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## The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance

Michael Goldsmith

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# THE SUPREME COURT AND TITLE III: REWRITING THE LAW OF ELECTRONIC SURVEILLANCE

MICHAEL GOLDSMITH\*

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\* Assistant Professor of Law, Vanderbilt Law School. J.D., Cornell Law School, 1975; B.S., Cornell University, 1972. Permission of the author is required for reproduction.

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Finally, while it is somewhat unusual to dedicate articles of this kind, this one is for my wife, Constance Healey, who stuck with me through it all.

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*The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. . . . You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard and, except in darkness, every movement scrutinized.*

*George Orwell, 1984.\*\**

*It's hard to argue with . . . tapes—It's too bad we couldn't have tapes at every trial.  
Watergate Juror\*\*\**

## I. INTRODUCTION

The question of electronic surveillance has long posed a classic confrontation between privacy interests and the need for effective law enforcement. Thus, while it has been suggested that Title III of the Omnibus Crime Control and Safe Streets Act of 1968<sup>1</sup> was enacted "[t]o guard against the realization of Orwellian fears and conform to the constitutional standards for electronic surveillance,"<sup>2</sup> the statute can better be characterized as a conscious compromise forged by Congress between competing privacy and law enforcement concerns. The comprehensive provisions of Title III authorize the use of electronic surveillance—wire-taps and bugs<sup>3</sup>—as a law enforcement investigative technique, subject,

\*\* G. ORWELL, NINETEEN EIGHTY-FOUR 4 (1949). Congress considered and rejected the proposition that electronic surveillance would necessarily lead to "excessive invasions of privacy and a Big Brother Society." S. REP. NO. 1097, 90th Cong., 2d Sess. 66, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2112, 2238. See *infra* notes 214-15 and accompanying text.

\*\*\* Ithaca Journal, Jan. 2, 1975, at 2, col. 2, quoted in NAT'L COMM'N, ELECTRONIC SURVEILLANCE, REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 198 (1976) (concurring opinion of Commissioner Blakey). Consider also the following remarks attributed to a juror in the racketeering trial of Anthony Scotto, a Vice President of the International Longshoremen's Association, that "in the end it was the 'hard evidence'—especially the prosecution tape recordings—that persuaded the jury to find the waterfront labor leader guilty. . . ." N.Y. Times, Nov. 17, 1979, at 27, col. 5. The juror stated, "The tapes were crucial. . . . They had the hardest evidence and while we didn't make our decision based solely on the tapes, I'd say that, until we heard them again, quite a few people were undecided. In that sense, they were a turnaround." *Id.* col. 6. See *infra* note 1008. Similarly, Melvin Weinberg, the FBI's operative in the controversial Abscam investigation, has been quoted as saying, "we showed what was really going on. The tapes are the record. Nobody can change that." R. GREENE, THE STINGMAN 287 (1981).

<sup>1</sup> 18 U.S.C. §§ 2510-2520 (1976). Title III, the federal statute regulating the use of electronic surveillance does not cover so-called "consensual" electronic surveillance in which one party, usually a police officer or cooperating citizen, consents to the eavesdropping. 18 U.S.C. § 2511(c)-(d) (1976). See NAT'L COMM'N, ELECTRONIC SURVEILLANCE, REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 10-11, 115-17 [hereinafter cited as NWC Report]. See *infra* notes 286-91 and accompanying text.

<sup>2</sup> United States v. Marion, 535 F.2d 697, 698 (2d Cir. 1976).

<sup>3</sup> "Wiretapping" generally refers to the interception (and recording) of a communication



however, to compliance with a series of stringent statutory requirements and prior judicial approval.<sup>4</sup> As such, Title III was the culmination of a forty year debate concerning the utility and constitutionality of electronic surveillance. The Supreme Court had resolved the constitutional merits of this debate a year earlier with its decisions in *Berger v. New York*<sup>5</sup> and *Katz v. United States*.<sup>6</sup> Ironically, although both *Berger* and *Katz* suppressed the eavesdropping evidence under consideration, the two cases, taken together, provided for the first time a definitive blueprint for constitutionalizing the law of electronic surveillance.<sup>7</sup> It was this blueprint which served as the foundation for Title III.

Nevertheless, because of the conflict between law enforcement and privacy interests, the enactment of federal electronic surveillance legislation was not without controversy.<sup>8</sup> Because of this controversy, and because of virtually unanimous concern with the potential abuses posed by electronic surveillance, the statute was drafted so that its requirements and protections exceeded constitutional requisites.<sup>9</sup> By imposing these measures, Congress hoped to realize the enormous potential of eavesdropping as a mode of organized crime control while simultaneously minimizing improper usage to invade privacy rights.<sup>10</sup> These safeguards, together with the expectation that compliance would be monitored closely by the courts,<sup>11</sup> served to alleviate the fear of many that Title III was synonymous with the arrival of Big Brother. Although the statute was still criticized by some as unconstitutional,<sup>12</sup> it received immediate and widespread judicial approval.<sup>13</sup>

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transmitted over a wire from a telephone, *without* the consent of any of the participants. *Bugging* generally refers to the interception (and recording) of a communication transmitted orally *without* the consent of any of the participants." NWC REPORT, *supra* note 1, at xiii n.\* (emphasis in original). These terms are also defined in the federal electronic surveillance statute. 18 U.S.C. § 2510(1)-(2) (1976).

<sup>4</sup> 18 U.S.C. §§ 2511-2519 (1976).

<sup>5</sup> 388 U.S. 41 (1967).

<sup>6</sup> 389 U.S. 347 (1967).

<sup>7</sup> See *Berger v. New York*, 388 U.S. 41, 116 (1967) (White, J., dissenting); see also *infra* notes 109-78 & 220-25 and accompanying text.

<sup>8</sup> See *infra* notes 179-215 and accompanying text.

<sup>9</sup> See *infra* notes 219-71 and accompanying text.

<sup>10</sup> See *infra* notes 184-219 and accompanying text.

<sup>11</sup> See *infra* notes 267-71 and accompanying text.

<sup>12</sup> See *infra* notes 272-78 and accompanying text.

<sup>13</sup> Nine circuits have held that Title III is constitutional under the fourth amendment: *United States v. Sklaroff*, 506 F.2d 837, 840 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975); *United States v. Ramsey*, 503 F.2d 524, 526-31 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); *United States v. Martinez*, 498 F.2d 464, 467-68 (6th Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States v. James*, 494 F.2d 1007, 1012-13 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Tortorello*, 480 F.2d 764, 771-75 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); *United States v. Bobo*, 477 F.2d 974, 978-81 (4th Cir. 1973), *cert. denied*, 421 U.S. 909 (1975); *United States v. Cafero*, 473 F.2d 489, 493-501 (3d Cir. 1973), *cert. denied*, 417 U.S. 918

Since that time, electronic surveillance as a law enforcement technique has substantially devolved from constitutional controversy to conventional wisdom. Title III has served as the basis for legislation in most of the twenty-eight states that presently permit court authorized electronic surveillance.<sup>14</sup> In contrast to the four decades preceding Title III, electronic surveillance, as a broad proposition, engendered almost no debate in the 1970's insofar as criminal law enforcement was concerned. For example, legal commentaries concerning the subject tended to address the merits of isolated statutory issues rather than the constitutionality of the premise that electronic surveillance is a permissible investigative device.<sup>15</sup> Similarly, when the body established by Title III to evaluate the statute's effectiveness, the National Wiretapping Commission, issued its comprehensive 1976 report, few paid any attention.<sup>16</sup>

Society's acquiescence in the use of electronic surveillance is difficult to explain. It may reflect an overall satisfaction with the utilitarian compromise between crime control and privacy rights that Title III

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(1974); *United States v. Cox*, 462 F.2d 1293, 1302-04 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974); *United States v. Cox*, 449 F.2d 679, 683-87 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

<sup>14</sup> ARIZ. REV. STAT. ANN. §§ 13-3004 to -3014 (1978 & Supp. 1981); COLO. REV. STAT. §§ 16-15-101 to -104 (1973); CONN. GEN. STAT. ANN. §§ 54-41a to -41s (West Supp. 1982); DEL. CODE ANN. tit. 11, § 1336 (1979); D.C. CODE ANN. §§ 23-541 to -556 (1981); FLA. STAT. ANN. §§ 934.01-.10 (West 1973 & Supp. 1983); GA. CODE ANN. §§ 26-3001 to -3010 (1977); HAWAII REV. STAT. §§ 803-41 to -50 (Supp. 1981); IDAHO CODE §§ 18-6701 to -6709 (Supp. 1982); KAN. STAT. ANN. §§ 22-2514 to -2519 (1981); LA. REV. STAT. ANN. §§ 15:1301 to 1312 (West 1981); MD. CTS. & JUD. PROC. CODE ANN. §§ 10-401 to -412 (1980); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1970); MINN. STAT. ANN. §§ 626A.01-.23 (West Supp. 1982); NEB. REV. STAT. §§ 86-701 to -712 (1976 & Supp. 1981); NEV. REV. STAT. §§ 179.410-.515 (1982); N.H. REV. STAT. ANN. §§ 570-A:1 to -A:11 (1974 & Supp. 1981); N.J. STAT. ANN. §§ 2A:156A-1 to -26 (West 1971 & Supp. 1982); N.M. STAT. ANN. §§ 30-12-1 to -11 (1978); N.Y. CRIM. PROC. LAW §§ 700.05-.70 (McKinney 1971 & Supp. 1982); OR. REV. STAT. §§ 133.721-.739 (1981); 18 PA. CONS. STAT. ANN. §§ 5701-5726 (Purdon Supp. 1982); R.I. GEN. LAWS §§ 12-5.1-1 to -16 (1981); S.D. CODIFIED LAWS ANN. §§ 23A-35A-1 to -21 (Supp. 1982); TEX. CRIM. PROC. CODE ANN. § 18.20 (Vernon Supp. 1982); UTAH CODE ANN. §§ 77-23a-1 to -11 (Supp. 1981); VA. CODE § 19.2-61 to -70 (1975 & Supp. 1982); WIS. STAT. ANN. §§ 968.27-.33 (West 1971 & Supp. 1982); WIS. STAT. ANN. § 885.365 (West 1971) (suppression provision).

<sup>15</sup> Compare King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 GEO. WASH. L. REV. 240 (1964) [hereinafter cited as *Electronic Surveillance and Constitutional Rights*]; and King, *Wiretapping and Electronic Surveillance: A Neglected Constitutional Consideration*, 66 DICK. L. REV. 17 (1961) [hereinafter cited as *Wiretapping and Electronic Surveillance*]; and Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969); and Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969); with Cranwell, *Judicial Fine-tuning of Electronic Surveillance*, 6 SETON HALL 225 (1975); and Decker & Handler, *Electronic Surveillance: Standards, Restrictions, and Remedies*, 12 CAL. W.L. REV. 60 (1975); and Pulaski, *Authorizing Wiretap Applications Under Title III: Another Dissent to Giordano and Chavez*, 123 U. PA. L. REV. 750 (1975).

<sup>16</sup> See N.Y. Times, Apr. 30, 1976, § 1, at 20.

sought to achieve, but it also might be attributable to fatigue after years of debate. Quite possibly, it may stem from law enforcement's relative reluctance to use eavesdropping devices, as—a few spectacular cases notwithstanding—electronic surveillance has been remarkably *underutilized*, and certainly has not achieved the ambitious goals its proponents had in mind.<sup>17</sup>

Ironically, paralleling the recent acceptance of electronic surveillance, the statute itself has quietly undergone a judicial reformation that has altered both its original legislative design and underlying constitutional framework. Thus, although it has been suggested that the "[c]ourts have rejected requests to rewrite Title III by making flexible interpretations which would have excused law enforcement errors, rather than demanding strict compliance with Title III's specific provisions,"<sup>18</sup> precisely this development has occurred. Since 1969, the Supreme Court has issued a series of decisions involving Title III which, taken together, reflect a trend that is certainly indicative of an unanticipated approach to Title III statutory interpretation. In addition, these decisions have raised the spectre that a comprehensive legislative package, which the courts have found to be facially valid, may be unconstitutional as applied.<sup>19</sup>

The Supreme Court has not addressed Title III since 1979. It is now time to give renewed attention to this area. Hence, the purpose of this Article is to analyze the Court's Title III decisions and evaluate their impact upon the jurisprudence of court authorized electronic surveillance. Moreover, rather than limiting its scope to a purely legal analysis of these issues, the Article will also examine whether the statute has been implemented by law enforcement officials in a manner consistent with congressional intentions. The Article consists of six major sections. Section II will review the controversial constitutional and statutory origins of Title III. As such, Section II will serve as a predicate for Section III, an analysis of Title III's legislative design. Section IV will examine the Supreme Court's implementation of constitutional doctrine and legislative design in a series of major Title III cases. The impact of these decisions will often be apparent from the discussion of each case, but Section V will further explore their aftereffects throughout the judiciary. Section VI will briefly address the legislative response to these decisions. Finally, within this context, Section VII will comment upon

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<sup>17</sup> See *infra* notes 940-1017 and accompanying text.

<sup>18</sup> J. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* 50 (1977).

<sup>19</sup> See *Scott v. United States*, 436 U.S. 128, 147-48 (1978) (Brennan, J., dissenting); see also *infra* note 667. But see Cranwell, *supra* note 15, at 267 (maintaining that courts have meticulously enforced the statute).

the extent to which present methods of executive enforcement have impacted upon privacy and organized crime.

## II. HISTORICAL ORIGINS OF TITLE III

### A. THE ORIGINAL CONSTITUTIONAL FRAMEWORK: *OLMSTEAD* AND ITS EARLY PROGENY

Electronic surveillance is hardly novel to modern law enforcement. In fact, with the onset of relatively sophisticated communications systems during the mid-1800's, electronic surveillance was used successfully as an intelligence technique in the Civil War, as well as for other, more mundane, industrial and political espionage of the nineteenth century.<sup>20</sup> While some states placed restrictions on electronic eavesdropping, the question of its constitutionality as a law enforcement tool was not considered by the Supreme Court until the 1928 landmark decision of *Olmstead v. United States*.<sup>21</sup>

The *Olmstead* case involved a bootlegging conspiracy which was considered to be of "amazing magnitude."<sup>22</sup> Since electronic eavesdropping traditionally has been considered a critical investigative technique against organized crime, it was by no means ironic that *Olmstead* served as the Supreme Court's initial vehicle for developing the constitutional doctrine of electronic surveillance.<sup>23</sup> Indeed, this factor may have provided some subtle motivation for the narrow mode of analysis that Chief Justice Taft adopted in rejecting the fourth amendment argument advanced by the *Olmstead* defendants.

Specifically, the defense maintained that the government's use of evidence, obtained during a five month warrantless wiretapping operation involving eight telephones, constituted an unreasonable search and seizure within the meaning of the fourth amendment.<sup>24</sup> As electronic surveillance obviously involves an intangible seizure of a kind unknown when the fourth amendment was written, *Olmstead* posed the Court with a model constitutional problem: are modern issues of constitutional significance to be decided solely by reference to the literal words of the Constitution, as those words were understood by the Founding Fathers?<sup>25</sup> When Chief Justice Taft resolved this question affirmatively,

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<sup>20</sup> See *Berger v. New York*, 388 U.S. 41, 45-46 (1967); NWC REPORT, *supra* note 1, at 33-34.

<sup>21</sup> 277 U.S. 438 (1928).

<sup>22</sup> *Id.* at 455.

<sup>23</sup> See *infra* notes 192-206 and accompanying text.

<sup>24</sup> 277 U.S. at 456-57.

<sup>25</sup> In his classic work on the fourth amendment, Professor Taylor articulated this issue as follows:

Does the Constitution speak as of yesterday, today, or tomorrow? By what temporal

rejection of the defendants' fourth amendment claim ineluctably followed.<sup>26</sup> Reasoning that the historical purpose of the fourth amendment was to protect against trespassory general searches for tangible items, Chief Justice Taft concluded that the amendment simply was inapplicable to this case as neither a technical trespass nor the seizure of tangible items was involved.<sup>27</sup>

Justice Holmes dissented, excoriating the government for obtaining its evidence by blatantly violating applicable state legislation prohibiting wiretapping,<sup>28</sup> but it was Justice Brandeis' historic dissent which provided the direct counterpoint to the majority's analysis. Justice Brandeis recognized that wiretapping potentially involves a far greater intrusion than ordinary searches, and that the Chief Justice's trespass-tangibles analysis offered no protection against wiretapping or other kinds of sophisticated searches that might be subsequently invented.<sup>29</sup> Accordingly, quoting former Chief Justice John Marshall, Justice Brandeis sought to remind the Court "that it is a constitution we are expounding," and, as such, it must be adaptable to modern problems if it is to retain its value.<sup>30</sup> The fourth amendment was to be interpreted in

standards are its words to be measured? Does the Constitution mean what it was meant to mean, or what it has come to mean, or what it ought to mean? Are these alternatives mutually exclusive, or may they be used in combination or according to circumstances? These are among the questions which closely hedge the path to constitutional decision.

T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 5-6 (1969).

<sup>26</sup> 277 U.S. at 463-66.

<sup>27</sup> *Id.* The Court also rejected petitioner's fifth amendment argument since there had been "no evidence of compulsion to induce the defendants to talk over their many telephones." *Id.* at 462.

<sup>28</sup> Justice Holmes made the following argument regarding electronic surveillance:

It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part *I think it a less evil that some criminals should escape than that the Government should play an ignoble part.*

*Id.* at 470 (Holmes, J., dissenting) (emphasis added).

<sup>29</sup> Specifically, Justice Brandeis raised the following concerns:

Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions . . . Can it be that the Constitution affords no protection against such invasions of individual security?

*Id.* at 474 (Brandeis, J., dissenting).

