.

[41] *Id.* at 574.

[42] 18 U.S.C. 2518(1)(a) and (4)(d) are virtually identical. The first describes the identification requirement in an application while the second proscribes the form of the authorization order.

[43] 416 U.S. at 577–78. The Court concluded its opinion with an analysis of the relevant provisions of the Senate Report in support of its position. *See id.* at 578–80.

[44] Justice Douglas strongly dissented from this selective enforcement of the provisions of Title III. 416 U.S. at 583 (Douglas J., dissenting). He found the language of the statute unambiguous in requiring the exclusion of any evidence obtained in violation of even a "non-central" provision:

> I cannot agree that Title III, fairly read, authorizes the courts to pick and choose among various statutory provisions, suppressing evidence only when they determine that a provision is "substantive," "central," or "directly and substantially" related to the congressional scheme.
>
> Section 2515 of Title III unambiguously provides that no evidence derived from any intercepted communication may be received "in any trial . . . in or before any court . . . if the disclosure of that information would be in violation of this chapter." The Court acknowledges this provision in *Chavez, ante,* at 575, but disregards two sections of Title III explicitly dealing with disclosure in determining when disclosure is in fact "in violation of" Title III. Section 2511 (1), which provides criminal penalties for willful violations of Title III, prohibits in § 2511(1)(c) knowing disclosure of communications intercepted in violation of subsection (1), and the subsection prohibits interception "[e]xcept as otherwise specifically provided in this chapter." § 2511(1)(a). Section 2517(3) authorizes the disclosure in a criminal proceeding of information received "by any means authorized by this chapter" or of evidence derived from a communication "intercepted in accordance with the provisions of this chapter." The statute does not distinguish between the various provisions of the Title, and it seems evident that disclosure is "in violation of" Title III when there has not been compliance with any of its requirements.

Id. at 584–85. Douglas, too, saw difficulty in giving simultaneous effect to sub-paragraphs (i), (ii) and (iii) of § 2518(10)(a), but he saw merely a certain redundancy resulting from "a degree of excessive cautiousness." *Id.* at 586. The other choice, for which the Court opted, seemed to Douglas to attribute a "foolishness" to Congress which led it to enact

In the course of its opinion, the Court elaborates on the *Giordano* analysis:

> Though we rejected, in *Giordano*, the Government's claim that Congress intended "unlawfully intercepted" communications to mean only those intercepted in violation of constitutional requirements, we did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications "unlawful." To establish such a rule would be at odds with the statute itself. Under § 2515, suppression is not mandated for every violation of Title III, but only if "disclosure" of the contents of intercepted communications, or derivative evidence, would be in violation of Title III. Moreover, as we suggested in *Giordano*, it is apparent from the scheme of the section that paragraph (i) was not intended to reach every failure to follow statutory procedures, else paragraphs (ii) and (iii) would be drained of meaning. *Giordano* holds that paragraph (i) does include any "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."[45]

Justice Douglas concurred in the result in *Giordano* and dissented in *Chavez*.[46] He worried that the Court had opened the door to "the creation of other non-central statutory requirements."[47] *Donovan* is the first case to step through that door. It entrenches and refines the *Giordano* analysis of Title III suppression questions.[48]

In *Donovan* the Court again noted that the judicially created exclusionary rule was not at

"statutory provisions for law enforcement officials to scurry about satisfying when it did not consider the provisions significant enough to enforce by suppression." *Id.* at 586. Looking to §§ 2515 and 2517, Douglas thought that "unlawful" clearly must refer to disclosures "in violation of the act." Accordingly, Title III "means what it says." *Id.* at 586.

Justice Marshall echoed these concerns in his dissent to *Donovan*, 429 U.S. at 445 (Marshall, J., dissenting), though he found that even under the Court's rationale suppression was not required:

> I continue to adhere to the position expressed for four members of the Court by Mr. Justice Douglas in his dissent in *United States v. Chavez*, 416 U.S. 562, 584–85 (1974), that Title III does not authorize "the courts to pick and choose among various statutory provisions, suppressing evidence only when they determine that a provision is 'substantive,' 'central,' or 'directly and substantially related to the congressional scheme.'". But even under the standard set forth in *Giordano* and *Chavez* and reaffirmed by the Court today . . . the evidence at issue here should be suppressed.

Id. at 445–46. The Court focused on whether the additional information resulting from full compliance could have affected the decision to issue the warrant. The Court ignored the identification requirement's function as a "statutory trigger." Section 2518 (1)(e) requires that an application disclose all previous applications "involving any of the same persons . . . specified in the application." 18 U.S.C. § 2518(1)(e). A violation of the identification requirement evades this duty. Further, the identification provision triggers the mandatory notice provision. To the extent that violations of the identification requirement are allowed, these provisions may be frustrated. Suppression should therefore be required. 429 U.S. at 446–49.

