Journal of Criminal Law and Criminology

Volume 69
Issue 4 *Winter*

Article 5

Winter 1978

# Fourth Amendment--Electronic Surveillance

9901-4169/78/6904-0493$02.00/00
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 69, No. 4
Printed in U.S.A.


# FOURTH AMENDMENT-ELECTRONIC SURVEILLANCE

**United States v. New York Telephone Co., 434 U.S. 159 (1977).**
**Scott v. United States, 98 S. Ct. 1717 (1978).**

## INTRODUCTION

The United States Supreme Court in two major electronic surveillance cases last term again tried to interpret Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[1] In *United States v. New York Telephone Co.*,[2] the Court ruled that Title III did not pertain to pen registers.[3] The Court held that under Rule 41 of the Federal Rules of Criminal Procedure,[4] courts can authorize the installation of pen registers. In addition, the Court held that the All Writs Act[5] gives district courts the power to compel telephone companies to help government authorities install pen registers. In *Scott v. United States*,[6] the Court decided that to determine

[1] 18 U.S.C. §§ 2510-20 (1976) [hereinafter Title III]. Congress passed Title III to establish standards for judicial authorization of wiretaps and other forms of electronic surveillance that would meet the fourth amendment requirements set out in Berger v. United States, 388 U.S. 41, 44 (1967) (New York's permissive eavesdrop statute was "too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area" and thus violated the fourth and fourteenth amendments); and Katz v. United States, 389 U.S. 347 (1967) (the fourth amendment requires judicial authorization before the government can wiretap phone booth conversations). Several Supreme Court cases have interpreted various provisions of Title III. *See* notes 19-22 and accompanying text *infra*.

The two most recent cases interpreted §§ 2510(4), 2510(8), 2518(1) and 2518(5) of Title III. The text of these provisions states that:

> § 2510. Definitions
> As used in this chapter-
> ....
> (4) 'intercept' means the aural acquisition of any wire or oral communication through the use of any electronic, mechanical, or other device;
> ....
> (8) 'contents,' when used with respect to any wire or oral communications, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;
> § 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.
> ....
> (5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. ... Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

[2] 434 U.S. 159 (1977).

[3] According to the Court of Appeals for the Second Circuit:

> A pen register is a mechanical instrument attached to a telephone line, usually at a central telephone office, which records the outgoing numbers dialed on a particular telephone. In the case of a rotary dial phone, the pen register records on a paper tape dots or dashes equal in number to electrical pulses which correspond to the telephone number dialed. The device is not used to learn or monitor the contents of a call nor does it record whether an outgoing call is ever completed. For incoming calls, the pen register records a dash for each ring of the telephone, but does not identify the number of the telephone from which the incoming call originated. ... The device used for touch tone telephones, the TR-12 touch tone decoder, is very similar to a pen register, differing primarily in that it causes the digits dialed on the subject telephone to be printed in arabic numerals, rather than dots or dashes, corresponding to the electrical pulses.

Application of United States in Matter of Order Authorizing the Use of a Pen Register, 538 F.2d 956, 957 (2d Cir. 1976) (citation omitted).

[4] The court discussed two parts of FED. R. CRIM. P. 41. One is 41(b) which authorizes courts to issue warrants to: "search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense."

Section 41(h) defines property "to include documents, books and any other tangible objects."

[5] 28 U.S.C. § 1651(a) (1970). The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[6] 98 S. Ct. 1717 (1978).

whether a government agent has complied with the minimization requirement of Title III,[7] a court must make an objective finding as to whether the government agent has minimized his interception of non-relevant phone calls. The intent of the agent is not relevant. Instead, the court must decide whether a reasonable man would have intercepted all of the calls that the agent did.

These two cases are the most recent results of continuing efforts on the part of the United States Congress and the federal courts to delimit the ways in which electronic surveillance devices can and should be used consistent with the fourth amendment of the United States Constitution.[8] In early cases, the Court held that the fourth amendment's prohibition against unreasonable searches only protected tangible property. In *Olmstead v. United States*,[9] the Court ruled that wiretapping was not a "search" within the fourth amendment meaning of that word. Rather, wiretapping was only forbidden by the fourth amendment when there was an "actual physical invasion" of the property.[10] Congress reacted to *Olmstead* by passing the Communications Act of 1934,[11] which banned all wire or radio interceptions that were not authorized by the sender. In 1966, the Seventh Circuit Court of Appeals held that pen registers were covered by the 1934 Communications Act.[12]

Since *Olmstead*, the Court has followed the lead of the Communications Act and has begun to recognize that privacy, as well as property, is also protected by the fourth amendment. In two 1967 cases, *Berger v. United States*[13] and *Katz v. United States*,[14] the Court rejected the *Olmstead* view that wiretapping was not a search unless it physically invaded the property of another. And, each of these cases established detailed procedures which had to be followed for the use of electronic surveillance devices to constitute a "reasonable" search.[15]

In response to these two decisions, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act,[16] requiring judicial authorization for electronic surveillance. According to Title III, the authorization may ensue only after the government has complied with a detailed set of procedures designed to ensure that the electronic surveillance meets the constitutional requirements set forth in *Berger* and *Katz*. Title III also amended § 605 of the Communications Act of 1934 so that it pertains only to "radio communications" and not to wire communications like telephones.[17]

Since the passage of Title III, federal courts have been trying to determine which forms of electronic surveillance are regulated by the statute and what procedures the statute requires. Most of the decisions have interpreted Title III as giving the government great flexibility in its use of electronic surveillance devices. For example, in three of the four major electronic surveillance cases decided under Title III prior to *New York Telephone Co.* and *Scott*, the Supreme Court has interpreted Title III liberally to allow the government to use the fruits of electronic surveillance.[18] In *United States v. Kahn*,[19] for example, the Court held that the government

[7] 18 U.S.C. § 2518(5). *See* note 1 *supra*.

[8] U.S. CONST. amend. IV states:
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.

[9] 277 U.S. 438, 465 (1928).

[10] *Id.* at 466.

[11] 47 U.S.C. § 605 (1970). The relevant portion of this statute provides "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 . . . ."