<sup>30</sup> *Id.* at 472 (Brandeis, J., dissenting). Justice Brandeis argued that, historically, the Court always had interpreted the Constitution flexibly to accommodate changing conditions: Since . . . [1819], this Court has repeatedly sustained the exercise of power by Congress,

light of its underlying principles. Significantly, for Justice Brandeis, the primary underlying principle was "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>31</sup> Hence, any unwarranted intrusion upon this right of privacy was to be "deemed a violation of the Fourth Amendment."<sup>32</sup>

Despite its modern appeal, Justice Brandeis' argument succumbed to a five to four majority. Fourteen years later, similar pleas by Justice Murphy were rejected in *Goldman v. United States*,<sup>33</sup> a case in which federal agents had eavesdropped by placing a detectaphone against an office partition wall.<sup>34</sup> Justice Murphy did not suggest that such electronic surveillance was unconstitutional per se; rather, he argued that, as modern citizens are subject to a "greatly expanded . . . range and character" of potential government intrusions, a realistic view of the fourth amendment's "historic purpose" and of its "modern social and legal implications" demands that there be compliance with its warrant clause requirements.<sup>35</sup> This willingness to concede that a warrant could be drafted that would be capable of effectively regulating electronic surveillance techniques may have represented a partial retreat from Brandeis' dissent in *Olmstead*.<sup>36</sup> The majority was unmoved, however. In a five to three decision, the use of electronic surveillance was approved because evidence obtained by detectaphone did not involve a technical trespass.<sup>37</sup>

The inherent anomaly in a constitutional doctrine that offers sub-

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under various clauses of . . . [the Constitution], over objects of which the Fathers could not have dreamed. We have likewise held that general limitations on the powers of Government, like those embodied in the due process clause of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this Court said in *Weems v. United States*: "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."

*Id.* at 472-73 (Brandeis, J., dissenting) (citations omitted).

<sup>31</sup> *Id.* at 478 (Brandeis, J., dissenting).

<sup>32</sup> *Id.* Note, however, that it is by no means certain that Justices Holmes and Brandeis were opposed to electronic surveillance per se. Had state law not been violated and a warrant obtained, they may have been inclined to sustain such searches. Compare NWC REPORT *supra* note 1, at 203 n.99 (concurring opinion of Commissioner Blakey), with Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 897 n.38 (1960).

<sup>33</sup> 316 U.S. 129 (1942).

<sup>34</sup> *Id.* at 134-35.

<sup>35</sup> *Id.* at 138 (Murphy, J., dissenting). Justices Stone and Frankfurter, citing the *Olmstead* dissents, also argued that the trespass doctrine should be overruled. *Id.* at 136.

<sup>36</sup> But see *supra* note 32.

<sup>37</sup> 316 U.S. at 134-35.

stantial protection to tangible items but does nothing to secure the privacy of thoughts disclosed in confidence<sup>38</sup> has fueled sharp criticism of the *Olmstead* doctrine.<sup>39</sup> Professor Carr's treatise on electronic surveillance expresses the basis for this criticism most succinctly:

As long as the trespass doctrine remained the decisional benchmark, consideration of basic privacy interests was disregarded. Under this doctrine, the privacy of the spoken word depended solely upon the officer's selection of the right equipment and location for overhearing the conversation. The only virtue of the trespass rule was its predictability: unlike most search and seizure decisions, these cases established a line which was as clear constitutionally as it was physically.<sup>40</sup>

Even predictability, however, was not always a simple matter. In *On Lee v. United States*,<sup>41</sup> in which an informant wired for sound had transmitted his conversation with On Lee to a federal officer located beyond defendant's premises, the Court was faced with the neoteric argument that the informant's unauthorized transmission constituted a "trespass *ab initio*,"<sup>42</sup> thereby vitiating the original consent for his initial entry. Ironically, the Court responded that "it is doubtful that the niceties of tort law initiated almost two and a half centuries ago . . . are of much aid in determining rights under the Fourth Amendment,"<sup>43</sup> and then proceeded to affirm petitioner's conviction because there had been no trespass.<sup>44</sup> Although dissents called for a more modern and realistic fourth amendment analysis,<sup>45</sup> *Olmstead* was to withstand these demands for more than another decade. Meanwhile, defendants sought partial refuge in the unanticipated protection offered by the Federal Communications Act of 1934.<sup>46</sup>

#### B. THE FEDERAL COMMUNICATIONS ACT OF 1934: STATUTORY PRECURSOR TO TITLE III

Chief Justice Taft's opinion in *Olmstead* suggested that an alternative was available to those who were dissatisfied with the Court's literalistic handling of the fourth amendment: "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct leg-

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<sup>38</sup> See *id.* at 141 (Murphy, J., dissenting).

<sup>39</sup> See, e.g., Hufstедler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1495 (1979); Westin, *The Wiretapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 173 (1952).

<sup>40</sup> J. CARR, *supra* note 18, at 13-14.

<sup>41</sup> 343 U.S. 747 (1952).

<sup>42</sup> *Id.* at 752.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 752-53.

<sup>45</sup> Justices Douglas, Burton, and Frankfurter dissented on this basis. 343 U.S. at 758-67.

<sup>46</sup> 47 U.S.C. § 605 (1946), amended by 47 U.S.C. § 605 (1976).

isolation . . . ."<sup>47</sup> Indeed, that is exactly what many lawmakers attempted by introducing an array of proposed bills that would have legislatively overruled *Olmstead*.<sup>48</sup> Significantly, however, no comprehensive measure was passed.

The legal community thus never anticipated the Supreme Court's decision in *Nardone v. United States (Nardone I)*,<sup>49</sup> which held that section 605 of the Federal Communications Act of 1934 precluded the admissibility of wiretap evidence. Although the Act had basically been passed for the limited purpose of defining the jurisdictional scope of the newly established Federal Communications Commission,<sup>50</sup> the Court concluded that the express language of section 605, providing, in relevant part, that "no person not being authorized by the sender shall intercept any communication and divulge [its] . . . contents . . . ,"<sup>51</sup> directly ap-

<sup>47</sup> 277 U.S. at 465-66.

<sup>48</sup> S. 1396, 72d Cong., 1st Sess. (1932); H.R. 9893, 72d Cong., 1st Sess. (1932); H.R. 5305, 72d Cong., 1st Sess. (1932); H.R. 23, 72d Cong., 1st Sess. (1932); S. 6061, 71st Cong., 3d Sess. (1931); H.R. 5416, 71st Cong., 1st Sess. (1929); H.R. 4139, 71st Cong., 1st Sess. (1929). See Gasque, *Wiretapping: A History of Federal Legislation and Supreme Court Decisions*, 15 S.C.L. REV. 593, 595 (1963). Note, however, that an appropriations bill was passed which provided that none of its funds could be used to effect wiretapping for National Prohibition Act prosecutions. Rosenzweig, *The Law of Wiretapping*, 32 CORNELL L.Q. 514, 534 n.134 (1947).

<sup>49</sup> 302 U.S. 379 (1937).

<sup>50</sup> See, e.g., Bradley & Hogan, *Wiretapping: From Nardone to Benanti and Rathbun*, 46 GEO. L.J. 418, 421-22 (1958); Gasque, *supra* note 48, at 598. The legislative history to § 605 nowhere suggests that Congress was addressing the wiretapping problem. See S. REP. NO. 781, 73d Cong., 2d Sess. 11 (1934).

<sup>51</sup> At the time of the enactment, the full text of § 605 provided as follows:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and 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; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communications by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

47 U.S.C. § 605 (1946) (emphasis added). After the passage of Title III, the language relied upon in *Nardone I* was modified by amendment. 47 U.S.C. § 605 (1976).



plied to prohibit wiretapping.<sup>52</sup> In dissent, Justice Sutherland argued that the statute's use of the word "person" obviously did not include law enforcement officers.<sup>53</sup> The Court, having previously embraced literalism in *Olmstead* to prevent a conceptual expansion of the fourth amendment, now relied upon literalism to effect a dynamic enlargement of a narrow legislative provision. Moreover, in a second *Nardone* appeal (*Nardone II*),<sup>54</sup> when the Government sought to circumvent the impact of *Nardone I* by introducing derivative wiretap evidence, the Court explicitly transformed the significance of its earlier pronouncement:

That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because "inconsistent with ethical standards and destructive of personal liberty.[sic]"<sup>55</sup>

*Nardone II* then held that, for the statutory preclusion to be effective, derivative wiretap evidence must be subject to suppression as "a fruit of the poisonous tree."<sup>56</sup>

Like *Olmstead*, both *Nardone* cases were widely criticized.<sup>57</sup> Primary concentration, however, was placed on *Nardone I*, since the derivative fruits analysis of *Nardone II* was seemingly a logical consequence of its predecessor. Since there was neither any reference to wiretapping in the statute nor any support for the decision in the law's legislative history, *Nardone I* was broadly perceived as "judicial legislation" by a reconstituted Supreme Court.<sup>58</sup> Nevertheless, congressional efforts to nullify its impact failed.<sup>59</sup>

By indirectly resurrecting the fourth amendment via the literal language of the Federal Communications Act, the Supreme Court unconsciously provided wiretap victims with potentially more protections than were available under the Constitution. For example, section 605 appeared to provide a broader suppression sanction than did the constitutional exclusionary rule; it was available in all state and federal court proceedings and applied even if a private party had done the wiretapping.<sup>60</sup> Nor was section 605 seemingly restricted by the standing rule

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<sup>52</sup> 302 U.S. at 381-82.

<sup>53</sup> *Id.* at 385 (Sutherland, J., dissenting).

<sup>54</sup> *Nardone v. United States*, 308 U.S. 338 (1939).

<sup>55</sup> *Id.* at 340 (quoting *Nardone v. United States*, 302 U.S. at 383).

<sup>56</sup> *Id.* at 341. Given the initial illegality, the case was then remanded for a determination of whether, in fact, the pertinent evidence had been derived from an unlawful wiretap or was sufficiently attenuated as to have been cleansed of the taint. *Id.* at 341-43.

<sup>57</sup> See, e.g., NWC REPORT, *supra* note 1, at 35; Westin, *supra* note 39, at 175.

<sup>58</sup> See, e.g., Westin, *supra* note 39, at 175.

<sup>59</sup> Gasque, *supra* note 48, at 599-600; Westin, *supra* note 39, at 175 n.54.

<sup>60</sup> Kamisar, *supra* note 32, at 907-09, 921-25. The exclusionary rule is inapplicable to

that limited application of the constitutional exclusionary remedy to actual victims of fourth amendment violations;<sup>61</sup> under the Act's terms, anyone could object to the introduction of evidence that stemmed from wiretapping.

Not all of this potential was realized, however, for in a series of restrictive decisions the Supreme Court soon took away much of what it had given.<sup>62</sup> Possibly realizing the irony of its misadventure, the Court imposed a fourth amendment standing limitation upon the statute,<sup>63</sup> declared the law inapplicable to state court proceedings,<sup>64</sup> and narrowed the scope of the critical term "intercept."<sup>65</sup> Nevertheless, while limiting the impact of *Nardone*, these changes did little to provide the law of electronic surveillance with a sense of doctrinal consistency. For civil libertarians, however, even the confusion of section 605's wiretapping protection was preferable to no protection at all. Meanwhile, federal law still offered no sanctuary against the potentially greater intrusions posed by a nontrespassory bug. It was within this context that the Supreme Court slowly began to reconsider the *Olmstead* doctrine.

## C. THE REVISED CONSTITUTIONAL FRAMEWORK

### 1. Preliminary Modifications

In 1954, two years after *On Lee*, the Supreme Court in *Irvine v. California*<sup>66</sup> gave the first intimation, albeit a subtle one, that electronic surveillance would eventually be considered from a new perspective. In *Irvine*, the Court declared for the first time that evidence obtained by means of a surreptitious bug violated the fourth amendment.<sup>67</sup> Since

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evidence obtained as a result of a private illegal search. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). See, e.g., W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.6 (1978). Prior to the 1960's, the remedy was deemed inapplicable to state litigation, *Mapp v. Ohio*, 367 U.S. 643, 650-53 (1961), or to cases in which evidence seized by state officers was being introduced in federal court, *Elkins v. United States*, 364 U.S. 206, 208-14 (1960).

<sup>61</sup> *Kamisar*, *supra* note 32, at 924-25. Federal courts historically have denied standing to utilize the suppression sanction to persons not victimized by alleged constitutional violations. See e.g., *Goldstein v. United States*, 316 U.S. 114, 121 (1942). For a discussion of basic standing principles, see *infra* notes 346-55 and accompanying text.

<sup>62</sup> *Kamisar*, *supra* note 32, at 908-09; see *Westin*, *supra* note 39, at 179-80.

<sup>63</sup> *Goldstein v. United States*, 316 U.S. 114, 121 (1942).

<sup>64</sup> *Schwartz v. Texas*, 344 U.S. 199, 201-04 (1952). Immediately prior to the passage of Title III, *Schwartz* was overruled in *Lee v. Florida*, 392 U.S. 378, 383-87 (1968).

<sup>65</sup> *Goldman v. United States*, 316 U.S. at 133-34 (eavesdropping from an adjacent room to one party's end of telephone conversation does not constitute interception).

<sup>66</sup> 347 U.S. 128 (1954).

<sup>67</sup> *Id.* at 132-33. *Irvine* did not suppress the tainted evidence because the exclusionary rule was not then binding upon the states. *Id.* at 132-38. The scope of the exclusionary principle was subsequently expanded in *Mapp v. Ohio*, 367 U.S. 643, 650-53 (1961).

the police had blatantly violated the *Olmstead* doctrine by trespassing both when they installed the bug and later when they repositioned it, the Court's conclusion was hardly surprising. Nevertheless, *Irvine* was significant both because of the tone of Justice Jackson's majority opinion condemning the police and because of his explicit acknowledgment that electronic eavesdropping devices had become "frightening instruments of surveillance and invasion of privacy."<sup>68</sup> Moreover, implicit to *Irvine* was the recognition that intangible conversations were both subject to seizure and deserving of fourth amendment protection.<sup>69</sup>

Similar values were expressed eight years later in *Silverman v. United States*,<sup>70</sup> when the Court ruled unconstitutional a surveillance practice that involved inserting a "so-called 'spike-mike'" into a partition wall adjacent to the target premises.<sup>71</sup> Justice Stewart's majority opinion emphasized the Court's concern with the danger posed by burgeoning scientific advances,<sup>72</sup> and implied that safeguarding intangible conversations was a legitimate fourth amendment exercise.<sup>73</sup> Although, narrowly read, *Silverman* was decided on the basis of an actual physical intrusion having occurred, Justice Stewart clearly transcended *Olmstead* by declining "to consider whether . . . there [had been] a technical trespass under . . . local property law";<sup>74</sup> fourth amendment liberties were no longer to be evaluated "in terms of ancient niceties of tort or real property law."<sup>75</sup> Instead, they were to be measured by their "very core," which, to Justice Stewart, meant "the right of a man to retreat into his own home and there be free from unreasonable governmental

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<sup>68</sup> 347 U.S. at 132 (emphasis added). Specifically, Justice Jackson rebuked law enforcement in the following terms:

Each of these repeated entries of petitioner's home without a search warrant or other process was a trespass, and probably a burglary, for which any unofficial person should be, and probably would be, severely punished. Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busybody. That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the . . . Fourth Amendment.

*Id.*

<sup>69</sup> Dash, *Katz—Variations on a Theme by Berger*, 17 CATH. U.L. REV. 296, 307 (1968). See also *Lopez v. United States*, 373 U.S. 427, 460-61 (1963) (Brennan, J., dissenting); T. TAYLOR, *supra* note 25, at 73; Semerjian, *Proposals on Wiretapping in Light of Recent Senate Hearings*, 45 B.U.L. REV. 216, 224 n.51 (1965).

<sup>70</sup> 365 U.S. 505 (1961).

<sup>71</sup> *Id.* at 506, 511-12.

<sup>72</sup> *Id.* at 508-09. For a discussion of electronic surveillance technology during more primitive times, see Westin, *supra* note 39, at 197-98.

<sup>73</sup> 365 U.S. at 511. *Silverman* was later interpreted to have extended fourth amendment protection to intangibles. *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963).

<sup>74</sup> 365 U.S. at 511.

<sup>75</sup> *Id.*; see also *supra* text accompanying note 43.

intrusion.”<sup>76</sup>

While Justice Stewart’s words were clearly indicative of a new direction, perhaps the most significant development towards *Olmstead*’s demise was *Lopez v. United States*.<sup>77</sup> Curiously, the majority opinion in *Lopez* did not appear to signify any unusual breakthrough. Citing *On Lee*, Justice Harlan rejected an argument that an IRS agent’s feigned acquiescence in a bribery scheme precluded his testimony concerning an incriminating conversation made in the defendant’s office.<sup>78</sup> In effect, by engaging in the conversation, Lopez had assumed the risk of its disclosure by the agent.<sup>79</sup> Once this testimony was deemed admissible, logic arguably compelled that a tape recording of the conversation was likewise admissible; after all, the Constitution conferred no “right to rely on possible flaws in the agent’s memory, or to challenge the agent’s credibility without being beset by corroborating evidence that is not susceptible of impeachment.”<sup>80</sup>

*Lopez*’ far reaching implications concerning nonconsensual electronic surveillance, however, evolved from Justice Brennan’s dissent. Joined by Justices Goldberg and Douglas, the Brennan opinion expressed both an awareness of prior electronic surveillance misconduct and a profound sensitivity to the potential for further technological abuse posed by sophisticated microphone devices.<sup>81</sup> Justice Brennan re-

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<sup>76</sup> *Id.* *Silverman* suggested that the Court’s focus should be on whether the government had impermissibly intruded upon a constitutionally protected area, *id.* at 512, rather than on trespass considerations. See *Clinton v. Virginia*, 377 U.S. 158 (1964) (citing *Silverman*, per curiam reversal even though listening device had only been attached to wall with a thumb-tack); *Lanza v. New York*, 370 U.S. 139, 142-45 (1962) (focusing on whether jail is a constitutionally protected area rather than deciding case on basis of no trespass). In *Katz v. United States*, 388 U.S. 347, 351 (1967), the Court repudiated the “constitutionally protected area” test; nevertheless, when originally implied by *Silverman*, this standard was a vast improvement over *Olmstead*.

<sup>77</sup> 373 U.S. 427 (1963).

<sup>78</sup> *Id.* at 437-38.

<sup>79</sup> *Id.* at 439.