Justice Marshall believed that the Court makes a similar error in discussing the notification requirement. "Again, the Court takes too narrow a view of the provision at issue, ignoring its place in the system Congress has created to restrain wiretapping." *Id.* at 449. Discretionary notice is tied to the civil remedies afforded injured parties by § 2520. The Senate Report observes that "[i]t is expected that civil suits, if any, will instead grow out of the filing of inventories." S. REP., *supra* note 16, at 2196. The Court has created an opportunity to limit the dangers of civil actions and to that extent has dismantled the congressional scheme. 429 U.S. at 449–50.

[45] 416 U.S. at 574–75.

[46] 416 U.S. at 484. See note 44.

[47] *Id.* at 587.

[48] The principal provision at issue in *Donovan* is the identification provision of § 2518(1)(b)(iv). That section requires the government to specify "the identity of the person, if known, committing the offense whose communications are to be intercepted." The legislative history of this provision is scanty and unilluminating. A section by section analysis of the new act merely paraphrases the provision. *See* S. REP., *supra* note 16, at 2184. In connection with § 2518(4)(d), the parallel provision requiring identification of the person committing the offense in the authorization order, the Senate Report cites *West v. Cabell*, 153 U.S. 78 (1894). *West* involved a civil action for false imprisonment. Vandy West was arrested on a warrant for the arrest of James West for murder. He was released after several days when it became apparent that the wrong West had been arrested. On appeal, the Supreme Court said:

> The principle of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in the American constitutions; and by the great weight of authority in this country, a warrant that does not do so will not justify the officer in making the arrest.

Id. at 86. A warrant that does not meet this fourth amendment requirement is void on its face as a general warrant. *Id.*

issue.[49] The question of suppression under the statute was again divided into two entirely distinct issues. The Court concluded the first issue in the respondents' favor—Title III does indeed require the identification of all individuals whom the Government has probable cause to believe are using the telephone in question for illegal purposes.[50] The Government had argued that only the principal target of the wiretap need be identified.[51] The Government based its argument on the plain meaning of the statute. The word "person" is singular in the relevant sections. It clearly refers to the individual whose telephone "is to be monitored."[52] This is not to say that every application need identify only one person. It is conceivable that several persons could use the same telephone to commit an offense in which case they all would be "principal targets." The Government maintained a distinction between those who operate the target telephone to place and receive calls and those who use unmonitored telephones to call into the wiretapped instrument. Only those who use the telephone to receive such calls are to be identified,[53] even though the Government has probable cause to believe that specific individuals will be calling into the monitored number in furtherance of the criminal offense.

The Court summarily rejected this interpretation. The use of the plural "persons" in other sections of the statute make it clear that Congress anticipated occasions when more than one person would be identified in the application and order.[54] On its face the statutory description of those who must be identified is "as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from that telephone."[55] The Court's analysis of the legislative history confirmed this result.[56]

Merlo and Lauer argued that the Government had an implied statutory duty to inform the issuing judge of the names of all parties intercepted. The Court agreed that the Government had an implied duty to provide sufficient information for the issuing judge to exercise discretion in giving notice, but found that it would be sufficient for the Government to identify the categories into which unnamed but overheard parties fell. The Court rejected the Government's contention that it was inappropriate to read such an implied duty into the Act when any information was available to the issuing judge at his request.[57]

However, the Court determined that a violation of these duties will not require suppression. The Court refined the *Giordano* model in reaching this conclusion. Although the Govern-

[49] 429 U.S. at 432 n.22 (quoting *Giordano*, 416 U.S. at 524).

[50] The Court said: "We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone." *Id.* at 428.

[51] *Id.* at 424.

[52] *Id.*

[53] *Id.* Also see note 12 *supra*.

[54] 18 U.S.C. § 2518(8)(d) & (1)(e).

[55] 429 U.S. at 425.

[56] *Id.* at 426–28.