[12] United States v. Dote, 371 F.2d 176 (7th Cir. 1966).

[13] 388 U.S. 41 (1967).

[14] 389 U.S. 347 (1967).

[15] *Berger* requires that a judge must find probable cause that a crime is being committed before authorizing a wiretap. The authorization must list the place to be wiretapped, the conversations to be sought and the identity of the person whose conversations are to be intercepted. The wiretap must be promptly executed, and the government must inform the judge how it was executed and what was seized. 388 U.S. at 56–60.
*Katz* requires antecedent judicial authorization before the government can conduct wiretaps. 389 U.S. at 359.

[16] 18 U.S.C. §§ 2510–20.

[17] This statute now reads: "§ 605 Unauthorized publication or use of communications . . . No person not being authorized by the sender shall intercept any *radio* communication . . . ." 47 U.S.C. § 605 (emphasis added).

[18] The only case which interpreted Title III very strictly was United States v. Giordano, 416 U.S. 505 (1974). In *Giordano*, the application for a wiretap had been authorized by the executive assistant to the Attorney General. However, Title III requires that the application must be authorized by the "Attorney General, or any assistant Attorney General specifically designated by the Attorney General." 18 U.S.C. § 2516(1). After examining the statute's legislative history, the Court reasoned that Congress wanted specific politically responsive officials to authorize the application and held that the evidence resulting from the wiretap authorized by the executive assistant had to be suppressed.

[19] 415 U.S. 143 (1974).

could use evidence obtained against a person through electronic surveillance even though that person had not been identified as a subject of the surveillance in the government's application for permission to use an electronic surveillance device if, at the time of the application, there had not been probable cause to believe that the person was committing a crime. Furthermore, in *United States v. Chavez*,[20] the Court held that if the Attorney General has authorized an application for a wiretap, the evidence obtained thereby is admissible even though the application itself mistakenly says that it was authorized by the assistant Attorney General. Finally, the Court in *United States v. Donovan*[21] held wiretap information admissible even when the identification and notice provisions of Title III were violated; in that case, the Court said that these provisions were not central to the statute.[22] *New York Telephone Co.* and *Scott* continue this trend of liberal interpretation of Title III, extending the admissibility of evidence obtained through wiretaps.

### New York Telephone Co. v. United States

In *New York Telephone Co.*, the District Court for the Southern District of New York had authorized agents of the Federal Bureau of Investigation (FBI) to use pen registers to investigate an allegedly illegal gambling operation. The district court also directed the telephone company to provide the FBI with technical assistance and facilities so that the FBI could install and operate the pen registers. The telephone company refused to lease lines to the FBI[23] which were needed to install the pen registers without the suspects' knowledge. When the telephone company moved to vacate that part of the order directing it to assist the FBI, the district court held that pen registers are not governed by Title III, and that the All Writs Act[24] and the inherent powers of the court allow a district court to order the telephone company to help install pen registers.

The United States Court of Appeals for the Second Circuit agreed that pen registers are not covered by Title III and that courts have the power—akin to the power given courts by Rule 41 of the Federal Rules of Criminal Procedure[25]—to authorize the use of pen registers.[26] However, the court of appeals in an opinion written by Judge Medina, in which Judge Feinberg joined, held that neither the inherent power of the court nor the All Writs Act allowed the district court to order the telephone company to assist the FBI. The appellate court also held that even if, *arguendo*, the district court could, under the All Writs Act and its inherent power, direct the telephone company to assist the government, the district court should not have exercised this power until it had specific Congressional authorization to do so.[27] The circuit court's decision reasoned that district courts should not order telephone companies to install pen registers until Congress specifically gives district courts the authority to do so because "without Congressional authority, such an order [to the telephone company] could establish a most undesirable . . . precedent for the authority of federal courts to impress unwilling aid on private third parties."[28]

Judge Mansfield concurred with the majority's holding that Title III does not govern pen registers and that courts have the power to authorize their use. However, unlike the majority, he said that the district court should order the telephone company to assist if such aid was necessary for the FBI to use the pen registers. He noted that the 1970 amendments to Title III,[29] which allow district courts to

[20] 416 U.S. 562 (1974).

[21] 429 U.S. 413 (1977).

[22] *Id.* at 434, 437, 439.

[23] Telephone company regulations prohibited it from giving this type of assistance. The telephone company said that the principal reason it opposed giving technical assistance was its fear that this would lead to indiscriminate invasions of privacy. Application of United States in matter of order authorizing the use of a Pen Register, 538 F.2d 956, 962 (2d Cir. 1976).

[24] *See* note 5 *supra*.

[25] *See* note 4 *supra*. The court of appeals said that Fed. R. Crim. P. 41 only gives courts the power to authorize the search and seizure of tangible property. But using the "commonsense approach" adopted by the Seventh Circuit in United States v. Illinois Bell Telephone Co., 531 F.2d 809 (7th Cir. 1976), the court held that courts have a power similar to their authority under Fed. R. Crim. P. 41 to authorize the search and seizure of intangible items. 538 F.2d at 959.

[26] 538 F.2d at 959-60.

[27] *Id.* at 961.

[28] *Id.* at 962.

[29] 18 U.S.C. § 2518(4). This amendment states:

> An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefore by the applicant at the prevailing rates.

order telephone companies to help install and operate wiretaps, do not establish any limitations or safeguards on this aid.

The Supreme Court reversed the Second Circuit's decision that district courts could not order telephone companies to install pen registers. The Court unanimously agreed with the court of appeals that Title III does not cover the use of pen registers. However, the majority of the Court[30] also held that Fed. R. Crim. P. 41 allows district courts to authorize the use of pen registers and that the All Writs Act gives district courts the authority to order telephone companies to install pen registers.