<sup>80</sup> *Id.*

<sup>81</sup> In this respect, Justice Brennan made the following observations:

Not only has the problem grown enormously in recent years . . . but its true dimensions have only recently become apparent from empirical studies not available when *Olmstead*, *Goldman*, and *On Lee* were decided. The comprehensive study by Samuel Dash and his associates as well as a number of legislative inquiries reveals these truly terrifying facts: (1) Electronic eavesdropping by means of concealed microphones and recording devices of various kinds has become as large a problem as wiretapping, and is pervasively employed by private detectives, police, labor spies, employers and others for a variety of purposes, some downright disreputable. (2) These devices go far beyond simply “bugging” and permit a degree of invasion of privacy that can only be described as frightening. (3) Far from providing unimpeachable evidence, the devices lend themselves to diabolical fakery.

*Id.* at 466-68 (citations omitted). The following observations, made by Samuel Dash, were stressed by Justice Brennan:

Dash suggests that a parabolic microphone (which concentrates sound much as a curved

garded the absence of meaningful protection against bugging devices an

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mirror focuses light) might pick up a conversation at a distance of 100 feet . . . Such a microphone can be made virtually impossible to detect, . . . but even the ordinary concealed microphone in the home may be impossible to detect, at least without a mine detector. . . . Such a device, if it exists, is not readily obtainable; but the parabolic microphone and a variety of other such devices are. Thus a current advertisement in a national magazine for "The Snooper" describes this device as follows: "This is literally an electronic marvel that's a direct result of the space age. Incredible as it may seem, it does amplify sound 1,000,000 times. Sensitive 18" disk reflector will pick up normal conversations at a distance (500 ft.) where you can't even see lips moving. Just think of the ways you can use this. Portable; complete with tripod and stethoscopic earphones. The best part—a regular tape recorder can be plugged into the back to take everything down. Have fun." The advertised price is \$18.85.

*Id.* at 468 n.16. See S. DASH, R. SCHWARTZ, & R. KNOWLTON, *THE EAVESDROPPERS* 305-79 (1959) [hereinafter cited as *THE EAVESDROPPERS*].

The accuracy of these claims, however, is not undisputed. STANDARDS RELATING TO ELECTRONIC SURVEILLANCE, general commentary 85 (Approved Draft 1968) [hereinafter cited as *ABA STANDARDS*]. The American Bar Association's standards on electronic surveillance, for example, suggested that eavesdropping does not lend itself to alteration of tapes. *Id.* at 45. Moreover, the ABA report noted that practical and scientific limitations tend to diminish the potential for abuse:

Less widespread publicity has been given, however, to the physical limitations in the existing devices or to the inherent investigative limitations on the use of these techniques. Telephone cable pairs must be located to wiretap. A plant must be established to listen or to record near the tap, or lines must be run to another location or another means of transmission set up, often a considerable distance away. Bugs must be installed or set up. It is often difficult, if not impossible, to install them where a surreptitious entry is required. Long range interception devices are often too large or too bulky to employ discreetly or quickly. Often one or more additional entries or at least a period of time is required to adjust installed equipment. Power sources must be found. Static and room noise interfere with reception often making use unproductive. Wireless transmission can be intercepted and the device discovered. It may, in addition, be electronically jammed. Wired equipment can be visually discovered. More often than not, the device, for one reason or another, sometimes technical and sometimes human, will not work. All of this is not to say that these devices cannot be profitably employed. If the past is any guide to the future, many of these physical limitations, moreover, will be overcome with "patience and ingenuity." It is to say, however, that the present situation, journalistic sensationalism to the contrary notwithstanding, cannot be fairly compared to anything out of George Orwell's *1984*.

While further technological and scientific development will probably overcome most of the existing physical limitations on the techniques themselves, the inherent investigative limitations on them stand on a different footing. Contrary to popular misconception, they are not a "lazy" way to conduct an investigation. Monitoring surveillance equipment in certain situations requires an inordinate amount of time, hours and hours spent without a word overheard, simply because no one is present and speaking. While automatic recording equipment is available, key devices still require human monitor. Seldom is it possible for him to be alone. Others have to be available to act immediately on intercepted information. It may be necessary, for example, to place in motion a physical tail or to place a key meeting under physical surveillance, the location of which has just become known. This may require the constant attention of several men and cars to be tied up. All of this takes precious manpower, yet most of the time of the men is spent waiting. Only an important investigation can warrant the use of police personnel, equipment and other resources in this fashion. Idle curiosity, of course, never will warrant such use. Analysis of the product, too, is painstaking. Voices and overheard names must be identified, and this demands time and talent. Meaning sometimes must be derived from the partial interception of a series of conversations when only one or two take place within the range of the device. Usually, the level of pre-surveillance information is such that the expected information, when it is intercepted, is intelligible, but this, in itself, normally means that extensive investigations must proceed [sic] the use of these tech-

"intolerable anomaly" in view of the relative safeguards available against the less serious intrusions posed by conventional searches.<sup>82</sup> Moreover, he maintained that the doctrinal underpinnings of *Olmstead* and *On Lee* had been swept away by *Irvine* and *Silverman*, thereby entitling one to protection under a revitalized fourth amendment against the surreptitious tape recording of his conversations with a federal agent.<sup>83</sup> This conclusion was grounded on the view that the fourth amendment's true purpose was to preserve for each individual a comprehensive right of privacy.<sup>84</sup>

The immediate significance of Justice Brennan's position, however, lay not in these arguments, but in his suggestion that the consequences of their acceptance were not necessarily that drastic.<sup>85</sup> Specifically, Justice Brennan observed that the Court's historic reluctance to nullify *Olmstead* reflected a "pervasive fear" that applying fourth amendment protection to electronic surveillance would eliminate an important investigative tool, since an electronic search arguably could never be reasonable under the amendment.<sup>86</sup> While not conceding the point,<sup>87</sup>

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niques. This, too, limits their use. Often, however, unexpected information is intercepted. Many times before it is fully understood, it is too late to take preventive action. The notion that the use of these techniques is thus a "short cut" designed to save "shoe leather" is mistaken.

Thus, even if there were no legal restraints on the use of these techniques, they could nevertheless be used profitably in only a limited number of investigative situations.

*Id.* at 45-47. The ABA Standards later served as a basis for Title III. *See infra* note 232. Similarly, in 1976 the National Wiretapping Commission issued a study which found that the technological capacity of most available eavesdropping devices has been overstated. The Commission made the following observation:

The use of laser beams to retrieve audio from vibrating windowpanes, although highly publicized, was not found to exist outside the experimental laboratory. This technology offers no substantive threat at the present time because of the high cost of special equipment, restrictive physical considerations, and skill required for successful operation.

Van Dewerker, *State of the Art of Electronic Surveillance*, in COMMISSION STUDIES, SUPPORTING MATERIALS FOR THE REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 141, 152 (1976) (emphasis added). The study concluded that laser technology was not cost-efficient. *Id.* at 182. Likewise, the study reported that the effectiveness of parabolic microphones is limited by ambient noises and wind. Moreover, as a practical matter, their use is limited because their large size prevents easy concealment. *Id.* at 171. While noting that future technological developments would, in theory, facilitate investigations using electronic surveillance by reducing the size of both transmitters and receivers, the report indicated that, absent corresponding progress in the development of battery technology, the expanded use of microcomputer processor techniques would have limited impact. *Id.* at 154. This Article will return to the question of abuse and technology. *See infra* notes 941-73 and accompanying text.

<sup>82</sup> 373 U.S. at 471.

<sup>83</sup> *Id.* at 460-61, 469-71.

<sup>84</sup> *Id.* at 455-57, 469-71.

<sup>85</sup> Westin, *Science, Privacy, and Freedom: Issues and Proposals For the 1970s*, 66 COLUM. L. REV. 1003, 1245 (1966).

<sup>86</sup> 373 U.S. at 463.

Justice Brennan sought to assure his brethren that such concerns were unnecessarily rigid:

[I]t is premature to conclude that no warrant for an electronic search can possibly be devised. The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment," . . . could be made a precondition of lawful electronic surveillance. And there have been numerous suggestions of ways in which electronic searches could be made to comply with the other requirements of the Fourth Amendment.

This is not to say that a warrant that will pass muster can actually be devised. It is not the business of this Court to pass upon hypothetical questions, and the question of the constitutionality of warrants for electronic surveillance is at this stage purely hypothetical. But it is important that the question is still an open one. Until the Court holds inadmissible the fruits of an electronic search made, as in the instant case, with no attempt whatever to comply with the requirements of the Fourth Amendment, there will be no incentive to seek an imaginative solution whereby the rights of individual liberty and the needs of law enforcement are fairly accommodated.<sup>88</sup>

Although the search warrant alternative had been suggested previously,<sup>89</sup> the force of Justice Brennan's words provided the predicate for a more flexible approach to the electronic surveillance question.<sup>90</sup> Electronic surveillance was no longer an all or nothing proposition. Instead, it was—at least potentially—a matter that could be appropriately regulated under the fourth amendment's warrant clause. Significantly, Justice Brennan's willingness to effect a possible compromise was entirely consistent with the Warren Court's overall approach to constitutional adjudication. For, notwithstanding its civil libertarian image, the Court understood that constitutional principles could not be pronounced in a vacuum. Hence, unless tempered by pragmatic concerns, the perceived social costs occasioned by new fourth amendment concepts ultimately

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<sup>87</sup> On the contrary, Justice Brennan suggested that, before electronic surveillance could be regarded as constitutionally reasonable, certain difficulties would have to be resolved:

For one thing, electronic surveillance is almost inherently indiscriminate, so that compliance with the requirement of particularity in the Fourth Amendment would be difficult; for another, words which are the objects of an electronic seizure, are ordinarily mere evidence and not the fruits or instrumentalities of crime, and so they are impermissible objects of lawful searches under any circumstances; . . . finally, the usefulness of electronic surveillance depends on lack of notice to the suspect.

*Id.*

<sup>88</sup> *Id.* at 464-65.

<sup>89</sup> See *Silverman v. United States*, 365 U.S. 505, 513 (1961) (Douglas, J., dissenting) (using an electronic device for the purpose of intercepting communications is a search that should be made, if at all, only on a warrant issued by a magistrate); *Goldman v. United States*, 316 U.S. 129, 140 n.7 (1942) (Murphy, J., dissenting) (suggesting that use of detectophones should be subject to search warrant process).

<sup>90</sup> Westin, *supra* note 85, at 1245-46; see, e.g., NWC REPORT, *supra* note 1, at 38.

would frustrate their effective implementation.<sup>91</sup>

An opportunity to test the Brennan suggestion was presented by *Osborn v. United States*,<sup>92</sup> in which the FBI had obtained a search warrant authorizing an informant to tape record his conversation with Jimmy Hoffa's lawyer (who wanted to bribe a juror). Significantly, although the case could have been decided by a per curiam citation to *On Lee* and *Lopez*,<sup>93</sup> the Court instead chose to reason that, since a search warrant had been obtained, the circumstances of this case came within the scope of Justice Brennan's position in *Lopez*. Consequently, the issue became "not the permissibility of 'indiscriminate use of [electronic] devices in law enforcement,' but the permissibility of using such a device under the most precise and discriminate circumstances, circumstances which fully met the 'requirement of particularity' which the dissenting opinion in *Lopez* found necessary."<sup>94</sup> Framed in this manner, admissibility of the tape recorded conversation easily followed.

Thus, *Osborn* demonstrated the fourth amendment's potential flexibility. Even so, a major hurdle known as the "mere evidence" rule had to be overcome before electronic surveillance could fit neatly within

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<sup>91</sup> This aspect of the Warren Court's judicial philosophy was made manifest by Professor Francis A. Allen:

The heart of the problem for judicial activism in the criminal area is not simply that of effecting an expansion of doctrine relating to the rights and immunities of persons against whom the state proceeds. The problem also encompasses the question of how, given the limitations of judicial remedies and devices, judicial power may be effectively exerted to achieve the desired objectives. Stated more graphically: how can a court, however exalted its authority, that stands at the apex of a complex judicial structure exercise its powers so as to achieve a genuine impact on the day-by-day behavior of police, prosecutory, judicial, and correctional officials throughout a nation of two hundred million inhabitants? Anyone who studies carefully the judicial expressions of the Warren Court in the criminal cases comes to the realization that this concern with implementation is never far below the surface. One is unlikely to understand the phenomenon of the Warren Court until he perceives that the persistent motive of the Court is not only to declare the rights of persons confronting state power in the criminal arena, but also to enlarge the exercise of its judicial authority in such fashion as most likely to render those declarations effective. This is surely not to say that concern with remedies and implementation is peculiar to fourteenth amendment law relating to criminal justice or even to constitutional adjudication generally. Such concerns impinge upon and condition judicial lawmaking whenever it occurs. Such problems assumed particularly large proportions for the Court, however, as it considered its role in the criminal cases during the early years of the 1960's and before.

Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 526 (footnotes omitted). Professor Allen later illustrated this observation by reference to the Court's tendency to deny many of its decisions' retrospective application. Hence, prospectivity served as "a device that encourages the making of new law by reducing some of the social costs." *Id.* at 529-30.

<sup>92</sup> 385 U.S. 323 (1966). At the time, Jimmy Hoffa, president of the International Brotherhood of Teamsters, was on trial for rigging a jury to escape a prior prosecution. See *Hoffa v. United States*, 385 U.S. 293, 294-95 (1966).

<sup>93</sup> See *Osborn v. United States*, 385 U.S. at 327; see also *supra* notes 41-45 & 77-80 and accompanying text.

<sup>94</sup> 385 U.S. at 329.



traditional search warrant analysis. Early search warrant law was based, at least in part, upon property concepts. Government could lawfully seize only those items to which it could assert a property interest superior to that of the person being searched.<sup>95</sup> Since no one has the right to possess stolen property, contraband, or instrumentalities of crime, search warrants could be issued for these items. Conversely, however, all other items, "mere evidence" of criminality, were not subject to search and seizure by warrant.<sup>96</sup> Although there was no support for a "mere evidence" limitation in any fourth amendment language, it somewhat anomalously became a part of nineteenth century constitutional doctrine.<sup>97</sup>

Often criticized as a rule without a modern reason,<sup>98</sup> its consequences were nonetheless potentially severe, for no evidence—however relevant—not fitting into one of the designated categories could be obtained by a search warrant.<sup>99</sup> Moreover, this limitation on the objects subject to seizure also tended to limit the scope of the search itself.<sup>100</sup> To escape this harsh result, courts often categorized virtually any type of evidentiary item as an instrumentality of crime.<sup>101</sup> For electronic surveillance, however, strict application of the mere evidence rule would have precluded the search warrant alternative, since it was evident that most electronically seized conversations could only be classified as evi-

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<sup>95</sup> If the government's possessory claim to the seized property was not better than the search victim's, the seizure was considered an unlawful trespass. Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CAL. L. REV. 474, 475-76 (1961); see N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 133-34 (1937); Mickenburg, *Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back*, 16 N.E.L. REV. 197, 199-201 (1981). Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593, 600-06 (1966).

<sup>96</sup> See, e.g., *United States v. Lefkowitz*, 285 U.S. 452, 465-66 (1932); *Gould v. United States*, 255 U.S. 298, 309 (1921); see also *Recent Decisions*, 34 BROOKLYN L. REV. 287, 309-10 (1968).

<sup>97</sup> For a critical analysis of the mere evidence rule and a description of its anomalous constitutional roots, see T. TAYLOR, *supra* note 25, at 52-64.

<sup>98</sup> See, e.g., Comment, *Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319, 330 (1953).

<sup>99</sup> See Kaplan, *supra* note 95, at 477-78. The rule, however, placed no similar limitation on searches incident to arrest. T. TAYLOR, *supra* note 25, at 57-58. Professor Taylor believed that this lack of uniformity demonstrated the rule's irrationality. *Id.*

<sup>100</sup> *Warden v. Hayden*, 387 U.S. 294, 309, 320-21 (1967).

<sup>101</sup> See, e.g., *Kamisar*, *supra* note 32, at 916-17. *United States v. Guido*, 251 F.2d 1 (7th Cir. 1958), provides a classic illustration of how courts circumvented the limitations of the "mere evidence" rule by broadly construing the definition of "instrumentality." In *Guido*, the court upheld the seizure of the defendant's shoes for the purpose of matching them with a heel impression taken from the scene of the bank robbery by characterizing the shoes as instrumentalities. *Id.* at 3-4. The court reasoned that, when fleeing, a barefoot robber would have attracted more public attention than a robber wearing shoes; therefore, the shoes were, in part, the instrumentalities of the crime.

dence of crime.<sup>102</sup>

In *Warden v. Hayden*,<sup>103</sup> however, the mere evidence rule was removed from our constitutional fabric. Recognizing the doctrine's historical roots, the Court announced that "[t]he premise that property interests control the right of the Government to search and seize has been discredited . . . . [T]he principal object of the Fourth Amendment is the protection of privacy rather than property, and [we] have increasingly discarded fictional and procedural barriers rested on property concepts."<sup>104</sup> The Court then concluded that privacy considerations were adequately protected by the probable cause and particularity limitations of the search warrant requirement.<sup>105</sup> Ironically, *Hayden*'s emphasis on the privacy considerations underlying the fourth amendment thereby reduced protections for search victims, a development that would be of particular import in the context of electronic surveillance. Nevertheless, the Court's analysis was entirely appropriate: if the trespass doctrine was soon to be discarded as outdated, there was likewise no constitutional reason to retain the anachronistic mere evidence rule.

It is not without significance that *Hayden* was authored by Justice Brennan, who, in fact, had previously recognized the rule's potential constraint on electronic surveillance.<sup>106</sup> While there has been suggestion that Justice Brennan "did not foresee the extent to which abandonment . . . of the mere evidence rule would dismantle protection of privacy,"<sup>107</sup> it is clear that, at least to some degree, *Hayden* was written with electronic surveillance in mind. This was apparent from the fact that the case was argued only a day before *Berger v. New York*,<sup>108</sup> the first of two cases that the Supreme Court would use to reconstitutionalize the law of electronic surveillance.