[57] *Id.* at 430–31. The Court adopted the reasoning of United States v. Chun, 503 F.2d 533 (9th Cir. 1974). In *Chun*, the Government originally decided not to indict certain unnamed but overheard suspects and thus did not provide their names to the issuing judge. The Government later decided to seek indictments but did not inform the issuing judge of the change in circumstances. Accordingly, these defendants never received inventory notice. The defendants moved to suppress the evidence as unlawfully intercepted and the motions were granted. The Government appealed and the Court of Appeals for the Ninth Circuit remanded with instructions because of the inadequate factual record. The court carefully separated the issues of suppression under the fourth amendment through the judicial exclusionary rule and suppression under the statute. Should the district court find that because of the Government's failure to provide "prompt" notice, the defendants were not "afforded a reasonable opportunity to prepare an adequate response to the evidence which has been derived from the interception," *id.* at 538, suppression would be required under the fourth amendment. In interpreting the statute the court concluded that the obligation of the issuing judge to give discretionary notice can be properly fulfulled only when there is adequate information available to him. The court said:

> To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted communication is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties.

Id. at 540. The Supreme Court quoted this passage and adopted its "balanced construction" of the act. 429 U.S. at 430.

ment violated the identification requirement, the information supplied to the judge was sufficient to authorize the wiretap. It is highly improbable that the additional names would have altered his judgment. Suppression is required only when the misconduct is such that the issuing judge might not have granted the application if there had been full compliance with the statute. The Court said:

> Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept. Rather, this case resembles *Chavez*, where we held that a wiretap was not unlawful simply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The *Chavez* intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to enable the issuing judge to determine that the statutory conditions were satisfied.[58]

In *Donovan* neither of the Government's violations required suppression. The statutory provisions involved were not central to the congressional scheme. The provisions in question are merely ancillary to that scheme.

Analysis of the prior case law reveals that very few courts have been willing to apply the suppression sanction to violations of the notification and identification requirements. Many courts believed that the identification issue had been decided in *United States v. Kahn*.[59] In *Kahn*, a court authorized a wiretap identifying Irving Kahn and "others as yet unknown" as the targets of the wiretap. Conversations implicating Mrs. Kahn in her hushand's gambling operation were intercepted. Both Mr. and Mrs. Kahn were later indicted. The defendants moved to suppress the evidence gained from the wiretaps. Mrs. Kahn alleged that she was not a "person as yet unknown" since the Government clearly had reason to believe that she would be using the telephone. Further, it appeared that a more in-depth conventional investigation might well have yielded probable cause to suspect her connection with the gambling operation. The district court suppressed the evidence and the Court of Appeals for the Seventh Circuit affirmed.[60] The court imposed a discoverability requirement on government applications. It held that the government was required to identify all those whom a thorough conventional investigation might discover.[61]

The Supreme Court reversed holding that Title III imposed no discoverability requirement and that the Government was not required to identify an individual when it had no probable cause to believe he was committing an offense. The statute requires only that the Government identify those who are known to it, not those who are known or discoverable.[62] The Court concluded "that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause."[63]

The holding in *Kahn* is essentially negative. The Government does not have the duty to identify when it does not have probable cause. The Court in *Donovan* addressed the same issue from the other side. Must the Government identify all those it has probable cause to believe are committing the offense, or will some subset of this class suffice?

Prior case law can be divided into three categories. First, those cases which relied on *Kahn* and hold that Government failure to identify all persons in an application for a wiretap it has probable cause to believe are committing the offense is a clear violation of section 2518(1)(b)(iv) and requires suppression.[64] Second, those cases that indicate that

[58] 429 U.S. at 436 (footnotes omitted). Justice Marshall believed that the Court had adopted the wrong criterion. Rather than speculating as to how the issuing judge might have been affected by full compliance, he felt that the Court should examine the extent to which other statutory provisions depend on the fulfillment of the identification and notice requirements. See note 44 *supra*.

[59] 415 U.S. 143 (1973).

[60] 471 F.2d 191 (7th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

[61] The court of appeals said, "if the government did not know but should have known by prudent investigation of the liklihood of Minnie Kahn's use of the telephones for illicit activities, she was not a person 'unknown.'" *Id.* at 196.

[62] 415 U.S. at 152–53.

[63] *Id.* at 155.

[64] *See* United States v. Moore, 513 F.2d. 485 (D.C. Cir. 1975); United States v. Bernstein, 509 F.2d. 996 (4th Cir. 1975), *remanded for consideration in light of*

this failure is a violation, but either refuse to suppress such evidence or find that the facts of the particular case do not show probable cause.[65] These cases usually refuse to suppress evidence absent a showing of prejudice to the defendant. A third school of thought is represented by *United States v. Doolittle*[66] which maintained that section 2518(1)(b)(iv) does not require identification of all suspects.

United States v. Moore[67] exemplifies the first category. Moore's conviction on a gambling charge was reversed on the ground that it was obtained using unlawfully intercepted wiretap evidence. There was no question that the Government had probable cause to believe that Moore was involved in the gambling operation. At roughly the same time the Government applied for the wiretap, it also applied for a "pen register" on Moore's personal telephone. A pen register is a device which records numbers dialed on a telephone but does not record conversations. The appliction for the pen register clearly demonstrated probable cause.