First, the Supreme Court held that Title III does not govern pen registers. Justice White, writing for the majority, noted that Title III deals with orders "authorizing and approving the interception of a wire or oral communication."[31] The act defines "intercept" as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."[32] "Contents . . . include any information concerning the identity of the parties to [the] communication or the existence, substance, purport, or meaning of [the] communication."[33] Based on these definitions, the Supreme Court held that "pen registers do not 'intercept' because they do not acquire the 'contents' of communications . . . . Furthermore, pen registers do not accomplish the 'aural acquisition' of anything."[34] The Court also noted that the legislative history shows that Title III is not meant to cover pen registers.[35] The Court held further that pen registers are no longer governed by § 605 of the Communications Act of 1934, since Title III amended that section to make it apply only to "radio communications."[36]

[30] Five justices, Chief Justice Burger and Justices White, Blackmun, Powell and Rehnquist, agreed with the entire decision of the Court. Justice Stewart only agreed that Title III does not cover pen registers and that FED. R. CRIM. P. 41 allows district courts to authorize the use of pen registers. Justices Brennan and Marshall only agreed that Title III does not cover pen registers.

[31] 18 U.S.C. § 2518(1).

[32] 18 U.S.C. § 2510(4).

[33] 18 U.S.C. § 2510(8).

[34] 434 U.S. at 167.

[35] *Id.* at 167–68. The Senate Report on Title III states: Paragraph 4 [of § 2510] defines "intercept" to include the aural acquisition of the contents of any wire or oral communication by any electronic, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. . . . The proposed legislation is not designed to prevent the tracing of phone calls. The use of a "pen register," for example, would be permissible.
S. REP. No. 1097, 90th Cong., 2d Sess. 90 (1968).

[36] 434 U.S. at 168 n.13.

The majority of the Court[37] held that district courts have the power to authorize government officials to use pen registers. The Court's opinion reasoned that Fed. R. Crim. P. 41(b) authorizes district courts to issue warrants to search and seize property.[38] Although the Court acknowledged that rule 41(h) defines property only "to include documents, books and any other tangible objects," they said that this was not an exhaustive list of all of the types of property covered by Rule 41.[39]

The Court's opinion also noted that two other factors supported the district court's authorization of pen registers. First, Fed. R. Crim. P. 57(b) provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."[40] Second, the legislative history of Title III indicates that Congress intended the use of pen registers to be legal.[41]

After determining that district courts have the power to authorize the installation of pen registers upon a finding of probable cause, the Court's opinion[42] held that the All Writs Act[43] gives district courts the power to order telephone companies to assist federal officials in installing and operating pen registers. The Court noted that the evidence in this particular case showed that unless the telephone company aided the government officials in installing the pen registers, the district court's order permitting the use of pen registers would be worthless: The FBI officials physically could not have installed the pen registers on their own. Since the district courts have the power to authorize the use of pen registers, the Court reasoned that they also must have the power to make sure the officials can use them.[44]

The Court stated that federal district courts can use the All Writs Act to compel third parties who are not participants in a particular investigation to assist the court in conducting that investigation. In this particular case, the Court noted first, that the telephone company's facilities were allegedly being

[37] Chief Justice Burger and Justices Stewart, White, Blackmun, Powell, and Rehnquist.

[38] *See* note 4 *supra.*

[39] 434 U.S. at 169.

[40] *Id.* at 170. The Court specifically refrained from saying that FED. R. CRIM. P. 57(b) is sufficient authorization by itself for allowing the district courts to authorize pen registers.

[41] *Id. See also* note 34 *supra.*

[42] The five justices who agreed with this holding were Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist.

[43] *See* note 5 *supra.*

[44] 434 U.S. at 175–76.

used for illegal purposes. Second, the Court recognized that the phone company itself used pen registers in its normal business operation. It was, therefore, not a great inconvenience to require the company to help the government install them in this situation. Finally, and most importantly, according to the Court, the government simply could not use pen registers at all without the company's help.

Moreover, the Court noted that after the Ninth Circuit in an earlier case held that district courts could not compel telephone company assistance in wiretap cases,[45] Congress promptly overruled that decision by amending Title III to give courts that power.[46] Since the legislative history of Title III reveals that Congress intended the use of pen registers to be a permissible form of electronic surveillance,[47] it must be presumed that Congress would not object to courts ordering telephone company assistance in pen register cases.[48]

Two justices authored opinions in which they dissented in part. Justice Stewart agreed with the majority that the district court could authorize government officials to use pen registers.[49] However, he agreed with Justice Stevens' dissent that the court could not force the telephone company to help officials install and operate the pen registers.[50]

Justice Stevens' dissent, in his dissent, joined by Justices Brennan and Marshall, stated that he disagreed that the district courts could authorize the use of pen registers.[51] He believed that the federal district courts cannot issue any type of search warrant without a specific Congressional authorization detailing the nature of and the requirements for the warrant. Justice Stevens cited Title III in which Congress authorized wiretaps as an example of the type of specific authorization that must be given before the courts can issue a warrant.[52] Title IX of the Omnibus Crime Control and Safe Streets Act of 1968, which allows courts to issue search warrants for "mere evidence,"[53] was cited by Stevens as another example of the specific authorization needed.[54] Since, as the majority had admitted, pen registers are not covered by the act, Justice Stevens reasoned that no Congressional authorization exists for the issuance of a warrant for such devices.

Justice Stevens further analyzed the history of Title IX to show that Rule 41 is not a general authorization to issue all types of warrants allowed under the fourth amendment. Prior to 1967, the Court had held that it was unconstitutional for the government to seize "mere evidence."[55] As a result, Rule 41(b) had only authorized district courts to issue warrants for search and seizure of "contraband, the fruits of crime, or things otherwise criminally possessed" or "property designed or intended for use or which is or has been used as the means of committing a criminal offense." In *Warden v. Hayden*,[56] the Court held that a police officer could seize "mere evidence" in a search incident to an arrest. Relying on Professor Wright's treatise,[57] Justice Stevens argued that, after *Warden v. Hayden*, but before Title IX, the government could seize mere evidence in conjunction with an arrest, but courts could not issue search warrants for mere evidence.[58] In 1968 Congress passed Title IX, which allowed courts to issue search warrants for mere evidence, and in 1972 Rule 41(b) was amended[59] to allow courts to issue warrants to search and seize "property that constitutes evidence of the commission of a criminal offense." Stevens argued, however, that if Rule 41(b) allowed courts to issue any warrants not prohibited by the fourth amendment or if "property" were merely illustrative of the sorts of things obtainable by a search and seizure, Congress would not have bothered to pass Title IX, and Rule 41(b) would not have been amended in 1972.[60]

[45] Application of the United States, 427 F.2d 639 (9th Cir. 1970).