## 2. *Berger v. New York and Katz v. United States*

*Berger v. New York* offered the Supreme Court an appropriate setting for a major electronic surveillance decision. *Berger* had been a principal in a sophisticated conspiracy to corrupt the New York State Liquor Au-

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<sup>102</sup> See, e.g., Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157, 163 (1954); Note, *On Applying the "Mere Evidence" Rule to Government Eavesdropping*, 14 U.C.L.A. L. REV. 1110, 1123-29 (1967). This, in fact, was one of the concerns mentioned by Justice Brennan in his *Lopez* dissent. See *supra* note 87. Some commentators, however, believed that, given the need for electronic surveillance, the rule would eventually succumb to modern reality. See T. TAYLOR, *supra* note 25, at 71; Kamisar, *supra* note 32, at 915-16.

<sup>103</sup> 387 U.S. 294 (1967).

<sup>104</sup> *Id.* at 304.

<sup>105</sup> *Id.* at 309-10.

<sup>106</sup> See *supra* note 87.

<sup>107</sup> Hufstедler, *supra* note 39, at 1500; see generally Spritzer, *supra* note 15, at 175-76.

<sup>108</sup> 388 U.S. 41 (1967).

thority. He and his associates had been investigated successfully through a series of bugs that were issued under a New York statute providing for court authorized electronic surveillance.<sup>109</sup> In all likelihood, the case could not have been effectively prosecuted without electronic surveillance.<sup>110</sup> Moreover, while *Berger* was pending, the President's Commission on Law Enforcement and Administration of Justice, Task Force on Organized Crime, issued a report which noted the importance of political corruption to organized crime.<sup>111</sup> A majority of the Presi-

<sup>109</sup> The details of this case are well documented in the American Bar Association's study on electronic surveillance. See ABA STANDARDS, *supra* note 81, at 58-70.

The New York Law provided:

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such an extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same.

N.Y. CODE CRIM. PROC. § 813-a (McKinney 1958) (repealed 1968).

<sup>110</sup> See ABA STANDARDS, *supra* note 81.

<sup>111</sup> THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 6 (1967) [hereinafter cited as TASK FORCE REPORT]. The term "organized crime" is an elusive concept. For a comparative analysis of this term, see Blakey & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 MICH. L. REV. 1511, 1538 n.154 (1976); see also NWC REPORT, *supra* note 1, at 189-92 (concurring opinion of Commissioner Blakey). Historically, the term has often been used to refer to La Cosa Nostra, but Title III's drafters did not view the concept in this limited manner. COMM'N ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, GAMBLING IN AMERICA, 181-82 (1976) (Final Report) (available from the GPO, stock no. 052-003-00243-3) [hereinafter cited as GAMBLING IN AMERICA] (statement by Senator John J. McClellan, principal Title III sponsor, that the term "organized crime" was not used in such a "circumscribed fashion" in any legislation with which he had been involved). See S. REP. NO. 1097, 90th Cong., 2d Sess. 66, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2112, 2157-58 [hereinafter cited as LEGISLATIVE HISTORY]. But see generally TASK FORCE REPORT, *supra*, at 10-15. Nevertheless, for purposes of this study, the National Wiretapping Commission's perspective will be used as a frame of reference:

Organized crime is a term which can be and often is used to describe . . . different criminal organizations. They are distinguished from each other by the extent to which La Cosa Nostra members are involved exclusively, indirectly, or not at all. But they are

dent's Commission, based upon this report's analysis emphasizing the critical role of electronic surveillance in penetrating complex criminal conspiracies, had recommended that "Congress should enact legislation dealing specifically with wiretapping and bugging."<sup>112</sup> Significantly, the Commission was aware of both the threat to privacy posed by electronic surveillance and of the pending *Berger* decision; as such, it recommended that the proposed legislation be carefully circumscribed in a manner consistent with the Supreme Court's resolution of *Berger*.<sup>113</sup>

Defendant *Berger*'s argument on appeal was that the New York statute authorizing the issuance of eavesdropping warrants was unconstitutional. While his position was based principally upon fourth amendment grounds,<sup>114</sup> the American Civil Liberties Union, as *amicus curiae*, raised first and fifth amendment arguments against the constitutionality of electronic surveillance.<sup>115</sup> Hence, electronic eavesdropping was under broadside attack.

In a six to three decision authored by Justice Clark, *Berger*'s conviction was reversed. As in other recent decisions, the Court recognized the technological potential of electronic surveillance,<sup>116</sup> but, now an effort finally was made to define what legal limitations could be imposed upon the use of such devices by law enforcement. Unfortunately, Justice Clark's approach to this task was somewhat imprecise. Although he both announced that the fourth amendment's "basic purpose . . . is to safeguard the privacy and security of individuals against arbitrary intru-

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also distinguished from other groups, also sometimes called Organized Crime, by their hierarchical structure and the long-term nature of their ongoing enterprises. They are, or are intended to be, in business permanently.

NWC REPORT, *supra* note 1, at 139; see NAT'L ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, ORGANIZED CRIME: REPORT OF THE TASK FORCE ON ORGANIZED CRIME 7-8 (1976).

<sup>112</sup> THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 203 (1967) [hereinafter cited as PRESIDENT'S CRIME COMMISSION]; see TASK FORCE REPORT, *supra* note 111, at 91-95.

<sup>113</sup> PRESIDENT'S CRIME COMMISSION, *supra* note 112, at 201-03.

<sup>114</sup> *Berger* argued that the New York statute established "a system of surveillance which involves trespassory intrusions into private, constitutionally protect premises, [and] authorizes 'general searches' for 'mere evidence.'" *Berger v. New York*, 388 U.S. 41, 43-4 (1967).

<sup>115</sup> Brief for the American Civil Liberties Union at 15-19, 23-30, *Berger v. New York*, 388 U.S. 41 (1967). There was substantial support for the proposition that warrantless electronic surveillance infringed upon first and fifth amendment protections. See King, *Electronic Surveillance and Constitutional Rights*, *supra* note 15, at 265; King, *Wiretapping and Electronic Surveillance*, *supra* note 15, at 28, 38; Westin, *supra* note 85, at 1027, 1038, 1044-45, 1248. This proposition, however, was rejected by the American Bar Association, ABA STANDARDS, *supra* note 81, at 87-89, and by the Task Force Report prepared for the President's Crime Commission. See TASK FORCE REPORT, *supra* note 111, at 96-98. Professor G. Robert Blakey, the principal draftsman of Title III, was the Reporter for the ABA Standards and, as a consultant to the President's Commission, authored a paper addressing electronic surveillance for the Task Force Report.

<sup>116</sup> 387 U.S. at 46-47, 62.

sion by governmental officials" and definitively stated that its protections were no longer limited to tangibles,<sup>117</sup> he addressed the constitutionality of New York's statute without formally advising whether the trespass doctrine still retained any vitality.<sup>118</sup>

Justice Clark approached the state statute without regard to either its interpretation by New York courts or its particular application in this case.<sup>119</sup> This was a marked departure from traditional Supreme Court procedure, which usually seeks to avoid deciding unnecessary constitutional questions by first focusing on the statute's actual application.<sup>120</sup> Nevertheless, Justice Clark, analyzing the statute facially, noted that, while it properly required that search warrants be issued only by "a neutral and detached authority,"<sup>121</sup> the law was still deficient in four critical respects: (1) eavesdropping warrants could be issued short of probable cause for the commission of a specific offense and without a particular description of the "property," or, in this context, the conversations to be seized.<sup>122</sup> Consequently, the probable cause shortcoming was unconstitutional because it allowed premature state intrusions, and the particularity omission was improper because it gave the monitoring officer "a roving commission to 'seize' any and all conversations."<sup>123</sup> (2) the availability of an initial two month surveillance period under the statute might avoid the need for prompt execution and potentially constituted "the equivalent of a series of . . . [dragnet] searches and seizures pursuant to a single showing of probable cause";<sup>124</sup> (3) by omitting a termination requirement, the law potentially allowed intrusions to continue even after the desired conversations had been obtained,<sup>125</sup> and

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<sup>117</sup> *Id.* at 53 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

<sup>118</sup> In other words, had the *Berger* eavesdrop been accomplished without a trespass, would the fourth amendment still have been triggered? See T. TAYLOR, *supra* note 25, at 104-05; Scott, *Wiretapping and Organized Crime*, 14 HOW. L.J. 1, 12 (1968). Justice Douglas, however, stated that *Olmstead* had been overruled *sub silentio*. 388 U.S. at 64 (Douglas, J., concurring). This question would not be addressed until *Katz v. United States*, 389 U.S. 347 (1967). See *infra* notes 151-65 and accompanying text. Even *Katz*, however, would not definitively dispose of the *Olmstead* doctrine. See *infra* note 154 and accompanying text.

<sup>119</sup> 388 U.S. at 54-60.

<sup>120</sup> The approach taken in *Berger* has been regarded as highly unusual. See *United States v. Ramsey*, 503 F.2d 524, 528-31 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); Scoular, *Wiretapping and Eavesdropping: Constitutional Developments From Olmstead to Katz*, 12 ST. LOUIS U.L.J. 513, 532 (1968); *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 188 (1967).

<sup>121</sup> 388 U.S. at 54.

<sup>122</sup> *Id.* at 58-59.

<sup>123</sup> *Id.* at 59.

<sup>124</sup> *Id.* The bracketed insertion of the word "dragnet" reflects the Supreme Court's concern with the potentially unlimited range of electronic surveillance: "During such a long and continuous . . . period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation." *Id.*

<sup>125</sup> *Id.* at 59-60.

(4) unlike conventional search warrant procedures, the statute permitted electronic searches without prior notice or a showing of exigency excusing such notice.<sup>126</sup> Thus, the statute was essentially held unconstitutional because it neither required probable cause nor properly limited the nature, scope, or duration of the electronic search. While indicating that the Constitution was not inflexible to law enforcement needs,<sup>127</sup> Justice Clark expressed mixed views concerning the indispensability of electronic surveillance<sup>128</sup> and concluded that, "[i]n any event, we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement."<sup>129</sup>

Justices Black, Harlan, and White filed dissenting opinions. All three, joined by Justice Stewart, believed that the New York statute, as interpreted by the New York courts, was fully constitutional (though they differed on the extent to which it had been constitutionally applied in this case).<sup>130</sup> New York courts, they maintained, had read a probable cause requirement into the statute.<sup>131</sup> Justices Black and White further argued that the majority's other concerns were not reflected in the fourth amendment.<sup>132</sup> Indeed, Justices Black and Stewart suggested that the state law actually exceeded fourth amendment requirements,<sup>133</sup> and charged that "from the deficiencies the Court finds in the New York statute, it seems that the Court would be compelled to strike down a state statute which merely tracked verbatim the language of the Fourth Amendment itself."<sup>134</sup> All three dissenting opinions challenged Justice

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<sup>126</sup> *Id.* at 60.

<sup>127</sup> *Id.* at 63. *But see infra* note 129.

<sup>128</sup> *Id.* at 60-62. Justice Clark was the father of then Attorney General Ramsey Clark, the first holder of that office ever to oppose electronic surveillance. Attorney General Clark believed such eavesdropping to be morally wrong and investigatively unproductive. *See infra* note 195-96 & 952 and accompanying text. The morality of electronic surveillance is a matter of personal choice, but, at least insofar as the effectiveness of electronic surveillance is concerned, Attorney General Clark's views were strongly criticized by the National Wiretapping Commission. NWC REPORT, *supra* note 1, at 134, 188 n.6 (concurring opinion of Commissioner Blakey).

<sup>129</sup> 388 U.S. at 62. Justice Clark further stated that, if a warrant could not "be drawn so as to meet the Fourth Amendment's requirements. . . then the 'fruits' of eavesdropping devices are barred under the Amendment." *Id.* at 63. Justice Clark, however, never examined whether the warrants used in this case complied with fourth amendment requirements. *See supra* notes 119-21 and accompanying text.

<sup>130</sup> Although the case was decided by a six to three vote, Justice Stewart concurred only in the result. He thought the statute was constitutional, but believed that New York officials had not applied it properly. 388 U.S. at 68-70. Justice Harlan argued that the statute had been applied improperly with regard to one of the surveillance orders, but that it otherwise was correctly implemented. *Id.* at 104-06. Justices White and Black would have ruled that the statute had been constitutionally enforced. *Id.* at 81-87, 118.

<sup>131</sup> *Id.* at 68, 84, 92-93; *see id.* at 110.

<sup>132</sup> *Id.* at 85, 111.

<sup>133</sup> *Id.* at 68, 83.

<sup>134</sup> *Id.* at 85. Justice Black, it should be noted, was still inclined to interpret the fourth

Clark's ambivalent view towards the need for electronic surveillance, and complained that the decision would seriously thwart pending legislation in this area.<sup>135</sup> Justice Black, in particular, thought that an insuperable obstacle had been imposed against the passage of such legislation.<sup>136</sup>

Despite these concerns, the majority's decision more realistically seemed to reflect disapproval of the New York statute as a potential model for statutory reform, than opposition to electronic surveillance per se; indeed, this may explain the Court's decision to approach the statute facially instead of as applied.<sup>137</sup> Significantly, there was much in *Berger* that was positive in tone. The Court had acknowledged the fourth amendment's flexibility for law enforcement purposes,<sup>138</sup> and had cited *Osborn* as an affirmative example of an eavesdropping warrant that fully complied with all fourth amendment requirements:

The invasion [in *Osborn*] was lawful because there was sufficient proof to obtain a search warrant to make the search for the limited purpose outlined in the order of the judges. Through these "precise and discriminate" procedures the order authorizing the use of the electronic device afforded similar protections to those that are present in the use of conventional war-

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amendment literally. Therefore, he maintained, the *Olmstead* doctrine was still good law. *Id.* at 74-81.

<sup>135</sup> *Id.* at 71-73, 95, 112-18. Justice White's criticism was the most severe:

[T]he Court ignores or discounts the need for wiretapping authority and incredibly suggests that there has been no breakdown of federal law enforcement despite the unavailability of a federal statute legalizing electronic surveillance. The Court thereby impliedly disagrees with the carefully documented reports of the Crime Commission which, contrary to the Court's intimations, underline the serious proportions of professional criminal activity in this country, the failure of current national and state efforts to eliminate it, and the need for a statute permitting carefully controlled official use of electronic surveillance, particularly in dealing with organized crime and official corruption. . . . How the Court can feel itself so much better qualified than the Commission, which spent months on its study, to assess the needs of law enforcement is beyond my comprehension.

*Id.* at 113-14.

<sup>136</sup> *Id.* at 71, 87; see, e.g., Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 141-42 (1968).

<sup>137</sup> This suggestion was made to the Senate when the significance of *Berger* was being considered in connection with pending electronic surveillance legislation:

[H]ad they sustained *Berger*, the likelihood is that the New York statute would have become the model and would have been copied and enacted by other States and the National Congress. I think that there were some members of the Supreme Court who did not want to see the New York statute drafted as it was to become that model. So they went to the face of the statute itself and struck it down, and struck it down in such a way that they could write, in effect, an advisory opinion to the Congress and the States on the kind of statute they would like to see. Now, the only way they could do that would be to go to the face of the statute.

*Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 957 (1967) (statement of Professor G. Robert Blakey) [hereinafter cited as *Controlling Crime Hearings*]. Had the statute been analyzed as applied, declaring eavesdropping unconstitutional would have been appreciably more difficult.

<sup>138</sup> 388 U.S. at 63.

rants authorizing the seizure of tangible evidence. Among other safeguards, the order described the type of conversation sought with particularity, thus indicating the specific objective of the Government in entering the constitutionally protected areas and the limitations placed upon the officer executing the warrant. Under it the officer could not search unauthorized areas; likewise, once the property sought, and for which the order was issued, was found the officer could not use the order as a passkey to further search. In addition, the order authorized one limited intrusion rather than a series or a continuous surveillance. And, we note that a new order was issued when the officer sought to resume the search and probable cause was shown for the succeeding one. Moreover, the order was executed by the officer with dispatch, not over a prolonged and extended period. In this manner no greater invasion of privacy was permitted than was necessary under the circumstances. Finally the officer was required to and did make a return on the order showing how it was executed and what was seized. Through these strict precautions the danger of an unlawful search and seizure was minimized.<sup>139</sup>

Since the *Osborn* warrant had been issued without *any* statutory authorization, the dissenting opinions properly criticized the majority for failing to consider either the New York courts' interpretation of the statute or whether the various warrants involved in *Berger* actually met constitutional standards.<sup>140</sup> Nevertheless, the majority's willingness to cite *Osborn* extensively was perceived by Congress as a signal that appropriately tailored electronic surveillance legislation would be received favorably.<sup>141</sup>

No doubt sensing this, Justice Douglas' concurring opinion argued that electronic surveillance was also unconstitutional under the fourth and fifth amendments.<sup>142</sup> The fifth amendment arguably was infringed by the involuntary nature of electronic surveillance,<sup>143</sup> and the fourth amendment by virtue of both the mere evidence rule<sup>144</sup> and the inevitably broad scope that was said to inhere to all electronic surveillance: "[t]he traditional wiretap or electronic eavesdropping device constitutes a dragnet, sweeping in all conversations within its scope—without regard to the participants or the nature of the conversations. It intrudes upon the privacy of those not even suspected of crime and intercepts the most intimate of conversations."<sup>145</sup>

Although Justice Douglas' concern over the potential scope of elec-

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<sup>139</sup> *Id.* at 57.

<sup>140</sup> *Id.* at 68, 81-83, 90-94, 108. See Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189, 201 (1968).

<sup>141</sup> See *Controlling Crime Hearings*, *supra* note 137, at 933-37 (statement of Professor G. Robert Blakey); Scott, *supra* note 118, at 13-15 (article by member of Congress).

<sup>142</sup> 388 U.S. at 64-67.

<sup>143</sup> *Id.* at 67; see *supra* note 115.

<sup>144</sup> 388 U.S. at 64-67.