The court in *Moore* thought that *Kahn* stood for the proposition that "once the Government possesses probable cause to suspect such complicity and use, the individual is 'known' within the statutory language and must be brought to the attention of the judge ruling on the wiretap request."[68]

The second category is represented by *United States v. Civella*.[69] In that case the Government failed to identify a suspect for whom it had probable cause. The court found that there was "substantial compliance" with the Act and refused to suppress the wiretap evidence, even though it acknowledged that "in order to comply literally with the relevant subsections of the statute, it was necessary for the Government to identify [all suspects in regard to whom the government had probable cause]."[70]

The Court of Appeals for the Fifth Circuit created the third category in *United States v. Doolittle*.[71] In that case, the court refused to suppress wiretap evidence involving an unidentified defendant even though the Government had probable cause. The court concluded that the Act had not been violated:

> The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. . . . All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes and received transcripts of the conversations prior to use against them at trial, as if they had been named in the order. . . . We hold that there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to them inadmissable under 18 U.S.C. § 2518(10)(a).[72]

The predominant rationale among those courts in the second and third categories is that wiretap evidence should not be suppressed where there has been substantial governmental compliance and the defendants cannot demonstrate prejudice resulting from the alleged violation. These courts have adopted a more flexible approach than the rigid statutory analysis of *Donovan*.

The analytical model adopted in *Giordano* and refined in *Donovan* makes a dead letter of those statutory provisions which are not "central" to the congressional plan. It is an invitation for governmental negligence. The Court assigns definite duties to the Government but insures that no practical consequences will attend a breach of those duties. Even the most well-intentioned law enforcement officials must surely come to consider such duties as an afterthought to be complied with only if there are no more pressing affairs.[73] There is no indica-

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Donovan, 430 U.S. 902 (1977). *See also* United States v. Martinez, 498 F.2d 464 (6th Cir. 1974), *cert. denied*, 419 U.S. 1056 (1975).

[65] *See* United States v. Civella, 533 F.2d 1395 (8th Cir. 1976), *remanded for consideration in light of Donovan*, 430 U.S. 905 (1977). United States v. Charizio, 525 F.2d. 289 (2d Cir. 1975); United States v. Russo, 492 F.2d 443 (2d Cir. 1974).

[66] 507 F.2d 1368 (5th Cir. 1974), *aff'd en banc*, 518 F.2d 500, (1975) *cert. denied*, 430 U.S. 905 (1977).

[67] 513 F.2d 485 (D.C. Cir. 1975) (interpreting 25 D.C. Code § 547(a)(1)(d), the District of Columbia's equivalent of 18 U.S.C. § 2518(1)(b)(iv)).

[68] *Id.* at 494.

[69] 533 F.2d. 1395 (8th Cir. 1976).

[70] *Id.* at 1403.

[71] 507 F.2d 1368 (5th Cir. 1974) *aff'd en banc*, 518 F.2d 500 (1975), *cert. denied*, 430 U.S. 905 (1977).

[72] *Id.* at 1371–72.

[73] The Court in *Donovan* noted that there is no question of an intentional violation and that if there were "we would have a different case." 429 U.S. at 436 n.23. But the Court expressly declined to reach this issue. *Id.* at 439 n.26. The only reported case of an intentional violation of § 2518 is United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972). The wiretap

tion that Congress intended this result in either the statute itself or the legislative history. The Court focuses its analysis on section 2518(10)(a). No attempt is made to integrate this provision with the substantive provisions which create the right to be enforced through the suppression motion. Neither section 2515 nor 2517 gives any indication that some provisions of section 2518 are central and others ancillary. The statute simply authorizes the disclosure of wiretap information as evidence when the interception was "in accordance with the provisions of this chapter"[74] and forbids such disclosure when it would be "in violation" of the chapter.[75] The more flexible approach of the lower courts which examines the peculiar facts of each case to determine if there has been "substantial compliance" with the provisions of the chapter and "prejudice to the defendant" seems more in harmony with the actual words of the statute.

The Court's analytical model fails to consider the suppression provisions of Title III in light of the judicially fashioned exclusionary rule and the congressional intent to define the scope of the fourth amendment. It thus failed to realize that no hard distinction can be maintained between purely statutory violations and those of a constitutional dimension.