[46] *See* note 29 *supra*.

[47] *See* note 34 *supra*.

[48] 434 U.S. at 176–78.

[49] *Id.* at 178 (Stewart, J., dissenting in part).

[50] *Id.*

[51] *Id.* at 179 (Stevens, J., dissenting in part).

[52] *Id.* at 182 (Stevens, J., dissenting in part).

[53] In Gouled v. United States, 255 U.S. 298 (1921), the Court held that the only type of property which the government could seize was property that had some intrinsic value. It could not take property that was "mere evidence," that is, only useful as evidence against a person. In Warden v. Hayden, 387 U.S. 294 (1967), the Court qualified its earlier holding by ruling that a police officer can seize mere evidence in a search which takes place during an arrest. The next year Congress passed Title IX of the Omnibus Crime Control and Safe Streets Act of 1968 which allows the government to seize mere evidence in searches which do not take place during arrests.

[54] 434 U.S. at 182–83 (Stevens, J., dissenting in part).

[55] *See* note 48 *supra*.

[56] 387 U.S. 294 (1967).

[57] 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE 41 (1969).

[58] 434 U.S. at 183 (Stevens, J., dissenting in part).

[59] *Id.*

[60] 434 U.S. at 183 (Stevens, J., dissenting in part). It is interesting to note Justice Stevens' reliance on Warden v. Hayden, 387 U.S. 294, for the proposition that in the absence of Congressional authorization, police could seize mere evidence in conjunction with arrests but courts could not issue search warrants for mere evidence. *Warden*

In addition, Justice Stevens claimed that Rule 41 does not give district courts the power to authorize pen registers because many of the limitations on searches and seizures listed in that rule are not applicable to pen registers. These limitations, which are designed to insure the reasonableness of the search and seizure, cannot be followed when the government uses pen registers. For example, he pointed out that Rule 41(c) provides that officials must prepare an inventory of the property to be seized in the presence of the person whose property is to be seized.[61] But, FBI officials using pen registers to seize phone numbers do not tell the parties using the phone that the government is taking the phone numbers.[62]

Justice Stevens also disagreed with the majority's contention that the All Writs Act gives district courts the power to order telephone companies to assist in the installation and operation of pen registers. The purpose of a court order under the All Writs Act, according to Justice Stevens, is to aid the court in performing its duties and exercising its jurisdiction. The court cannot use the All Writs Act simply to order one party to help another party perform its duties or exercise its rights. Rather, the court can only use the act to require a party to help the court perform its functions. Stevens noted that an order to the telephone company merely aids the government's interests, not the court's jurisdiction.[63] And, while the government may have a right to use pen registers to gather evidence, Justice Stevens claimed that it is not the court's function to gather the evidence.[64] Orders under the All Writs Act, according to Justice Stevens, should be analogous to common-law writs.[65] He argued than an order requiring the telephone company's assistance in setting up a pen register is similar to a writ of assistance,[66] one of the governmental abuses that the American Revolution was intended to eliminate.[67]

As Justice Stevens so aptly stated, there is indeed a difficulty raised by the majority's reasoning that Rule 41 authorizes the use of pen registers. That difficulty is the Court's expansion of the term "property." Rule 41 clearly authorizes the issuance of warrants to search for and seize any "property that constitutes evidence"[68] and defines "property" "to include documents, books and any other tangible objects."[69] And, as a familiar Latin maxim states: *inclusio unius exclusio alterius*" (the enumeration of certain things in a statute implies the exclusion of others).[70] As Justice Stevens noted, the enumeration in Rule 41(h) ends with "other tan-

could be cited for another proposition altogether; it illustrates the fact that the judiciary, acting in the absence of specific Congressional authorization, can set its own standards for search and seizure.

Similarly, in several cases federal judges have authorized the use of electronic surveillance devices, although no statutes specifically authorized them to do so. For example, in Osborn v. United States, 385 U.S. 323 (1966), two district court judges authorized FBI agents to put a recorder on an informant in order to obtain an accurate account of the conversations he had with a lawyer suspected of bribing a juror. The Court held that because the government had obtained antecedent judicial authorization, the recordings were admissible. 385 U.S. at 330–31. *See also Katz*, 389 U.S. 347.

[61] 434 U.S. at 185 (Stevens, J., dissenting in part).

[62] While it is true that FED. R. CRIM. P. 41 safeguards are not entirely applicable to pen registers, the Court has modified these safeguards in the past to make them applicable to electronic surveillance. In a footnote, the majority discusses how in *Katz* the Court stated that contrary to FED. R. CRIM. P. 41(d), one did not have to give notice to the person "searched" prior to the commencement of electronic surveillance. 434 U.S. at 169–70 n.16 (quoting *Katz*, 389 U.S. at 355–56 n.16). *Katz* held that antecedent judicial authorization is necessary for electronic surveillance and the Court stated that a judge authorizing the use of such devices would require "appropriate safeguards" similar, though not identical, to those of conventional constitutionally permissible warrants. 389 U.S. at 354. But the notice requirement could be omitted because "officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." *Id.* at 355 n.16.

[63] 434 U.S. at 187–90 (Stevens, J., dissenting in part).

[64] The majority pointed out, 434 U.S. at 173, that courts do have jurisdiction to authorize searches and seizures and to make sure that they are performed reasonably. The Court cited Harris v. Nelson, 394 U.S. 286, 299 (1969), which held that courts may require interrogatories for a habeas corpus proceeding even though they have no specific authority to do so.

[65] 434 U.S. at 187 (Stevens, J., dissenting in part).

[66] Writs of assistance were prevalent during colonial times. They commanded "all officers and subjects of the crown to assist" the government in searches and seizures and gave the government authority to require citizens to assist it during the life of the sovereign who issued the writ. *Id.* at 180 n.3 (Stevens, J., dissenting in part) (quoting N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT 51–55 (1937)).