<sup>145</sup> *Id.* at 65.



tronic surveillance was quite legitimate,<sup>146</sup> the mere evidence objection had been settled by *Hayden*,<sup>147</sup> and the fifth amendment claim received no acknowledgment from the Court.<sup>148</sup> Likewise, the ACLU's first amendment argument was answered with silence.<sup>149</sup> Congress was soon apprised that these omissions suggested that the Court did not consider these claims to be serious constitutional barriers.<sup>150</sup> Nevertheless, any remaining doubts concerning the import of *Berger* were resolved by *Katz v. United States*.<sup>151</sup>

Petitioner Katz' conviction had been partly based upon evidence that was obtained when the police bugged his end of conversations that had occurred in a telephone booth.<sup>152</sup> The electronic surveillance, however, had been effected without trespass. Thus, since Katz' argument was that this surveillance, albeit without trespass, was an impermissible intrusion into a "constitutionally protected area,"<sup>153</sup> these circumstances were ideally suited for directly confronting *Olmstead*. Ironically, in reversing Katz' conviction and establishing new constitutional guidelines for this area, Justice Stewart's opinion for a seven to one majority never

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<sup>146</sup> Justice Douglas cited numerous cases of obvious eavesdropping abuse:

Thus, in the *Coplon* case wiretaps of the defendant's home and office telephone recorded conversations between the defendant and her mother, a quarrel between a husband and wife who had no connection with the case, and conferences between the defendant and her attorney concerning the preparation of briefs, testimony of government witnesses, selection of jurors and trial strategy. . . . It is also reported that the FBI incidentally learned about an affair, totally unrelated to espionage, between the defendant and a Justice Department attorney. . . . While tapping one telephone, police recorded conversations involving, at the other end, The Julliard School of Music, Brooklyn Law School, Consolidated Radio Artists, Western Union, Mercantile Commercial Bank, several restaurants, a real estate company, a drug store, many attorneys, an importer, a dry cleaning establishment, a number of taverns, a garage, and the Prudential Insurance Company. These cases are but a few of many demonstrating the sweeping nature of electronic surveillance as we know it today.

*Id.* at 65-66 (citations omitted). The danger of indiscriminate eavesdropping has been a major source of concern since *Olmstead*. 277 U.S. at 475-76 (Brandeis, J., dissenting); see, e.g., Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 YALE L.J. 799, 804-07 (1954); Katzenbach, *An Approach to the Problems of Wiretapping*, 32 F.R.D. 107, 108 (1963); Semerjian, *supra* note 69, at 227.

<sup>147</sup> The Court disposed of the mere evidence issue by a brief citation to *Hayden*. 388 U.S. at 44 n.2; see *supra* notes 103-06 and accompanying text.

<sup>148</sup> The Court said that its resolution of the case made consideration of this issue unnecessary. 388 U.S. at 44. Nevertheless, given the broad advisory tone of Justice Clark's opinion, this omission was noteworthy. The fifth amendment claim had previously been rejected in *Olmstead*, 277 U.S. at 464, and the Court did nothing to revive it.

<sup>149</sup> Only Justice Harlan, in dissent, even bothered to mention this point. 388 U.S. at 97 n.4. He, of course, rejected it.

<sup>150</sup> *Controlling Crime Hearings*, *supra* note 137, at 933-37 (statement of Professor G. Robert Blakey).

<sup>151</sup> 389 U.S. 347 (1967).

<sup>152</sup> *Id.* at 348.

<sup>153</sup> *Id.* at 349-50.

formally repudiated the trespass doctrine.<sup>154</sup> Even so, this clearly was the *sub silentio* effect of the decision.<sup>155</sup>

Although declining to find that the fourth amendment could "be translated into a general constitutional 'right to privacy,'"<sup>156</sup> Justice Stewart's opinion firmly eschewed a mechanistic approach towards resolving whether governmental action had improperly intruded upon privacy concerns. Hence, the Court expressly avoided relying upon petitioner's proposed term—"constitutionally protected area"—as providing a "talismanic solution to every Fourth Amendment problem."<sup>157</sup> Moreover, Justice Stewart asserted that focusing on this term improperly "deflects attention from the problem presented by [the] case," since the Court's recent decisions had shown that property concepts were no longer controlling in fourth amendment litigation.<sup>158</sup> "Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply areas—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."<sup>159</sup>

Instead, the *Katz* Court chose to focus upon whether the governmental intrusion infringed upon petitioner's reasonable expectation of privacy.<sup>160</sup> If so, a search and seizure had occurred for fourth amend-

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<sup>154</sup> While the Court did state that the occurrence of a trespass should not be determinative in fourth amendment analysis, *see infra* text accompanying note 159, Justice Stewart merely meant by this that the *Olmstead* doctrine was not controlling. *Id.* at 353. This point later became an issue when defendants sought to argue that court authorized buggings, effected by trespassory covert entries, were unconstitutional. *See Dalia v. United States*, 441 U.S. 238, 246-48 (1979); Note, *Breaking and Entering into Private Premises to Effect Electronic Surveillance*, 39 MD. L. REV. 754, 777-78 (1980).

<sup>155</sup> *See* 389 U.S. at 362 n.\* (Harlan, J., concurring).

<sup>156</sup> *Id.* at 350.

<sup>157</sup> *Id.* at 351 n.9.

<sup>158</sup> *Id.* at 351.

<sup>159</sup> *Id.* at 353.

<sup>160</sup> This term has become basic to fourth amendment litigation. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968). In this respect, most jurists and courts have relied upon Justice Harlan's interpretation of its requirements:

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

389 U.S. at 361 (Harlan, J., concurring); *see Amsterdam, Perspectives on the Fourth Amendment* 58 MINN. L. REV. 349, 383-85 (1974).

ment purposes and prior judicial sanction normally would be a prerequisite to constitutional approval.<sup>161</sup> On this basis, the Court found that Katz' fourth amendment rights had been violated.<sup>162</sup> Justice Stewart acknowledged that the surveilling officers, in fact, may have conducted a narrowly limited search: it reportedly was based upon probable cause and confined to relevant conversations involving Katz, precisely the type of circumscribed search for which prior judicial approval would have been available under *Osborn*.<sup>163</sup> Nevertheless, reasoning that a citizen's fourth amendment rights should not be dependent exclusively upon an officer's exercise of discretion,<sup>164</sup> Justice Stewart ruled that the self-restraint exercised in this case was not sufficient to save the search:

[T]he inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.<sup>165</sup>

Accordingly, Katz' conviction was reversed.

*Katz* was misperceived initially by some criminal elements, who were apparently relieved to learn that electronic surveillance had finally come within the fourth amendment's protections.<sup>166</sup> Similarly, civil libertarians, whose interests in privacy were more pristine,<sup>167</sup> may have read the opinion optimistically,<sup>168</sup> especially since the Court's reason-

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<sup>161</sup> 389 U.S. at 353. The Court did not discuss the ramification of its decision upon traditional exceptions to the warrant requirement, but it did intimate that there would be no emergency exception for electronic surveillance. *Id.* at 357-58. For a more detailed discussion of this matter, see *infra* notes 292-302 and accompanying text.

<sup>162</sup> 389 U.S. at 359.

<sup>163</sup> *Id.* at 354-56.

<sup>164</sup> *Id.* at 356-57.

<sup>165</sup> *Id.*

<sup>166</sup> One prominent defense attorney told the National Wiretapping Commission that, immediately after *Katz*, many professional gamblers called his office to celebrate the Supreme Court's decision to bring electronic surveillance within the fourth amendment. The attorney, however, realized that *Katz* would soon serve as the predicate for a federal eavesdropping statute. 1 NAT'L WIRETAPPING COMM'N, COMMISSION HEARINGS, SUPPORTING MATERIAL FOR THE REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 638 (1976) (statement of James Jay Hogan) [hereinafter cited as NWC HEARINGS].

<sup>167</sup> For example, some civil libertarians persuasively argued that widespread eavesdropping inevitably would impact upon both the criminal and *noncriminal* elements of society. See Greenawalt, *supra* note 140, at 220-21; Westin, *supra* note 85, at 1045.

<sup>168</sup> See Spritzer, *supra* note 15, at 172.

able expectation of privacy test seemed to have been derived from earlier liberal commentaries which had proposed this very standard in the electronic surveillance context.<sup>169</sup> The impact of this standard, however, also seemed to free law enforcement from the constraints of the trespass rule.<sup>170</sup> Further, the Court by no means had ruled electronic surveillance unconstitutional. Rather, by citing *Osborn* and the agents' narrowly limited search as models of propriety, the Court clearly was stating that, reasonable expectations of privacy notwithstanding, electronic surveillance was permissible constitutionally so long as prior judicial approval had been obtained.<sup>171</sup> Indeed, even Justice Black, although dissenting in *Katz*, acknowledged that Justice Stewart's opinion both had removed the "insuperable obstacles" erected by *Berger* and had provided constitutional guidelines for electronic surveillance legislation.<sup>172</sup>

*Katz* was subjected to skeptical criticism.<sup>173</sup> How, for example, might a conversation be particularized sufficiently before its occurrence and simultaneous seizure?<sup>174</sup> Nevertheless, an American Bar Association study concluded that "[t]he overriding significance of *Berger* and *Katz* lies in their rejection of all arguments that would reject outright the use of [electronic surveillance] . . ."<sup>175</sup> Moreover, in keeping with other aspects of its judicial activism, the Warren Court had used these cases as a means for providing explicit guidelines for statutory reform.<sup>176</sup>

<sup>169</sup> See Kamisar, *supra* note 32, at 925; Semerjian, *supra* note 69, at 226; Westin, *supra* note 85, at 1225.

<sup>170</sup> Although the Court did not explicitly state that electronic surveillance occasioning trespassory covert entries could ever be constitutional, that was a fair inference from Justice Stewart's opinion. See *supra* text accompanying note 159.

<sup>171</sup> See generally Spritzer, *supra* note 15, at 172-76.

<sup>172</sup> 389 U.S. at 364 (Black, J., dissenting). Justice Black, however, never explained how *Katz* removed the "insuperable obstacles" previously erected by *Berger*. In *Berger*, he was especially concerned about whether future conversations could ever be adequately particularized. *Berger v. New York*, 388 U.S. at 85-89. *Katz*, however, did nothing to change this requirement. Possibly, Justice Black may have been placated by the Court's willingness to handle the notice question more flexibly. 389 U.S. at 355 n.16. It should be noted, however, that *Katz* left open the question of whether enabling legislation for electronic surveillance was even necessary. See Greenawalt, *supra* note 140, at 201-02; Scoular, *supra* note 120, at 537-38.

<sup>173</sup> See Kitch, *supra* note 136; Schwartz, *Electronic Eavesdropping—What the Supreme Court Did Not Do*, 4 CRIM. L. BULL. 83 (1968); Solomon, *The Short Happy Life of Berger v. New York*, 45 CHI.-[KENT L. REV. 123 (1968).

<sup>174</sup> See *infra* notes 323-26 and accompanying text.

<sup>175</sup> ABA STANDARDS, *supra* note 81, at 15 n.9.

<sup>176</sup> See text accompanying note 224. In this respect, Professor Allen's comments seem applicable by analogy:

Perhaps the most interesting influence of the exigencies of judicial supervision in criminal cases on the kinds of judicial lawmaking in which the Court engaged is revealed in the tendency of the Court to turn to broad, legislative-like directives, sometimes called "flat" or "per se" rules. Such a rule is one in which a given fact, circumstances, or a limited set of facts is taken as the requisite ground for reversal in a criminal case or the

The electronic surveillance controversy thus effectively had been shifted from a constitutional issue to a legislative question.<sup>177</sup> Consequently, Congress expedited its consideration of pending electronic surveillance proposals. Within seven months of *Katz*, Title III was enacted into law.<sup>178</sup>

### III. LEGISLATIVE DESIGN

#### A. THE CONTEXT OF REFORM

By 1968, the inadequacy of existing electronic surveillance legislation had long been an issue in American law. Certainly, few were pleased with the operation of the Federal Communications Act in this area.<sup>179</sup> Aside from the multiplicity of issues raised by various Supreme Court decisions, defense lawyers and civil libertarians complained that the statute often had been flouted openly by the Justice Department's

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barring of evidence from court. These rules avoid or lessen the occasions that require consideration of the "totality of the circumstances" presented by the record and the concomitant determination whether, on balance, the defendant received a fair trial in the particular case. The principal advantages of per se rules to a Court embracing broad supervision of the criminal justice function were thought to be two. First, such rules give relatively certain guidance to the lower courts, and thus avoid the confusions and uncertainties associated with precedents that weigh a multitude of factors, some of which may be unique to the particular case at hand. Second, such rules are applicable to a great mass of cases at the trial court levels without direct involvement of the Supreme Court, thereby minimizing the consequences of the Court's lack of time and resources to adjudicate more than the smallest fraction of criminal cases presenting constitutional issues.

Allen, *supra* note 91 at 532 (footnotes omitted). Although the *Katz* reasonable expectation of privacy standard requires application on a case by case basis, the promulgation of specific standards for reform provided a convenient means for reviewing electronic surveillance cases that were, in fact, subject to fourth amendment protections under the *Katz* test. Professor Allen, however, might be more inclined to characterize *Berger* and *Katz* as cases that were more indicative of the Warren Court's "loss of impetus" during its closing days:

Perhaps the late history of the Warren Court suggests that something inherent in the judicial process or the traditions of court adjudication renders it difficult for a court to formulate and to adhere to broad categorical rules that demand the judge to ignore apparently substantial social costs in the form of frustrations of law enforcement in the particular cases under scrutiny. Assurances that the categorical rules do by and large constitute a proper restraint on police activity may often appear remote, speculative, and insufficient to justify the losses sustained in the concrete case.

But surely the most fundamental reasons for the Court's loss of impetus lies in the social and political context of the Court in the late 1960's. That period was a time of social upheaval, violence in the ghettos, and disorder on the campuses. Fears of the breakdown of the public order were widespread. Inevitably, the issue of law and order were [sic] politically exploited. In the presidential campaign of 1968 the bewildering problems of crime in the United States were represented simply as a war between the "peace forces" and the "criminal forces."

Allen, *supra* note 91, at 538-39 (footnotes omitted).

<sup>177</sup> *Id.* at 538-40; see *Controlling Crime Hearings*, *supra* note 137, at 978 (statement of Professor G. Robert Blakey).

<sup>178</sup> *Katz* was decided on December 18, 1967. 387 U.S. 347 (1967). Title III was passed on June 19, 1968. Title III, Pub. L. No. 90-351, § 802, 82 Stat. 212 (1968) (codified as amended at 18 U.S.C. §§ 2510-2519 (1976)).

<sup>179</sup> For a discussion of this provision, see *supra* notes 46-64 and accompanying text.

interpretation that section 605 was not triggered until there had been an actual divulgence of wiretap evidence beyond the Justice Department bureaucracy.<sup>180</sup> Although no longer its policy, the Department had maintained until recently that it could wiretap for "strategic intelligence" purposes so long as the results were not divulged in court.<sup>181</sup> For its part, however, the Justice Department had been frustrated by the inadmissibility of such strategic intelligence.<sup>182</sup> Such conflicts had prompted both periodic calls for reform by legal commentators and considerable legislative debate.<sup>183</sup> Nevertheless, prior to 1968, none of these proposals became law.

In 1967, however, the President's Crime Commission found that "[t]he present status of the law with respect to wiretapping and bugging is intolerable."<sup>184</sup> Significantly, the focus of the controversy had changed considerably since 1940. Wiretapping during World War II was used primarily for counterespionage.<sup>185</sup> Since subsequent debate during the Red Scare era had centered around the need for electronic surveillance to combat saboteurs and subversives, electronic surveillance proponents occasionally resorted to polemical assaults by characterizing some of their opponents as protectors of spies and enemies of liberty.<sup>186</sup>

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<sup>180</sup> *Wiretapping, Eavesdropping and the Bill of Rights: Hearings Before the Senate Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 86th Cong., 1st Sess. 1037-38 (1959) (letter from Attorney General William P. Rogers); *To Authorize Wiretapping: Hearings on H.R. 2266 and H.R. 3099 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 1st Sess. 18-19 (1941) (letter from Attorney General Robert Jackson). Accordingly, the Justice Department's view was that wiretaps were not illegal per se. This unduly narrow interpretation overlooks § 605's prohibition against any use of wiretap information, see *supra* note 51, and has consequently been widely criticized. See, e.g., Kamisar, *supra* note 32, at 929 ("tortured rationalization"); Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 MINN. L. REV. 855, 859-60 (1960) (mere "use" of intercepted information a crime); Note, *Congressional Wiretapping Policy Overdue*, 2 STAN. L. REV. 744, 748-58 (1950) (Justice Department intellectually dishonest).

<sup>181</sup> See, e.g., *supra* note 180. "Strategic intelligence" may be defined as intelligence aimed primarily at obtaining long term information about the operations of the surveillance target and his associates. In contrast, tactical intelligence is oriented towards obtaining evidence to convict the target and his associates for crimes related to the immediate investigation in progress. See generally NWC REPORT, *supra* note 1, at 39-40; TASK FORCE REPORT, *supra* note 111, at 92.

<sup>182</sup> Westin, *supra* note 85, at 1223.

<sup>183</sup> See Donnelly, *supra* note 146, at 799-804; Westin, *supra* note 85, at 1223-24; Note, *supra* note 180, at 748-51. For example, one article observed that "[a]fter 1940, the attempts at wiretapping legislation have been legion." Semerjian, *supra* note 146, at 233 n.93; see Schwartz, *supra* note 15, at 455 n.1; Westin, *supra* note 39, at 177; Donnelly, *supra* note 146, at 804.

<sup>184</sup> PRESIDENT'S CRIME COMMISSION, *supra* note 112, at 203.

<sup>185</sup> See, e.g., Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans in 3 FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94th Cong., 2d Sess. 279-81 (1976) [hereinafter cited as CHURCH COMMITTEE REPORT].