In drafting Title III, Congress clearly felt that it was implementing the commands of the fourth amendment in the wiretap context. The Senate Report repeatedly emphasizes the belief that the provisions of section 2518 are constitutionally mandated. For example, in referring to the provisions of section 2518(1), the report says, "[e]ach of these requirements reflects the constitutional command of particularization."[76] Since Congress enacted its own conception of the fourth amendment's requirements in the wiretap context, violations of the statute are also violations of the fourth amendment. These two classes of violations are intended to be roughly identical. Yet the Court's analytical approach to suppression questions arises from the assumption that these two classes are distinct. The starting point of the Court's analysis in *Giordano* was the supposed difficulty in giving simultaneous meaning to all three subsections of section 2518(10)(a). The Government argued that "unlawfully intercepted" must include only constitutional violations and the Court concluded that the sub-paragraph must refer to some statutory violations and constitutional violations. The fact that Congress legislated against the background of the judicially fashioned exclusionary rule adds an unconsidered complexity. Evidence seized in violation of the fourth amendment will be suppressed through the judicially fashioned exclusionary rule without regard to the statute. Thus to the extent that "unlawfully intercepted" comprehends *any* constitutional violations it is surplusage. But if this sub-paragraph comprehends only statutory violations, then the other sub-paragraphs are surplusage since they merely describe types of unlawful statutory violations comprehended under sub-paragraph (i).

An examination of the three sub-paragraphs without regard to the confusing and unnecessary distinction between statutory and constitutional violations reveals a new way to give these sections simultaneous meaning.[77] Sub-para-

order in *Eastman* "expressly waived" notice to the defendants. Accordingly, neither mandatory nor discretionary notice was ever given. The court concluded that such communications were unlawfully intercepted and suppressed the evidence. The court said: "The touchstone of our decision on this aspect of the case at bar is not one in which an inventory was delayed but rather is one in which specific provisions of Title III were deliberately and advertently not followed. . . . This we cannot countenance." *Id.* at 1062.

[74] 18 U.S.C. § 2517(3). See note 19 *supra* for full text.

[75] 18 U.S.C. § 2515. See note 15 *supra*.

[76] Title III was drafted in response to *Berger* and *Katz* and the drafters considered those decisions to be authoritative pronouncements of the procedures needed to make wiretaps constitutional. The Senate Report says, "[i]n the course of the Opinion [*Berger*] the Court delineated the constitutional criteria that electronic surveillance legislation should contain. Title III was drafted to meet these standards. . . ." S. REP., *supra* note 16, at 2153. Each of the sections was intended to reflect a constitutional command. The limitation on the duration of surveillance contained in § 2518(4) is a "command of the constitution," *Id.* at 2191. Finally, all the subsections of § 2518(1) taken together "are intended to meet the test of the constitution that electronic surveillance techniques be used under the most precise and discriminate circumstances, which fully comply with the requirement of particularity." *Id.*

[77] Charles A. Pulaski, Jr., came to a similar conclusion in Pulaski, *Authorizing Wiretap Applications Under Title III: Another Dissent to Giordano and Chavez*, 123 U. PA. L. REV. 750 (1975). The author attacks Justice White's distinction between "central" and "non-central" provisions in *Giordano*. There are other "equally

graph (i) must refer to violations not within the scope of sub-paragraphs (ii) and (iii). Sub-paragraph (ii) deals with facially insufficient warrants. "Unlawfully intercepted" must refer to interceptions made pursuant to facially sufficient warrants. Sub-paragraph (iii) deals with facially sufficient warrants that are improperly executed. "Unlawfully intercepted" must refer to evidence resulting from a facially sufficient warrant properly executed. Such a warrant could only be unlawful where the issuing judge erred in making the required findings. For example, suppose the issuing judge erroneously finds probable cause. The warrant recites that there is probable cause and is therefore facially sufficient. Suppose further that the warrant was properly executed. Since the warrant in fact issued on a showing of less than probable cause, section 2518(3)(a) has been violated. Since information gained pursuant to such a warrant is not intercepted in accordance with Title III, its use as evidence is unlawful under sections 2515 and 2517. It is to these situations that "unlawfully intercepted" must refer.

Donovan, however, has entrenched the *Giordano* analysis and whatever its merits any authoritative interpretation of the statute must utilize it. After *Donovan*, the course of litigation concerning new breaches of other provisions of section 2518 is set. The primary question—indeed the only significant question—must be whether the section violated was "central" in the congressional scheme to limit the use of wiretaps.

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plausible" interpretations of "unlawfully intercepted." The author suggests that "unlawfully intercepted" should refer to interceptions which would be criminal offenses under 18 U.S.C. § 2511(1). That section prescribes criminal penalties for the wilful interception of wire communications except as provided by Title III. 123 U. PA. L. REV. at 785–86.