[67] 434 U.S. at 190 (Stevens, J., dissenting in part). However, the case law refutes the idea that writs issued under the All Writs Act must be analogous to common law writs. In Price v. Johnston, 334 U.S. 266 (1948), the Court specifically stated that writs were not set in the 1700's. Speaking of the law that preceded the All Writs Act, the Court said it was "not confined to the precise forms of that writ in vogue at the common law or in the English judicial system." *Id.* at 282.

[68] FED. R. CRIM. P. 41(b). *See* note 4 *supra*.

[69] FED. R. CRIM. P. 41(h). *See* note 4 *supra*.

[70] Colyer v. Skeffington, 265 F. 17, 44–45 (D. Mass. 1920), *rev'd on other grounds*, 277 F. 129 (1st Cir. 1922).

gible property,"[71] which would seem to limit the use of warrants to tangible property. The *New York Telephone* majority cited one case to show that since "property" is defined to "include" the listed items, the definition is not exclusive. However, in that case, *Helvering v. Morgan's Inc.*,[72] the Court had held that a definition using the word "include" was not exclusive because the statute it was examining, the Revenue Act of 1926, specifically stated, "The terms 'includes' and 'including' when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined."[73] *Helvering*, in fact, seems to indicate that if a definition using the word "include" is not meant to be exclusive, the statute must specifically so state.

Despite this obvious and perhaps unjustified expansion of Rule 41, the majority's ruling is logical and in keeping with common sense. Since courts can constitutionally authorize the use of wiretaps, they should also be able to authorize the use of pen registers which involve less extensive intrusions than wiretaps.[74] There are no federal statutes prohibiting the use of pen registers[75] and the legislative history of Title III shows that Congress wishes to permit their use.[76] Therefore, it seems reasonable that courts can authorize the use of pen registers.

This conclusion is also consistent with the Court's other decisions on search and seizure. Although Rule 41(h) still refers only to warrants for the search and seizure of tangible, physical property, recent cases have recognized that an intangible interest, privacy, as well as property, is protected by the fourth amendment.[77] In *Warden v. Hayden*,[78] for instance, the Court maintained that "the premise that property interests control the right of the Government to search and seize has been discredited." In sum, it simply appears that the rules of criminal procedure have not caught up with the Court's view that the law of search and seizure also extends to the area of privacy.

On the opposite spectrum, there *is* a difficulty with the majority's reasoning behind ordering the telephone company to assist the federal government in installing the pen registers. The Court is requiring a third party who is not involved in the investigation to help affirmatively the courts catch criminals. But, none of the cases cited by the Court in support of this ruling is directly on point. In two of the cases cited by the majority, *Mississippi Valley Barge Line Co. v. United States*[79] and *Board of Education v. York*,[80] an affirmative duty was created, but the courts were not asking private citizens to help catch criminals. In *United States v. McHie*[81] and *United States v. Field*[82] lower federal courts did require third parties to turn over books and papers that were in their possession, but these holdings were merely in keeping with the tradition of requiring third parties to present evidence[83] and did not in any way command them to assist affirmatively the government in gathering evidence. In a footnote,[84] the Court in *New York Telephone* cites several cases[85] where third parties helped catch criminals. However, in all of these cases the third party voluntarily pursued the criminals. None of these cases support the proposition that the courts have the power to force third parties to help the government develop criminal cases.

Even though there may be no precedent requiring active law enforcement assistance on the part of third parties, under the circumstances of this case, this again seems the logical path for the Court to have taken. Since Congress has clearly provided that the district courts can order telephone companies to assist with wiretaps,[86] it seems logical that the district courts should also be able to compel phone companies to assist with pen registers.[87]

[71] 434 U.S. at 184 (Stevens, J., dissenting in part).

[72] 293 U.S. 121 (1934).

[73] *Id.* at 125 n.1.

[74] Wiretaps can also be used to determine the telephone numbers dialed. United States v. Falcone, 505 F.2d 478, 483 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

[75] *See* note 17 *supra*.

[76] *See* note 34 *supra*.

[77] *See* note 14 and accompanying text *supra*.

[78] 387 U.S. 294, 304 (1967).

[79] 273 F. Supp. 1 (E.D. Mo. 1967), *aff'd*, 389 U.S. 579 (1968). The court held that it could enforce an order against third parties who were not parties to the lawsuit.

[80] 429 F.2d 66 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). The court's jurisdiction over public school segregation problems empowered it to issue an injunction requiring parents to send their child to a certain school.

[81] 196 F. 586 (N.D. Ill. 1912).

[82] 193 F.2d 92 (2d Cir. 1951).

[83] FED. R. CRIM. P. 17 allows district courts to issue subpoenas and subpoenas duces tecum to people who are not parties to the suit and to hold those who do not comply with these subpoenas in contempt.

[84] 434 U.S. at 175-76 n.24.

[85] 434 U.S. at 176 n.24 citing Hamilton v. Regents, 293 U.S. 245, 265 n. (1934) (Cardozo, J., concurring); In re Quarles v. Butler, 158 U.S. 532, 535 (1895); Elrod v. Moss, 278 F. 123, 129 (4th Cir. 1921); Barrington v. Yellow Taxi Corp., 250 N.Y. 14, 17, 164 N.E. 726, 727 (1928).

[86] 18 U.S.C. § 2518(4).

[87] Even the dissent implies that the authorization of pen registers and the coercion of the phone companies is logical. Justice Stevens said, "[T]he Court's rush to

Finally, while this was apparently not argued at any stage of the proceedings, the very nature of phone companies—highly regulated companies granted monopolies in most of the services they provide the public—may impose upon them a special duty to assist the government when it becomes necessary.