<sup>186</sup> See Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195, 201-03 (1954); see generally Rogers, *The Case For Wiretapping*, 63 YALE L.J. 792 (1954). Perhaps such attacks

Subsequently, however, claims of both remarkable technological advances and patterns of abuse were made with increasing frequency by non-ideologues.<sup>187</sup> Not all of the claims were valid,<sup>188</sup> and not all involved law enforcement; private eavesdropping was also in vogue.<sup>189</sup> Regardless, by the 1960's it had become apparent that, even discounting some of these claims, the privacy rights of thousands of Americans had been unlawfully violated.<sup>190</sup> Accordingly, most of the debate now centered upon whether electronic surveillance should be outlawed completely or subjected to stringent statutory controls requiring prior court approval.<sup>191</sup>

Electronic surveillance proponents argued that wiretapping and bugs were essential prosecutorial tools in the effort against organized crime. Since today's sophisticated criminals were taking advantage of modern technology—including communications facilities—to effect their crimes, law enforcement had to be given the means to respond in kind.<sup>192</sup> In fact, this has long been a traditional justification for electronic surveillance.<sup>193</sup> Eavesdropping opponents, however, always were

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would have occurred more frequently if Senator Joseph McCarthy, ironically, had not been opposed to electronic surveillance. See Donnelly, *supra* note 146, at 804 n.28 (suggesting that Senator Joseph McCarthy appeared to ascribe to the views expressed by Justice Brandeis in *Olmstead v. United States*).

<sup>187</sup> See, e.g., *Osborn v. United States*, 385 U.S. 323, 341-42 (1966) (Douglas, J., dissenting); NWC REPORT, *supra* note 1, at 39; TASK FORCE REPORT, *supra* note 111, at 92; THE EAVES-DROPPERS, *supra* note 81, at 305-79; A. WESTIN, *PRIVACY AND FREEDOM* 65-132, 365-99 (1967); see also *supra* notes 72-81 and accompanying text.

<sup>188</sup> See ABA STANDARDS, *supra* note 81 at 46-47, 85-93; Brown, *The Great Wiretapping Debate and the Crisis in Law Enforcement*, 6 N.Y.L.F. 265, 270-71 (1960); Hennings, *The Wiretapping-Eavesdropping Problem: A Legislator's View*, 44 MINN. L. REV. 813, 825 (1960); Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 MINN. L. REV. 835, 837 (1960); see also *supra* note 81, *infra* notes 941 & 944 and accompanying text.

<sup>189</sup> NWC REPORT, *supra* note 1, at 39.

<sup>190</sup> *Id.* See *Invasions of Privacy, Government Agencies: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965).

<sup>191</sup> NWC REPORT, *supra* note 1, at 39.

<sup>192</sup> NWC REPORT, *supra* note 1, at 33. See generally ABA STANDARDS, *supra* note 81, at 22. For example, one law enforcement official made the following observation:

The underworld of today would rate Jesse James as a small-fry amateur. Crime has become big business, with campaigns planned and organized like operations in a legitimate business, with a structure of chief executives, fiscal departments, legal departments, public relations and the rest. Advantage has been taken of the most modern methods in business organization, swift communications, swift transportation. Advantage has also been taken of lagging organization of government. Law enforcement systems operating along lines good enough for 1851 or 1901 are too slow for the swifter pace of the time we are living in.

Silver, *supra* note 188, at 848 (quoting former Secretary of War, Robert P. Patterson, before the American Bar Association on September 19, 1951).

<sup>193</sup> See, e.g., *Nardone v. United States*, 302 U.S. 379, 385-87 (1937) (Sutherland, J., dissenting).

skeptical of this assertion,<sup>194</sup> and their arguments only recently had been reinforced by Attorney General Ramsey Clark's public position that electronic eavesdropping was "neither effective nor highly productive."<sup>195</sup> This statement, however, the first of its kind by an Attorney General,<sup>196</sup> was contradicted squarely by the President's Crime Commission.<sup>197</sup>

As originally empanelled, the Commission did not intend to examine organized crime, but former ABA President Lewis Powell insisted that any national crime study could not ignore this problem.<sup>198</sup> The Commission's task force assigned to this matter noted that traditional evidence gathering techniques are relatively ineffectual in organized crime cases: "[T]he American system was not designed with Cosa Nostra-type criminal organizations in mind, and it has been notably unsuccessful to date in preventing such organizations from preying on society."<sup>199</sup> Organized crime was found to have a structure and code of conduct that precluded ordinary penetration efforts: "High-ranking organized crime figures are protected by layers of insulation from direct

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<sup>194</sup> For example, Justice Frankfurter felt that electronic surveillance was not necessary to effective law enforcement:

My deepest feeling against giving legal sanction to such "dirty business" . . . is that it makes for lazy and not alert law enforcement. It puts a premium on force and fraud, not on imagination and enterprise and professional training. The third degree, search without warrant, wiretapping and the like, were not tolerated in what was probably the most successful administration in our time of the busiest United States Attorney's office. This experience under Henry L. Stimson in the Southern District of New York, compared with happenings elsewhere, doubtless planted in me a deep conviction that these shortcuts in the detection and prosecution of crime are as self-defeating as they are immoral.

On *Lee v. United States*, 343 U.S. 747, 761 (1952) (Frankfurter, J., dissenting). Similarly, other scholars have echoed Justice Frankfurter's remarks:

[I]t is impossible to conclude that the record shows a "need" for wiretapping. In this context, "need" must be defined as a situation in which effective law enforcement in an appreciable number of cases would be impossible without it. It would appear from the testimony of certain witnesses that there was some confusion between the concept of "need" for wiretapping because of an intolerable situation without it, and the idea of "need" for wiretapping because of an easier situation with it. In this regard, there has not even been a comparative study made to determine whether it is true that law enforcement is *easier* in areas where wiretapping is practiced. In fact, all indications are to the contrary.

Semerjian, *supra* note 69, at 231 (footnotes omitted); see Schwartz, *supra* note 15, at 505; Schwartz, *On Current Proposals to Legalize Wiretapping*, 103 U. PA. L. REV. 157, 159-61 (1954); see also *infra* note 759 and accompanying text.

<sup>195</sup> NWC REPORT, *supra* note 1, at 188 n.6 (concurring opinion of Commissioner Blakey); see LEGISLATIVE HISTORY, *supra* note 111, at 2163.

<sup>196</sup> For a detailed history of the Justice Department's use of electronic surveillance, see CHURCH COMMITTEE REPORT, *supra* note 185, at 273-345.

<sup>197</sup> See TASK FORCE REPORT, *supra* note 111, at 17-19, 91-100; see also *supra* notes 111-13 and accompanying text.

<sup>198</sup> *Controlling Crime Hearings*, *supra* note 137, at 982-83 (citing N.Y. Times, Nov. 23, 1966, at 1, col. 7).

<sup>199</sup> PRESIDENT'S CRIME COMMISSION, *supra* note 112, at 7.



participation in criminal acts, and a rigid code of discipline inhibits the development of informants against them.<sup>200</sup> Moreover, organized crime often deals in so-called "victimless crimes" where few, if any, have incentive to testify; in other cases, intimidation tactics are often effective deterrents.<sup>201</sup> Organized criminals, however, must communicate to achieve their goals, especially when the criminal enterprise is engaged in diverse activities involving numerous members in multiple areas.<sup>202</sup> Consequently, the Commission observed that electronic surveillance provided a means to exploit this vulnerability.<sup>203</sup> In particular, electronic surveillance was perceived as a way to obtain important strategic intelligence against organized crime.<sup>204</sup> This was considered critical because, unlike ordinary street crime which often involves investigating a known crime for an unknown criminal, organized crime often involves latent, long term criminal activity which cannot be investigated on a purely reactive basis. Rather, long term proactive investigations that aggressively seek out the criminal activity are indispensable to successful organized crime control.<sup>205</sup> Thus, as organized crime police work often requires targeting a known criminal until evidence of a previously unknown crime is detected, electronic surveillance is ideally suited to this type of investigative mode.<sup>206</sup> To illustrate the potential utility of electronic surveillance, the Commission provided several examples of successful New York organized crime prosecutions that purportedly could not have been made without electronic surveillance.<sup>207</sup> Indeed, the Commission observed that only in New York, where electronic surveillance had been used for more than two decades, "have law enforcement officials achieved some level of success in bringing prosecutions against organized crime."<sup>208</sup> It was these findings, together with a concern for controlling abuses, which prompted a majority of the Commission's members to recommend the adoption of legislation authorizing electronic surveillance under a system of strict controls.<sup>209</sup>

The Commission's recommendation for eavesdropping legislation was somewhat of an embarrassment to the Johnson Administration, which had established the study group but had opposed electronic sur-

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<sup>200</sup> *Id.* at 201.

<sup>201</sup> TASK FORCE REPORT, *supra* note 111, at 14. *See id.* at 92-95.

<sup>202</sup> PRESIDENT'S CRIME COMMISSION, *supra* note 112, at 201.

<sup>203</sup> *Id.*

<sup>204</sup> TASK FORCE REPORT, *supra* note 111, at 92.

<sup>205</sup> *Id.* G. BLAKEY, R. GOLDSTOCK & C. ROGOVIN, RACKETS BUREAUS: INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME xiii-xiv (1978) [hereinafter cited as RACKETS BUREAUS].

<sup>206</sup> TASK FORCE REPORT, *supra* note 111, at 92; *see* NWC REPORT, *supra* note 1, at 49-51.

<sup>207</sup> TASK FORCE REPORT, *supra* note 111, at 91-95.

<sup>208</sup> PRESIDENT'S CRIME COMMISSION, *supra* note 112, at 201.

<sup>209</sup> *See supra* notes 111-12 and accompanying text.

veillance.<sup>210</sup> Nevertheless, the drafters of Title III relied heavily upon the Commission's analysis in determining that such legislation was necessary for modern law enforcement.<sup>211</sup> The legislative history noted that crime was a "national catastrophe" and that organized crime, in particular, had a pervasive influence upon American society which previous law enforcement efforts had been unable to control.<sup>212</sup> Although concern was also expressed over the widespread abuses made possible by scientific advances in electronic surveillance,<sup>213</sup> the drafters rejected arguments that authorized electronic surveillance, under a system of strict controls, would promote further abuse by law enforcement.<sup>214</sup> Rather, Congress suggested that police misconduct had been responsible for few unlawful invasions of privacy, and implicitly concluded that providing the police with a carefully controlled, lawful means for conducting electronic surveillance would remove the incentive for abuse.<sup>215</sup>

It has been suggested that Title III was the product of a hysterical Congress responding to conservative political pressure exerted during a national climate of fear.<sup>216</sup> No doubt the debate over electronic surveillance was at times emotional, and it is probably true that the assassinations of Martin Luther King and Robert F. Kennedy contributed somewhat to Title III's expedited approval.<sup>217</sup> Overall, however, the measure appears to have been a bipartisan effort designed to accommodate the demands of modern society's conflicting needs for privacy and law enforcement.<sup>218</sup> This conclusion seems apparent from the "scrupu-

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<sup>210</sup> See *supra* note 198 and accompanying text; see also *Controlling Crime Hearings*, *supra* note 137, at 983 (citing N.Y. Times, Jan. 30, 1967, at 1, col.1).

<sup>211</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2157-61, 2264; see generally Scott, *supra* note 18. While such views were by no means unanimous, see LEGISLATIVE HISTORY, *supra* note 111, at 2224-25, 2232-33, nevertheless, some liberals reluctantly supported Title III for this very reason. See *id.* at 2245-47.

<sup>212</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2117, 2119-20, 2160.

<sup>213</sup> *Id.* at 2154.

<sup>214</sup> *Id.* at 2159-60. For a summary of the argument that court authorized eavesdropping would result in increased law enforcement abuse, see Dash, *Remarks*, 32 F.R.D. 114, 115-19 (1962); Schwartz, *supra* note 15, at 478-80; Westin, *supra* note 39, at 195-96.

<sup>215</sup> *Anti Crime Program: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 1381-82 (statement of Professor G. Robert Blakey); PRESIDENT'S CRIME COMMISSION, *supra* note 112, at 203; see LEGISLATIVE HISTORY, *supra* note 111, at 2159; ABA STANDARDS, *supra* note 81, at 84-85; Kamisar, *supra* note 32, at 901-06. In this respect, it has been suggested that the critical question is whether a court authorized system would lead to increased abuse, rather than whether less abuse can be expected. TASK FORCE REPORT, *supra* note 111, at 98.

<sup>216</sup> H. SCHWARTZ, TAPS, BUGS AND FOOLING PEOPLE 11-13 (1977); Harris, *Annals of Legislation*, THE NEW YORKER, Dec. 14, 1968, at 68, 172-76; see E. LAPIDUS, EAVESDROPPING ON TRIAL 38-40 (1974).

<sup>217</sup> See 114 CONG. REC. 16297-98 (1968) (statement of Rep. Pollock); E. LAPIDUS, *supra* note 216, at 40; Harris, *supra* note 216, at 172.

<sup>218</sup> For example, the bill was supported by Senators Bayh, Brook, Percy, Muskie, Ervin and Tydings. It was also endorsed by the Judicial Conference of the United States, which

lous" manner in which Congress sought to implement and actually exceed the *Berger* and *Katz* guidelines.<sup>219</sup>

## B. THE MECHANICS OF REFORM

The process of designing warrant procedures for electronic eavesdropping was an intricate one. Many legal scholars believed that any analogy to a conventional search warrant was inherently flawed.<sup>220</sup> Indeed, Justice Douglas dissenting in *Osborn* had made this very argument:

The objects to be "seized" cannot be particularly described; all the suspect's conversations are intercepted. The search is not confined to a particular time, but may go on for weeks or months. The citizen is completely unaware of the invasion of his privacy. The invasion of privacy is not limited to him, but extends to his friends and acquaintances—to anyone who happens to talk on the telephone with the suspect or who happens to come within the range of the electronic device. Their words are also intercepted; their privacy is also shattered. Such devices lay down a dragnet which indiscriminately sweeps in all conversations within its scope, without regard to the nature of the conversations, or the participants. A warrant authorizing such devices is no different from the general warrants the Fourth Amendment was intended to prohibit.<sup>221</sup>

These were very real concerns. Nevertheless, the Supreme Court had relied upon the search warrant analogy in giving electronic surveillance constitutional approval.<sup>222</sup> Consequently, the challenge facing Congress was the design of a statute that conformed to *Berger*, *Katz*, and other Supreme Court decisions in a manner which also addressed the concerns raised by Justice Douglas. The resulting legislative history cited Supreme Court decisions "66 times in 20 pages of technical commentary . . . . *Berger* and *Katz* themselves [were] cited and relied upon 16 times."<sup>223</sup> Indeed, in an effort to ensure compliance, Congress prepared a checklist of *Berger* and *Katz* requirements:

- (1) Particularity in describing the place to be searched and the person or thing to be seized.
- (2) Particularity in describing the crime that has been, is being, or is about to be committed.
- (3) Particularity in describing the type of conversation sought.
- (4) Limitations on the officer executing the eavesdrop order which (a) pre-

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was then chaired by Chief Justice Earl Warren. TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME; ELECTRONIC SURVEILLANCE: TWO VIEWS 2-3 (G. Blakey ed. 1980) [hereinafter cited as ELECTRONIC SURVEILLANCE: TWO VIEWS]. See H.R. DOC. NO. 194, 90th Cong., 1st Sess. 80 (1967) (The Judicial Conference of the United States).

<sup>219</sup> See *infra* notes 220-25 and accompanying text.

<sup>220</sup> See, e.g., Donnelly, *Comments and Caveats on the Wiretapping Controversy*, 63 YALE L.J. 799, 804-05 (1954); Westin, *supra* note 39, at 188.

<sup>221</sup> 385 U.S. 323, 353 (Douglas, J., dissenting).

<sup>222</sup> See *supra* notes 92-94, 118-26 & 160-65 and accompanying text.

<sup>223</sup> NWC REPORT, *supra* note 1, at 189 n.7 (concurring opinion of Commissioner Blakey).

vent his searching unauthorized areas, and (b) prevent further searching once the property sought is found.

(5) Probable cause in seeking to renew the eavesdrop order.

(6) Dispatch in executing the eavesdrop order.

(7) Requirement that the executing officer make a return on the eavesdrop order showing what was seized.

(8) A showing of exigent circumstances in order to overcome the defect of not giving prior notice.<sup>224</sup>

Congress, however, did not rely exclusively upon this checklist. Years of debate had produced many proposals of both constitutional and nonconstitutional dimension that offered additional ways both to limit the availability of electronic surveillance and control against abuse.<sup>225</sup> These proposals, together with the Supreme Court's guidelines, served as the foundation for Title III.

### C. TITLE III STANDARDS

#### 1. *Prohibitions and Sanctions*

The structure of Title III is comprehensive. It was designed to provide a framework for regulating all so-called *nonconsensual*<sup>226</sup> electronic surveillance except national security eavesdropping;<sup>227</sup> states were free to adopt laws of their own, but compliance with federal statutory standards was deemed essential.<sup>228</sup> From a philosophical as well as pragmatic perspective, Title III is restrictive in tone: all electronic surveillance is prohibited, except as specifically provided therein. Thus, "Title III takes the form of a series of limitations and prohibitions on lawful eavesdropping: the 'do's' are largely the residue of multitudinous

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<sup>224</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2161-62.

<sup>225</sup> For example, the following were among the early proposals that were eventually incorporated into Title III: (1) limitation of electronic surveillance to certain specified crimes; (2) requiring preapplication approval by a senior executive official; (3) mandating exhaustion of investigative alternatives; (4) imposing a post-interception notice obligation; (5) ensuring political accountability by requiring that public reports be filed; (6) suppression of evidence for noncompliance; and (7) civil and criminal penalties for statutory violations. See T. TAYLOR, *supra* note 25, at 89-90; Semerjian, *supra* note 69, at 242-44; Gasque, *supra* note 48, at 609-13; Westin, *supra* note 39, at 200-08; Westin, *supra* note 85, at 1224-28.

<sup>226</sup> Electronic surveillance is considered nonconsensual when none of the overheard parties have consented to the interception. Somewhat anomalously, eavesdropping is considered consensual so long as any one of the intercepted parties had consented. See *supra* note 1.

<sup>227</sup> 18 U.S.C. § 2511(2)(3) (1970), amended by 18 U.S.C. § 2511(f) (Supp. III 1979); LEGISLATIVE HISTORY, *supra* note 111, at 2153; see Title III, Pub. L. No. 90-351, § 801(b), 82 Stat. 211 (1968) (congressional statement of findings). Congress later enacted the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-11 (Supp. III 1979)), to address the question of domestic security surveillance. This enactment was done in response to the Supreme Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972). See *infra* notes 392-402 and accompanying text.

<sup>228</sup> 18 U.S.C. § 2516(2) (1976); LEGISLATIVE HISTORY, *supra* note 111, at 2156, 2187.

'don't's'.<sup>229</sup> Criminal penalties and civil remedies are available against anyone who willfully intercepts, uses, or discloses information in violation of the statute.<sup>230</sup> Disclosure of evidence derived from electronic surveillance is prohibited unless the evidence was obtained by "means authorized by this chapter,"<sup>231</sup> a prohibition primarily enforced through a broad statutory exclusionary rule that transcends its constitutional counterpart by being applicable to all governmental judicial, quasi-judicial, and administrative proceedings.<sup>232</sup> Hence, the rule was designed to have a powerful deterrent effect against abuse.<sup>233</sup>

<sup>229</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2153, 2180; NWC REPORT, *supra* note 1, at 4; see *United States v. LaGorga*, 336 F. Supp. 190, 192 n.2 (W.D. Pa. 1971). This approach is in sharp contrast to one which authorizes all eavesdropping except as specifically prohibited. See generally Warren, *Telephone-Tapping in the United Kingdom: Is Big Brother Watching You?*, 14 BRACTON L.J. 7, 7-10 (1981).

<sup>230</sup> 18 U.S.C. §§ 2511(a), 2520 (1976).

<sup>231</sup> 18 U.S.C. § 2517 (1976).

<sup>232</sup> Title III's exclusionary remedy provides as follows:

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.

18 U.S.C. § 2515 (1976). While the reach of the Supreme Court's exclusionary rule may have been somewhat uncertain in 1968, it is nevertheless clear that Title III's drafters believed that they were extending the scope of this principle:

The standard goes, however, beyond existing law in some respects. Unlawful wiretap evidence is presently suppressible in federal . . . but not state . . . criminal trials. . . . [I]t is not clear that unlawful wiretap evidence would be suppressible in a private civil trial. . . . Generally, the suppression rule has been held not to apply in civil litigation . . . or to the actions of private parties. . . . Recent comprehensive legislation in Illinois . . . and New York . . . on the other hand, has extended the suppression rule to all illegally obtained evidence secured by electronic surveillance techniques by private or law enforcement officials. The standard thus reflects this legislation and seeks to deter both unlawful law enforcement and private use by extending the suppression rule to both criminal and civil litigation.

ABA STANDARDS, *supra* note 81, at 115-16 (citations omitted). The Reporter of the ABA Standards was Professor G. Robert Blakey, principal draftsman of Title III. These standards were relied upon extensively in codifying the federal statute. Telephone interview with Professor G. Robert Blakey, Notre Dame Law School (Sept. 22, 1982). See J. CARR, *supra* note 18, at 150-51; Schwartz, *supra* note 15, at 456. See generally *United States v. Dorfman*, 690 F.2d 1217, 1227 (7th Cir. 1982).

Title III's legislative history states that there was no intention "generally to press the scope of the suppression rule beyond present search and seizure law." LEGISLATIVE HISTORY, *supra* note 111, at 2185. Professor Blakey, however, indicates that this language was merely intended to ensure the retention of certain common law exceptions to the suppression principle, such as attenuation and use for impeachment. Telephone interview with Professor G. Robert Blakey, Notre Dame Law School (Sept. 22, 1982); cf. *Sabbath v. United States*, 391 U.S. 585, 589-91 (1968) (recognizing common law exception to statutory announcement requirement of 18 U.S.C. § 3109 arrest rule).

<sup>233</sup> It has been noted that the exclusionary evidence rule, as applied to the conduct of searches generally, does not work to prevent unlawful searches since police officers, acting on the spot, are not always conscious of the future problems of the prosecutor at trial. This is not necessarily so with respect to electronic surveillance procedures, however,

## 2. Prerequisites to Lawful Surveillance

Compliance with Title III involves conforming to three categories of requirements: jurisdictional, documentary, and executional.

### a. Jurisdictional requirements

Title III imposes three jurisdictional prerequisites for a valid eavesdropping order: (1) the application must be for surveillance pertaining to a crime designated by the statute;<sup>234</sup> (2) it must initially have been authorized by a designated executive official;<sup>235</sup> and (3) it must be filed before a judge of competent jurisdiction.<sup>236</sup> Each of these requirements is designed to limit the use of electronic surveillance. For example, federal applications may be authorized only by the Attorney General or a specially designated Assistant Attorney General,<sup>237</sup> a restriction intended to ensure that a high level of discretion is exercised by a politically accountable, senior executive official before a court application is even undertaken.<sup>238</sup> The designated crime limitation is designed to restrict electronic surveillance to major crimes which are either "intrinsically serious or . . . characteristic of the operations of organized crime."<sup>239</sup> Finally, the statute defines judges of competent jurisdiction to include only federal district and appellate judges and their state counterparts.<sup>240</sup> In contrast to the relatively permissive practices associated with conventional search warrants, this "is intended to guarantee responsible judicial participation in the decision to use these techniques."<sup>241</sup> None of these requirements are constitutionally mandated. They all, however, are "central" to the statutory scheme.<sup>242</sup>

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where the prosecutor is, under the statute, brought into the electronic surveillance investigation from the outset. Since a proper Title III search is so carefully guided to securing the best evidence for conviction, and provides for prosecutorial and judicial guidance throughout the course of the search, the exclusionary evidence rule has special impact with respect to these searches.

NWC REPORT, *supra* note 1, at 12; see J. CARR, *supra* note 18, at 354-55.

<sup>234</sup> 18 U.S.C. § 2516(1) (1976).

<sup>235</sup> *Id.*

<sup>236</sup> 18 U.S.C. §§ 2510(9)(a), 2518(1) (1976).

<sup>237</sup> 18 U.S.C. § 2516(1) (1976). In states authorizing electronic surveillance, Title III requires wiretaps to be initially authorized by the "principal prosecuting attorney of any state or political subdivision thereof." 18 U.S.C. § 2516(2) (1976). Congress recognized that this would not foster the same centralization achieved federally, but the realities of state law enforcement systems precluded any other approach. See LEGISLATIVE HISTORY, *supra* note 111, at 2187.

<sup>238</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2185. Accordingly, "[s]hould abuses occur, the lines of responsibility lead to an identifiable person." *Id.*

<sup>239</sup> *Id.* at 2186.

<sup>240</sup> 18 U.S.C. § 2510(9) (1976).

<sup>241</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2179.

<sup>242</sup> For a discussion of the concept of centrality, see *infra* notes 454-66 and accompanying text.

## b. Documentary requirements

Except for emergency situations recognized by Title III,<sup>243</sup> no eavesdropping order may be issued without a properly authorized application.<sup>244</sup> The eavesdropping application must be in writing and under oath.<sup>245</sup> In essence, it must provide a "full and complete" statement establishing probable cause for each of the following elements: person, designated crime, conversation, communication facility, and time period. In other words, there must be probable cause to believe that a particular person involved in a designated crime will have discussion pertinent to that crime using a particular phone (or at a particular place) during a specified time period.<sup>246</sup> Title III's legislative history indicates that, together, these requirements "are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirements of particularity."<sup>247</sup> Furthermore, to discourage both routine use of electronic surveillance and the possibility of abuse for individual harassment, the application must detail whether investigative alternatives reasonably have been exhausted and provide "a full and complete statement" concerning any previous surveillance requests involving persons or facilities named in the application.<sup>248</sup>

Once these requirements are satisfactorily met, the judge may issue an eavesdropping order.<sup>249</sup> The order itself must designate the personnel authorized to conduct the surveillance,<sup>250</sup> identify both the person (if known) and place targeted for interception,<sup>251</sup> provide "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates,"<sup>252</sup> and specify the period of surveillance.<sup>253</sup> Each order must contain directives mandating prompt execution, minimization of the interception of irrelevant conversations, and termination upon attainment of the surveillance objective or passage of the authorized time period (not to exceed 30 days) whichever comes first.<sup>254</sup> Applications for extensions may be filed.

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<sup>243</sup> 18 U.S.C. § 2518(7) (1976); *see infra* notes 292-302.

<sup>244</sup> 18 U.S.C. § 2518(1) (1976).

<sup>245</sup> *Id.*

<sup>246</sup> 18 U.S.C. § 2518(1)(b) (1976).

<sup>247</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2191.

<sup>248</sup> 18 U.S.C. § 2518(1)(c), (e) (1976); *see* LEGISLATIVE HISTORY, *supra* note 111, 2190-91; ELECTRONIC SURVEILLANCE: TWO VIEWS, *supra* note 218, at 29-31, 33.

<sup>249</sup> This decision is discretionary. *See infra* note 267 and accompanying text.

<sup>250</sup> 18 U.S.C. § 2518(4)(d) (1976).

<sup>251</sup> *Id.* § 2518(4)(a), (b).

<sup>252</sup> *Id.* § 2518(4)(c).

<sup>253</sup> *Id.* § 2518(4)(e).

<sup>254</sup> *Id.* § 2518(5).

Each such application, however, must comply anew with all statutory requirements, and, if granted, be met with a corresponding extension order.<sup>255</sup>

c. Executorial requirements

Surveillance may only be conducted by properly authorized personnel,<sup>256</sup> and must be done in a manner that minimizes the interception of irrelevant conversations;<sup>257</sup> subject to legitimate "plain view" exceptions, officers, in effect, must "spot monitor" whenever a communication seems nonpertinent to the crime specified in the order.<sup>258</sup> To the extent possible, however, all monitored conversations (or portions thereof) should be recorded.<sup>259</sup> This recordation requirement is intended to ensure the availability at trial of the most reliable evidence of the conversations; subject to technical difficulties, a tape recording of the conversation will be more reliable and more credible than an agent's recollection.<sup>260</sup> The statute requires that the recording be made in a way that reduces the possibility of alteration;<sup>261</sup> as a further precaution, immediately upon expiration of the authorized surveillance period, all tape recordings must be sealed under judicial supervision.<sup>262</sup> Next, within flexible time limits, the statute requires post-interception inventory notice to be given to all persons who were named in the application or order; such notice to other overheard parties is left to the judge's discretion.<sup>263</sup> Potential victims of unlawful surveillance thus may be encouraged to file civil suits.<sup>264</sup> Finally, the statute directs both the authorizing executive official and the approving judge to provide the Administrative Office of the United States Courts with a comprehensive summary of each surveillance case.<sup>265</sup> These reports serve as the basis for a detailed compilation that is presented to Congress annually, thereby furnishing a means for public evaluation of the court order

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<sup>255</sup> *Id.* § 2518(1)(f), (4); *see infra* notes 333-34 and accompanying text.

<sup>256</sup> 18 U.S.C. §§ 2510(7), 2518(1)(a), (4)(d) (1976).

<sup>257</sup> *Id.* § 2518(5).

<sup>258</sup> *Id.* § 2518(5), 2517(5). To "spot monitor" means that the surveilling agent temporarily terminates interception, subject to periodic checks to ensure that the conversation has not taken a pertinent turn. *See, e.g.*, Note, *Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories*, 61 CORNELL L. REV. 92, 121 (1975).

<sup>259</sup> 18 U.S.C. § 2518(9)(a) (1976).

<sup>260</sup> *See* LEGISLATIVE HISTORY, *supra* note 111, at 2193; *see also supra* note 80 and accompanying text.

<sup>261</sup> 18 U.S.C. § 2518(8)(a) (1976).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* § 2518(8)(d).

<sup>264</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2194.

<sup>265</sup> 18 U.S.C. § 2519 (1976).



system.<sup>266</sup>

### 3. *Judicial Supervision and Strict Enforcement*

Basic to Title III is the concept of judicial supervision. The supervising judge is responsible for ensuring compliance with a complex array of constitutional and statutory requirements. Additionally, the judge is given discretion to "deny the application altogether, or grant it as suitably modified,"<sup>267</sup> notwithstanding technical compliance with all legal requirements. For example, he may consider electronic surveillance unwise on policy grounds. Furthermore, should the application be granted, his order may be conditioned upon the delivery of periodic progress reports to ensure that continued surveillance is appropriate,<sup>268</sup> and, at any time, he may direct that monitoring be discontinued.<sup>269</sup>

The legislative record also demonstrates that Congress intended the statute to be enforced with meticulous care.<sup>270</sup> Title III's sponsors clearly recognized that society's right to privacy would depend, in large part, upon this system of statutory controls and that these controls, in turn, were dependent upon proper judicial implementation. For this reason, the sponsors repeatedly sought to reassure the public that the law would be enforced strictly "by a scrupulous system of impartial court authorized supervision."<sup>271</sup> Civil libertarians, however, were not persuaded. They still believed the statute to be unconstitutional.

### 4. *The Critical Response*

This Article, of course, is ultimately concerned with the enforcement of Title III. Nevertheless, in order to appreciate the major issues raised by its application, the original facial attacks on the statute must be put into perspective. Criticism of Title III was multifaceted. The law was perceived by some as "an invitation to widespread eavesdropping."<sup>272</sup> Critics, claiming that too much electronic surveillance was not subject to the warrant requirement, urged that national security surveil-

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<sup>266</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2196.

<sup>267</sup> *Id.* at 2191. Section 2518(3) states in pertinent part: "Upon such application the judge may enter an ex parte order . . . authorizing or approving interception of wire or oral communications. . . ." 18 U.S.C. § 2518(3) (1976) (emphasis added). See NWC REPORT, *supra* note 1, at 76-77; ABA STANDARDS, *supra* note 81, at 146.

<sup>268</sup> 18 U.S.C. § 2518(6) (1976).

<sup>269</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2193; see *supra* note 267.

<sup>270</sup> Title III, Pub. L. No. 90-351, § 801(b), (d), 82 Stat. 211 (1968) (congressional statement of findings).

<sup>271</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2274 (statements of Sen. Dirksen, Sen. Hruska, Sen. Scott and Sen. Thurmond).

<sup>272</sup> Schwartz, *supra* note 15, at 509. Since Professor Schwartz has been one of Title III's foremost opponents, his criticisms provide much of the initial framework for the textual discussion which follows.

lances, consensual monitorings, and emergency eavesdroppings should also require prior judicial authorization.<sup>273</sup> Moreover, too much surveillance purportedly was permitted under the court order system; in this respect, opponents contended that the range of designated offenses was far too broad<sup>274</sup> and that the standards for authorizing surveillance and controlling its scope were too flexible.<sup>275</sup> Nor did the statute contain any direct controls against "judge shopping," so that any judges who chose to enforce the law strictly would, in all likelihood, be avoided.<sup>276</sup> Title III's inventory notice provision was also criticized, as it failed to guarantee notice for all overheard parties.<sup>277</sup> Finally, it was argued that the need for electronic surveillance had not been demonstrated; organized crime investigations could be effective without it.<sup>278</sup>

Not all these arguments, however, were of constitutional significance. For example, the range of designated offenses, while admittedly very broad, was essentially a matter of legislative choice rather than a constitutional requirement.<sup>279</sup> Similarly, the Constitution normally does not require strict controls against judge shopping.<sup>280</sup> Finally, the question of need was also a matter of legislative wisdom; at the very least, there was certainly a rational basis to support Congress' findings of necessity.<sup>281</sup> Moreover, Title III provided for the establishment of a National Wiretapping Commission—six years hence—to reassess the question of need as well as the statute's overall operation.<sup>282</sup>

Regarding the scope of Title III's search warrant exceptions, some basis for constitutional concern existed. The widely criticized national

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<sup>273</sup> Schwartz, *supra* note 15, at 496; see LEGISLATIVE HISTORY, *supra* note 111, at 2236 (statement of Sen. Hart); Linzer, *Federal Procedure for Court Ordered Electronic Surveillance: Does it Meet the Standards of Berger and Katz?*, 60 J. CRIM. L. & CRIMINOLOGY 203, 206-07 (1969). See generally E. LAPIDUS, *supra* note 216, at 92-105.

<sup>274</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2235, 2242 (statements of Sen. Hart and Sen. Fong); E. LAPIDUS, *supra* note 216, at 73-76; Schwartz, *supra* note 15, at 481-82.

<sup>275</sup> See *infra* notes 303-12 and accompanying text.

<sup>276</sup> Schwartz, *supra* note 15, at 483-84; see E. LAPIDUS, *supra* note 216, at 72.

<sup>277</sup> Schwartz, *supra* note 15, at 485; see E. LAPIDUS, *supra* note 216, at 73.

<sup>278</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2224, 2232 (statements of Sen. Long and Sen. Hart); see Semerjian, *supra* note 68, at 231.

<sup>279</sup> See generally *Wiretapping, Attorney General's Program, 1962: Hearings on S.2813 and S.1495 Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 17, 22-23 (1962) (statement of Attorney General Robert F. Kennedy). Attorney General Kennedy stated that specific enumeration of particular offenses ensures that a definitive line is indicated, but he also acknowledged that the decision as to which crimes were to be included was somewhat arbitrary.

<sup>280</sup> The availability of subsequent judicial review under circumstances in which the choice of judge cannot be influenced is an adequate response to this claim. ABA STANDARDS, *supra* note 81, at 136-37.

<sup>281</sup> See *supra* notes 199-206 and accompanying text.