### Scott v. United States

In *Scott v. United States*,[88] the Court was again faced with a Title III question. In that case, the United States District Court for the District of Columbia had, pursuant to Title III, authorized federal officials to wiretap a residential phone to learn about an alleged narcotics ring. The order required the agents to conduct the wiretap in "such a way as to minimize the interception of communications that are [not] otherwise subject to interception."[89] For the thirty-day period authorized by the warrant, the agents intercepted every call on that phone. Forty percent of these calls were narcotics-related.[90]

In a pretrial motion, the defendants moved to suppress the wiretap evidence. They claimed that the government had not minimized the interception of conversations not related to narcotics as Title III and the district court's order required. The district court agreed and suppressed the evidence.[91] The court of appeals reversed and remanded, holding that the district court had to make "an assessment of the reasonableness of the agents' efforts in light of the purpose of the wiretap and the information available to them at the time" of the interception.[92] On remand, the district court again held that the agents had violated the minimization rule, but the court of appeals again disagreed.[93] This time, the court of appeals itself reviewed the evidence and determined that all the interceptions had been reasonable.[94] On remand again, the district court finally convicted the defendants and the court of appeals affirmed.[95]

When the case eventually reached the Supreme Court, Justice Rehnquist, writing for the majority, affirmed the court of appeals decision. The Supreme Court's decision in *Scott*, however, was less controversial than its decision in the *New York Telephone Co.* case, because the *Scott* Court simply interpreted Title III in a way very similar to the way that previous Supreme Court decisions dealt with the law. In previous decisions, the Court had set up a two-fold analytical model to use in dealing with Title III. First, the Court would question whether the action at issue violated the statute. Second, if it did, the Court would consider whether the violated provision was central to the act.[96]

In *Scott*, the Court held that the FBI had not even violated the minimization provision of the statute. The Court said that the proper way to determine whether the FBI agents had followed the minimization rule was to judge their actions in light of the facts and circumstances that confronted them when they were doing the wiretapping. The Court stated that this is the way that all alleged violations of the fourth amendment are determined and cited *United States v. Robinson*[97] for the proposition that an officer's motivation for conducting a search is immaterial to the admissibility of evidence so obtained.[98] Having held motive unimportant, the Court found it unnecessary to determine what the motive of the government agents in *Scott* was.[99] The Court claimed that Title III, instead, requires an objective assessment of the agents' actions. The statute's language directs searches to be "conducted" so as to minimize the interceptions on irrelevant phone calls.[100] This language, the Court reasoned, indicated that the focus was on actions,

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achieve a logical result must await congressional deliberations." 434 U.S. at 179 (Stevens, J., dissenting in part).

[88] 98 S. Ct. 1717 (1978).

[89] 18 U.S.C. § 2518(5). *See* note 1 *supra*.

[90] United States v. Scott, 516 F.2d 751, 756 (D.C. Cir. 1975). Most of the rest were either short or ambiguous. Seven of the calls were between Geneva Jenkins, the person in whose name the phone was listed, and her mother. *Id.* at 757.

[91] United States v. Scott, 331 F. Supp. 233 (D. D.C. 1971).

[92] United States v. Scott, 504 F.2d 194, 198 (D.C. Cir. 1974).

[93] 516 F.2d 751.

[94] United States v. Scott, 522 F.2d 1333 (D.C. Cir. 1975). Four judges dissented from the court of appeals' decision to deny a rehearing en banc. Justice Brennan, joined by Justice Marshall, dissented from the Supreme Court's decision not to grant certiorari at that time. United States v. Scott, 425 U.S. 917 (1976).

[95] For a discussion of this analytical model, *see* 68 J. Crim. L. & C. 505, 508 (1977).

[96] For a discussion of this analytical model, *see* Note, *Federal Law—Wiretaps*, 68. J. Crim. L & C. 505, 508

[97] 414 U.S. 218 (1973).

[98] In *Robinson*, a police officer searched a man after arresting him for driving while his license was revoked. The Court held that the fact that the officer did not fear the suspect or think that he was armed was immaterial. *Id.* at 235.

[99] In a footnote, it recognized that the government disputes the district court's finding that the agents subjectively intended to violate the Constitution or the statute. However, the Court said it expressed "no view on this matter." 98 S. Ct. at 1723 n.11.

[100] 18 U.S.C. § 2518(5). *See* note 1 *supra*.

not motives. In addition, the Court pointed out that the legislative history reveals that Title III was not intended "generally to press the scope of the suppression role beyond present search and seizure law."[101] Therefore, the standard must be the objective reasonableness of the agents' actions and not their subjective motives.

Twice in this discussion, however, the Court recognized that motive is sometimes important. First, the Court said that if there is a statutory or constitutional violation,[102] then a court might want to consider the agents' motives in determining whether to exclude the evidence. If an examination of the evidence shows that the agents did not minimize and if the agents acted in bad faith, then courts may want to exclude the evidence to deter agents from acting in bad faith in the future.[103] Second, in a footnote,[104] the Court recognized that judges may, in practice, occasionally take motive into account when they are determining whether a person's actions show minimization. For example, if a judge believes that a federal agent did not act in good faith, he may not believe the agent's claims about what information he had available to him at the time of the search.

After determining that the proper test is the reasonableness of the agents' actions, the Court discussed what factors are important in making this evaluation. The percentage of nonpertinent calls was considered by the Court to be only one factor. A court must also consider the character of nonpertinent calls: if such calls were very short, ambiguous or one-time calls, the agents may reasonably have intercepted them.[105] Other important factors were thought to be the circumstances of the wiretap, the type of use the phone normally receives, and the time during the authorized period at which the agents intercepted the calls. Based on these factors, the Court determined that the agents in *Scott* did minimize their interception of nonpertinent phone calls.[106]

Justices Brennan and Marshall disagreed with the Court's entire analysis. Justice Brennan stated, in a dissent in which Justice Marshall joined, that the Court had misinterpreted the statute and had thereby eliminated one of the safeguards that Congress had established.[107] Justice Brennan interpreted the minimization provision to mean that the agents must make a good faith effort to minimize the calls. He relied on the finding of the district court that the agents "did not even attempt 'lip service' compliance to the provision," for they monitored every call, sixty percent of which were not pertinent.[108] This, according to Justice Brennan, indicated that the agents lacked good faith in their actions. Justice Brennan also complained that it is impossible to determine whether an agent has acted "reasonably" because one can never know whether he would have intercepted fewer calls if he had made a good faith effort to do so.[109] The result of the majority's test, according to Justice Brennan, is that government agents can now disregard this section, in violation of the statute's purpose to limit severely the use of interceptions as a means of protecting individual privacy. As Justice Brennan complained, the majority's holding reduces the deterrent value of the statute's exclusionary remedy.[110]

Justice Brennan also disagreed with the majority's view that minimization should be treated like other fourth amendment procedures. He noted that none of the cases cited by the majority referred to electronic surveillance, and thus reasoned that the plain language of the statute should take precedence over general fourth amendment principles.[111] He also felt that the majority's decision undercut the reasoning of *United States v. Kahn*,[112] in which the Court relied on the minimization clause to

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[101] S. REP. No. 1097, 90th Cong., 2d Sess. 96 (April 29, 1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2185.

[102] An example of a statutory violation is an agent's failure to list in the wiretap application all of the people he has probable cause to believe are committing an offense. *See* note 19 and accompanying text *supra*.

[103] 98 S. Ct. at 1724 n.13.

[104] *Id.*

[105] *Id.* at 1724–25.

[106] In *Scott*, 40% of the calls were narcotics related. Because most of the rest were short or ambiguous or one-time conversations, it was reasonable to intercept them. Of the seven calls between the owner of the phone and her mother, the first four were at the beginning of the surveillance, and two of them suggested that the mother knew about the narcotics conspiracy. The last three calls also indicated that the mother may have had some knowledge of the conspiracy. *Id.* at 1725–26.

[107] *Id.* at__, 98 S. Ct. at 1726 (Brennan, J., dissenting).

[108] United States v. Scott, 331 F. Supp. at 247.

[109] 98 S. Ct. at 1727 (Brennan, J., dissenting).

[110] *Id.*

[111] *Id.* at 1728 (Brennan, J., dissenting).

[112] 415 U.S. 143. In *Kahn*, although government agents were tapping the Kahn family home, they did not have probable cause to believe that Mrs. Kahn was involved in her husband's illegal gambling operation and had not included her name in their application for a wiretap. However, they did listen to her calls and obtained evidence from them. The Court held that this activity did not violate Title III's requirement that the government list all parties whose conversations would be intercepted.

safeguard against unlimited invasions of privacy. The Court in *Kahn* held that the requirement of only identifying those people who the government had probable cause to believe were committing crimes would not allow the government "to seize at will every communication that came over the line."[113] The Court reasoned that the government still had "to execute the warrant in such a manner as to minimize the interception of any innocent conversation."[114] Justice Brennan argued that because of the *Scott* decision, the minimization clause no longer prevents the government from seizing at will every conversation that comes over the tapped line as the *Kahn* Court had relied on.[115] Although the government agents in *Scott* had intercepted every call that came over the line, the Court held that the agents had not violated Title III's minimization clause. Justice Brennan concluded by warning that if the Court continues to dilute Title III's safeguards, the act itself may violate the fourth amendment.[116]

As a further criticism of the majority's opinion, it appears strange that the Court would hold that an agent's intent should not influence the court's determination of whether the agent complied with the minimization requirement. However, the cases cited by the Court do show why intent really cannot be relevant. For example, in *Klinger v. United States,*[117] a policeman ordered to find a robbery suspect stopped a car matching the description of the getaway vehicle and arrested the driver for vagrancy. He also seized a pistol, which the defendant moved to suppress at trial. The policeman testified that when he arrested Klinger for vagrancy, he did not think that he had "enough facts" to arrest him for robbery. The court of appeals said the policeman's motives were immaterial. What was important was whether he actually did have probable cause to arrest the defendant for robbery.[118] After all, if he had had good motives, but had not had probable cause, the evidence should have been suppressed.

The facts in *Scott* show how difficult it can be to determine what an agent's motives were. The record revealed that in *Scott* the agents knew about the minimization rule, and before they started, they decided that they would not intercept any privileged phone calls.[119] And, when they discovered at one point that they were tapping the wrong line, they disconnected that tap. Every five days the agents told the judge how many calls they had listened to and how many of these calls were narcotics-related. They had not, however, actually stopped listening to or recording any call because they thought it was not pertinent. On the basis of this information, it might be difficult indeed for a court to decide whether the agents had used good faith judgment when they were tapping the phone.

Not only does it appear that the Court majority correctly decided that one must determine objectively whether an agent followed the minimization rule, the Court also appears to have correctly decided that the agents did minimize their interception of irrelevant calls. Justice Brennan himself set forth some principles for minimization in his dissent to a denial of certiorari in *Bynum v. United States,*[120] and based on these principles, the interceptions in *Scott* were minimized. In *Bynum,* Justice Brennan had maintained that "agents must inevitably listen briefly to all calls in order to determine the parties to and the nature of the conversation."[121] Thus, under Justice Brennan's own standard in *Bynum,* the fact that the agents in *Scott* intercepted every call and that sixty percent of them were not related to narcotics is not important. Justice Brennan had stated, too, that "[n]ecessarily, calls of short duration," which he defined as calls lasting three minutes or less, "will generally have to be monitored *in toto.*"[122] The record demonstrated that many of the *Scott* calls were short, such as ninety second phone messages about the weather and wrong numbers. According to Justice Brennan's own standards in *Bynum,* these would generally have had to have been entirely monitored. In *Bynum,* Justice Brennan thought the agents should not have intercepted calls between a babysitter for the suspect's child and her boyfriend.[123] In *Scott,* there apparently was no call as obviously nonpertinent.

## Conclusion

The differences between *New York Telephone Co.* and *Scott* are obvious. *New York Telephone Co.* concerns the use of pen registers and primarily involves

[113] *Id.* at 154-55.
[114] *Id.* at 154.
[115] 98 S. Ct. at 1728 (Brennan, J., dissenting).
[116] Id. at 1729 (Brennan, J., dissenting).
[117] 409 F.2d 299 (8th Cir. 1969), *cert. denied,* 396 U.S. 859 (1969).
[118] *Id.* at 304.
[119] 516 F.2d at 755 n.9. Privileged calls are those between *e.g.,* a doctor and his patient, an attorney and his client, or a priest and a penitent.
[120] 423 U.S. 952 (1975) (Brennan, J., dissenting from denial of certiorari).
[121] *Id.* at 954 (Brennan, J., dissenting).
[122] *Id.*
[123] *Id.*

interpreting statutes other than Title III. It also deals with the propriety of forcing a third party who is not a participant in the investigation to help the government. *Scott* is solely an interpretation of the minimization requirement of Title III.

Yet, on a deeper level, the cases are very similar. First, both may be seen as part of a continuing trend to interpret the Omnibus Crime Control and Safe Streets Act liberally to allow the government to use the fruits of electronic surveillance. The dissents in both cases recognize and deplore this trend. As Justice Stevens in *New York Telephone Co.* stated:

> Today's decision appears to present no radical departure from this Court's prior holdings. It builds upon previous intimations that a federal district court's power to issue a search warrant under Fed. Rule Crim. Proc. 41 is a flexible one, not strictly restained by statutory authorization, and it applies the same flexible analysis to the All Writs Act, 28 U.S.C. § 1651(a).[124]

Similarly, *Scott,* according to Justice Brennan, marked the "third decision in which the Court has disregarded or diluted congressionally established safeguards designed to prevent Government electronic surveillance from becoming the abhorred general warrant which historically had destroyed the cherished expectation of privacy in the home."[125]

In deciding both of these cases, the Court favored a flexible interpretation of the relevant statutory provisions. In *New York Telephone Co.,* the Court held that "property" in Rule 41[126] was broad enough to cover electronic surveillance, and the phrase "the court may order all writs" in the All Writs Act[127] was broad enough to cover an order to the telephone company to help the government install pen registers. In *Scott,* the Court held that Title III's "shall be conducted in such a way as to minimize"[128] language meant that the searcher did not actually have to try to minimize as long as he did as much minimizing as a reasonable person in his situation would have.

Furthermore, in each case, the majority relied heavily on interpretations of the Congressional intent in enacting Title III. In *New York Telephone Co.,* the majority cited the legislative history of Title III to show that Congress wanted pen registers to be permissible. The justices also noted that it would be very unlikely for Congress to have authorized wiretapping without also allowing the use of the less-intrusive pen registers. The majority in *Scott* also relied on legislative history, here to demonstrate that Title III was not intended "generally to press the scope of the suppression role beyond present search and seizure law,"[129] which does not consider the government's motives in deciding whether to suppress evidence.

Through these liberal interpretations of the statutes, the Court in the two cases has increased the government's ability to use electronic surveillance devices. Yet, the dissenting opinions in each case seemed to state that these two cases are not in and of themselves of much significance. In *New York Telephone Co.* Justice Stevens said that telephone companies will probably not mind assisting in installing pen registers since they will be paid a normal profit by the government.[130] Similarly, Justice Brennan called the *Scott* decision merely an "incremental denigration of Title III's safeguards."[131] Still, the dissenting justices fear what these cases could mean in the future. Justice Stevens fears that after *New York Telephone Co.* courts may use Rule 41 and the All Writs Act to expand the power of the judiciary even further.[132] And, Justice Brennan warns that if the Court continues to interpret Title III as it did in *Scott,*[133] *Donovan,*[134] *Chavez,*[135] and *Kahn,*[136] then Title III may violate the fourth amendment standards announced in *Berger* and *Katz.*[137]

Both of these decisions demonstrate that there are several issues which the court is likely to face in the near future. First, the Court will undoubtedly have to clarify what procedures are necessary before the government can use pen registers.[138] Sec-

[124] 434 U.S. at 178 (Stevens, J., dissenting in part).
[125] 98 S. Ct. at 1726 (Brennan, J., dissenting).
[126] *See* note 4 *supra.*
[127] *See* note 5 *supra.*
[128] *See* note 1 *supra.*
[129] 98 S. Ct. at 1724 (quoting S. REP. No. 1097, 90th Cong., 2d Sess., 96 (April 29, 1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2185).
[130] 434 U.S. at 191 (Stevens, J., dissenting in part).
[131] 98 S. Ct. at 1728–29 (Brennan, J., dissenting).
[132] 434 U.S. at 191 (Stevens, J., dissenting in part).
[133] 98 S. Ct. 1717 (1978).
[134] 429 U.S. 413. *See* note 21 and accompanying text *supra.*
[135] 416 U.S. 562. *See* note 20 and accompanying text *supra.*
[136] 415 U.S. 143. *See* note 19 and accompanying text *supra.*
[137] 98 S. Ct. at 1728–29 (Brennan, J., dissenting).
[138] In *New York Telephone Co.*, the district court found there was probable cause to believe that the telephones were being used as part of an illegal gambling operation.

ond, the Court will probably have to determine how to treat other types of electronic surveillance devices, some of which have already been discussed by lower courts,[139] which are not explicitly covered by the Omnibus Crime Control and Safe Streets Act of 1968.

As to Title III itself, the Court will probably not interpret the statute in such a way that it will violate the standards set out in *Katz* and *Berger*. The statute, as interpreted, still requires antecedent judicial authorization specifying, among other things, the identity of the person whose conversations are to be intercepted, a description of the type of conversations that will be intercepted and a time limit on the length of the wiretap. The Court is unlikely to tamper in a major way with any of these safeguards.

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In its order, the district court said that the FBI could use pen registers until it learned who the people involved in the gambling operation were or for 20 days, "whichever is earlier." 434 U.S. at 162. However, in Martin v. DeSilvia, 556 F.2d 356, 361 n.4 (1st Cir. 1977), the Court of Appeals for the First Circuit interpreted *New York Telephone Co.* as holding that government officials did not need a judicial warrant before using pen registers in criminal investigations. Yet *New York Telephone Co.* said that district courts could authorize the use of pen registers because of FED. R. CRIM. P. 41 which relates to the issuance of a warrant. 434 U.S. at 168. In the future, the Court will probably clarify that the use of pen registers must meet fourth amendment standards.

[139] In Michigan Bell Telephone Co. v. United States, 565 F.2d 385 (6th Cir. 1977), the Sixth Circuit held that card drops, which trace phone calls, should be treated like pen registers. In United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976), the Ninth Circuit held that the attachment of electronic location devices to planes was not a "search." *Id.* at 520.