<sup>282</sup> Commission Enabling Act, Pub. L. No. 90-351, § 804, 82 Stat. 223 (1968), amended by, Pub. L. No. 91-644, 84 Stat. 1880 (1971), Pub. L. No. 93-609, 88 Stat. 1972 (1974), and Pub. L. No. 94-176, 89 Stat. 1031 (1975); see also NWC REPORT, *supra* note 1, at 230-31.

security exemption, however, was ambiguous in impact. Arguably, the applicable clause merely stated that such surveillances were not regulated by Title III.<sup>283</sup> If so, no constitutional problem was raised—at least by Title III—since the validity of any warrantless national security surveillance would then have to stand on its own. Admittedly, most critics maintained that Title III affirmatively authorized such eavesdropping, and was therefore unconstitutional,<sup>284</sup> but the matter still was subject to potentially differing judicial interpretation.<sup>285</sup>

There was no doubt, however, that the statute did allow warrantless consensual electronic surveillance (which occurs when one party to the conversation, usually a police officer or cooperating citizen, permits the monitoring).<sup>286</sup> Such surveillance was far more frequent than non-consensual eavesdropping.<sup>287</sup> Critics argued that, despite *On Lee* and *Lopez*, *Osborn*'s emphasis on prior judicial authorization in a consensual monitoring case now mandated prior warrants for all consensual electronic surveillance.<sup>288</sup> In support of this argument, they pointed to the emphasis which *Katz* and *Berger* had placed on the *Osborn* case. Nevertheless, sound tactical reasons existed for authorizing such surveillance without prior judicial authorization. Consensual electronic surveillance often was used to protect informants and undercover police officers in cases in which there was no probable cause; indeed, such surveillance was often crucial towards corroborating the reliability of an informant or developing probable cause.<sup>289</sup> Thus, a prior search warrant based

<sup>283</sup> At the time, 18 U.S.C. § 2511(3) (1976) was the applicable clause. For the full text of § 2511(3), see *infra* text accompanying note 400. See LEGISLATIVE HISTORY, *supra* note 111, at 2182-83. The provision has since been amended in light of the Supreme Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972), and the passage of the Foreign Intelligence Surveillance Act of 1978. See *supra* note 227 and *infra* notes 392-412 and accompanying text.

<sup>284</sup> See Linzer, *supra* note 273, at 213-14; Schwartz, *supra* note 15, at 491-93.

<sup>285</sup> See *infra* notes 392-412.

<sup>286</sup> 18 U.S.C. § 2511(2)(b)-(d) (1976); see *supra* note 1.

<sup>287</sup> Greenawalt, *supra* note 140, at 211-12; see NWC REPORT, *supra* note 1, at 114; see *infra* note 947.

<sup>288</sup> See, e.g., Greenawalt, *supra* note 140, at 201-02; Schwartz, *supra* note 15, at 495-96.

<sup>289</sup> For example, the National Wiretapping Commission made the following observations in this respect:

In consensual surveillance, the consenting party is often an informant of somewhat dubious character. Quite often the informant's consent to interception is obtained to establish his veracity and credibility, which might otherwise be impossible. Wiring the informant is thus related to establishing sufficient probable cause, once his credibility is established, for a surveillance order or an arrest or search warrant. As one prosecutor stated, this is frequently the "first step" in an investigation. Also, when informants' conversations are overheard or recorded, they themselves are kept honest, later impeachment becomes impossible, and informants' covers can be preserved. Furthermore, by recording an informant's conversation, the government obtains a form of insurance against later recantation.

As a result of consensual surveillance, officers generally believe, the best possible evidence is acquired, and no better means of corroborating an informant's information

upon probable cause frequently would not be obtainable for such surveillance.<sup>290</sup> Moreover, from a constitutional standpoint, *On Lee* and *Lopez* had not been overruled. Indeed, there was no reason to question the continued validity of the proposition, established in *Lopez*, that once someone assumes the risk of disclosure by another party to a conversation, he has no constitutional right "to rely upon possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment."<sup>291</sup>

Title III's treatment of warrantless emergency surveillances, however, was somewhat suspect. The provision authorized such searches in national security situations or cases involving "conspiratorial activities characteristic of organized crime," provided that all statutory requirements could have been met but for prevailing time constraints.<sup>292</sup> Furthermore, within forty-eight hours of interception, an application must be filed seeking retroactive approval for the surveillance.<sup>293</sup> This provision, however, was considered ambiguous and unnecessarily broad.<sup>294</sup> Moreover, it was maintained that it was not very difficult to find a judge

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or a witness' testimony is available. This is particularly important in corruption cases and similar situations involving the word of one person against another.

Furthermore, wiring a person who is alleging official impropriety can benefit the official involved. Not infrequently, persons making such charges withdraw them when asked to be wired. In such circumstances, the official is protected, and it has been suggested that elimination of consensual surveillance would adversely affect innocent people and potential defendants as much as it would harm law enforcement.

Another very important use of consensual surveillance is to protect the agent or informant. Particularly in narcotics cases, where acts of violence against agents have increased substantially in recent years, wiring the officer can add a measure of protection not otherwise available. On the other hand, if the officer is discovered wearing the device, he is likely to be more endangered. When such danger is anticipated, bugging the room or area where the conversation will take place is a better solution.

Consensual surveillance gives officers mobility and flexibility. Not only can immediate protective action be taken if the officer is assaulted, but raids and related activities can be more efficiently coordinated. Finally, consensual surveillance can also play an important part in gathering intelligence.

. . . .

If consensual surveillance were to be used to obtain probable cause for a surveillance order or an arrest or search warrant, as is often the case, a warrant procedure, if it had a probable cause requirement, would be impossible to obtain. It would require officers to have probable cause to use a device for obtaining probable cause. In other situations, such as drug transactions, two meetings instead of one would be required: the first to acquire probable cause, the second to record the conversation.

NWC REPORT, *supra* note 1, at 113-14, 117 (footnotes omitted).

<sup>290</sup> *Id.*

<sup>291</sup> *Lopez v. United States*, 377 U.S. 427, 437-38 (1963); see *supra* note 77. In 1971, the Supreme Court definitively decided that consensual electronic surveillance is not governed by the fourth amendment. *United States v. White*, 401 U.S. 745, 752-54 (1971).

<sup>292</sup> 18 U.S.C. § 2518(8) (1976).

<sup>293</sup> *Id.*

<sup>294</sup> Schwartz, *supra* note 15, at 486-90; see E. LAPIDUS, *supra* note 216, at 6, 93-95, 141.

who would approve an emergency interception.<sup>295</sup> Critics also observed that should the police initiate such surveillance and fail to obtain pertinent information, the courts and overheard parties would never know eavesdropping had occurred if no retroactive application were ever filed.<sup>296</sup> Finally, from a constitutional perspective, the Supreme Court had suggested in *Katz* that electronic surveillance without prior judicial approval could not be justified on traditional emergency search grounds.<sup>297</sup>

There was considerable validity to these arguments. Although in some respects the emergency exception is actually too narrow,<sup>298</sup> overall it is, in fact, unnecessarily flexible. Its scope is ambiguous,<sup>299</sup> and there is no reason not to require prior oral approval from an emergency judge before permitting such searches.<sup>300</sup> The Supreme Court's statements in *Katz* are also troublesome; but since warrantless emergency searches are an established part of our constitutional doctrine,<sup>301</sup> the *Katz* Court may

<sup>295</sup> Schwartz, *supra* note 15, at 487-88.

<sup>296</sup> *Id.* at 487; *cf.* United States v. United States District Court, 407 U.S. 297, 317-18 (1972).

<sup>297</sup> *Katz v. United States*, 389 U.S. 347, 357-58 (1967).

<sup>298</sup> For example, a glaring omission is the provision's failure to authorize emergency searches in life endangering situations not involving organized crime or national security interests. A Justice Department spokesman has acknowledged that this omission occasionally has effected somewhat strained statutory interpretations:

I know that the Attorney General has approved emergency wiretaps without court order followed 48 hours later by a court order in situations concerning hostages or other grave danger.

I think that has been true of Attorneys General for a period of time. They have done it with some stretching, both of conscience and of statutory language. It has seemed entirely clear to them and to me that Congress did not intend in Title III to preclude the temporary placing of an electronic monitoring device or of a wiretap in a situation where a bank robber was holding five people hostage or a kidnaper was taking a kidnap victim away in a car.

*Wiretap Amendments: Hearings Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 6-7 (1980) (statement of Assistant Attorney General Philip B. Heymann); see SENATE COMM. ON THE JUDICIARY, AMENDMENTS TO THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, S. REP. NO. 319, 97th Cong., 1st Sess. 6-10 (1982).

<sup>299</sup> For example, the terms "organized crime" and "national security" are not statutorily defined. See 18 U.S.C. § 2510 (1976). For a discussion of the term "organized crime," see *supra* note 111.

<sup>300</sup> This is the procedure employed in New Jersey. N.J. STAT. ANN. § 2A:156A-13 (West 1971). At the very least, investigators should be required to notify a judge that emergency surveillance is being conducted. See NWC REPORT, *supra* note 1, at 18 (recommending statutory amendment requiring oral notification of judges). This notification would eliminate the concern raised earlier. See *supra* note 296 and accompanying text.

<sup>301</sup> See, e.g., *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (recognizing propriety of emergency searches). For a detailed discussion of this principle, see 2 W. LAFAVE, *supra* note 60, § 6.5, (b), (d), at 437-50, 455-58 (1978). For an excellent case demonstrating this principle in application, see *People v. Sirhan*, 7 Cal. 3d 710, 736-41, 497 P.2d 1121, 1138-41, 102 Cal. Rptr. 385, 402-05 (1972), *cert. denied*, 410 U.S. 947 (1973) (emergency search to uncover possi-

have been stating its position only in terms of there being "little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency."<sup>302</sup> Presumably, the statutory provision was inserted to address this remote possibility, with the constitutionality of its application left to case by case determination. In any event, the availability of emergency searches certainly does not invalidate the entire statute.

Regarding the actual authorization and surveillance process, Title III opponents were somewhat concerned that the exhaustion requirement would be blithely ignored.<sup>303</sup> The main focus of their criticism, however, centered around the statute's particularity standards, as well as the potential scope and duration of the resulting surveillance. In a conventional search warrant, particularity serves to limit the scope of both the search and the resulting seizure.<sup>304</sup> These same purposes are served in an electronic search; if the surveilling officer understands the precise conversation which is the subject of his search, he will know to terminate interception (and commence spot monitoring) when nonpertinent conversations occur. Critics maintained, however, that particularizing an anticipated conversation is almost always an inherently impossible task.<sup>305</sup> The Supreme Court's reliance upon *Osborn* was said to be distinguishable because *Osborn* involved a one shot, consensual monitoring which easily lends itself to particularization as the undercover agent can plan the conversation before it occurs.<sup>306</sup> Thus, it was argued, unless electronic surveillance is limited to situations in which

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ble widespread conspiracy to assassinate political leaders). Hence, specific statutory authorization for such searches was not constitutionally required.

<sup>302</sup> *Katz v. United States*, 389 U.S. at 358 n.21. More specifically, the Court's statement suggesting that "electronic surveillance, without prior authorization [cannot] be justified on grounds of 'hot pursuit,'" *id.* at 358, appears to have been qualified by the accompanying footnote commentary:

Although "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," . . . there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

*Id.* at 358 n.21 (citation omitted).

<sup>303</sup> For example, Professor Schwartz was extremely skeptical of this provision:

Finally, the requirement set forth in section 2518(1)(c), that reasons must be given as to why measures other than eavesdropping are not used, is likely to be of little or no significance if any relationship to organized crime is alleged; and this seems to be the only requirement specially imposed for wiretapping and bugging.

Schwartz, *supra* note 15, at 486.

<sup>304</sup> 3 W. LAFAVE, *supra* note 60, §§ 4.5, 4.6, at 72, 95. This is accomplished because the warrant's specification of what may be seized necessarily determines the permissible scope of the resulting search. Thus, for example, under a warrant for stolen televisions, agents would not be permitted to examine the contents of desk drawers.

<sup>305</sup> See, e.g., E. LAPIDUS, *supra* note 216, at 194; Schwartz, *supra* note 15, at 457-73.

<sup>306</sup> Dash, *supra* note 69, at 311, 313; Schwartz, *supra* note 15, at 459.

particularity similar to *Osborn* can be attained, there has not been compliance with the *Berger* and *Katz* standards.<sup>307</sup>

Moreover, once permitted, electronic surveillance was said to sweep too broadly.<sup>308</sup> In *Berger*, Justice Douglas had warned of the indiscriminate nature of electronic surveillance.<sup>309</sup> Critics contended that Title III does not adequately cure this problem: "Nothing can be done to capture only the conversations authorized in the tapping order."<sup>310</sup> Irrelevant and, indeed, often privileged conversations inevitably will be overheard and recorded.<sup>311</sup> Frequently, these conversations would involve innocent parties for whom the statute does not automatically provide inventory notice.<sup>312</sup> Further, the length of such surveillance was purported to be unlimited, directly in violation of *Berger*. In effect, such surveillance was said to constitute an endless series of intrusions pursuant to a single showing of probable cause.<sup>313</sup>

These criticisms, however, usually either stemmed from a misconstruction of applicable statutory provisions or sought to impose an unduly rigid constitutional perspective upon Title III. Surely it was inconsistent to demand a liberal interpretation of the fourth amendment to effect the demise of *Olmstead*—so that modern privacy rights are protected—and then to insist upon a narrow reading when the needs of modern law enforcement are considered.<sup>314</sup> Civil liberties ought not necessarily "call for inherently inefficient police work."<sup>315</sup> Title III is a modern statute designed to address a modern problem,<sup>316</sup> and the Con-

<sup>307</sup> Dash, *supra* note 69, at 311, 313; Schwartz, *supra* note 15, at 459.

<sup>308</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2229-31 (statement of Sen. Hart); Schwartz, *supra* note 15, at 457-64.

<sup>309</sup> See *supra* text accompanying notes 142-45.

<sup>310</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2229 (statement of Sen. Hart).

<sup>311</sup> Schwartz, *supra* note 15, at 466.

<sup>312</sup> See *supra* notes 145, 264 & 277 and accompanying text.

<sup>313</sup> Linzer, *supra* note 273, at 211-12; Schwartz, *supra* note 15, at 461-62.

<sup>314</sup> Professor Kamisar's observations are directly pertinent here:

Nor does the wording of the amendment bother me very much. The amendment does call for a warrant "particularly describing" the "things to be seized." However, if to rule that conversations are not "papers" or "effects" or capable of being "seized" is to read the fourth amendment "with the literalness of a country parson interpreting the first chapter of Genesis," to contend on the other hand that such conversations are not only constitutionally protected, but incapable of being "particularly described" in advance, and therefore beyond the reach of any court order, is not to display much more sophistication. Surely wiretapping opponents do not have to be reminded that "it is a Constitution we are expounding."

Kamisar, *supra* note 32, at 912-13 (footnotes omitted).

<sup>315</sup> NWC REPORT, *supra* note 1, at 205-06 (concurring opinion of Commissioner Blakey).

<sup>316</sup> The basis for this observation was summarized in Title III's legislative history:

We inherited from England a medieval system, devised originally for a stable, homogeneous, primarily agrarian community. In our formative years, we had no professional police force. Today, however, we are a mobile, modern, heterogeneous, urban industrial community. Our Nation, moreover, is no longer small. Our traditional methods in the administration of justice, too, were fashioned in response to the problems of our Nation

stitution should be interpreted accordingly. Indeed, such flexibility seems to be what Justice Brennan envisioned when he wrote his historic dissent in *Lopez*.<sup>317</sup>

Of greater significance, however, Title III as drafted effectively meets those problems which might otherwise make electronic surveillance indiscriminate and inordinately prolonged. By initially imposing a probable cause requirement as to person, designated crime, communication facility, particular conversations, and time period,<sup>318</sup> the statute provides an initial framework for defining the permissible scope and duration of surveillance. The order may authorize surveillance for as much as thirty days, but only if there is probable cause to believe that relevant conversations will be overheard during this time period.<sup>319</sup> The statute further provides that surveillance must terminate earlier if the

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as they were in its formative years. In years past it was not possible to investigate crime aided by science. Today it is not only possible but necessary, in the development of evidence, to subject it to analysis by the hands of those trained in the scientific disciplines. Even so, scientific "crime detection, popular fiction to the contrary notwithstanding, at present is a limited tool" . . . . In our formative years, offenses usually occurred between neighbors. No specialized law enforcement force was thought necessary to bring such crimes into the system of justice. Ignored entirely in the development of our system of justice, therefore, was the possibility of the growth of a phenomenon such as modern organized crime with its attendant corruption of our political and law enforcement processes.

We have always had forms of organized crime and corruption. But there has grown up in our society today highly organized, structured and formalized groups of criminal cartels, whose existence transcends the crime known yesterday, for which our criminal laws and procedures were primarily designed. The "American system was not designed with (organized crime) . . . in mind." [sic] the President's Crime Commission noted in its report "The Challenge of Crime in a Free Society" (1967), "and it has been notably unsuccessful to date in preventing such organizations from preying on society." These hard-core groups have become more than just loose associations of criminals. They have developed into corporations of corruption, indeed quasi-governments within our society, presenting a unique challenge to the administration of justice.

LEGISLATIVE HISTORY, *supra* note 111, at 2157 (citation omitted); see *supra* notes 192 & 199-204 and accompanying text.

<sup>317</sup> See *supra* notes 81-88 and accompanying text. Significantly, Justice Brennan then remarked that "[t]he Constitution would be an utterly impractical instrument of contemporary government if it were deemed to reach only problems familiar to the technology of the eighteenth century . . . ." *Lopez v. United States*, 373 U.S. at 459 (Brennan, J., dissenting).

<sup>318</sup> See *supra* notes 246-47 and accompanying text.

<sup>319</sup> 18 U.S.C. § 2518(1)(d) (1976). The legislative history indicates that surveillance is not to be open-ended:

Subparagraph (d) requires a statement of the period of time during which the interceptions are to be made. This provision must be read in light of paragraphs (4)(e), (5), and (6). . . . Together they require that the duration of an interception not be longer than is necessary under the facts of the particular case. This is a command of the Constitution according to *Berger v. New York* . . . and *Katz v. United States*. . . . Where it is necessary to obtain coverage to [sic] only one meeting, the order should not authorize additional surveillance. Compare *Osborn v. United States*. . . . Where a course of conduct embracing multiple parties and extending over a period of time is involved, the order may properly authorize proportionately longer surveillance, but in no event for longer than 30 days, unless extensions are granted . . . . What is important is that the facts in the application on a case-by-case basis justify the period of time of the surveillance.

LEGISLATIVE HISTORY, *supra* note 111, at 2190.



investigative objective which originally led to the application has been met.<sup>320</sup> During all such surveillance, the monitors may only listen to those conversations relevant to the particularized description contained in the order.<sup>321</sup> Thus, at least theoretically, Title III eliminates open-ended surveillance for purely strategic intelligence purposes.<sup>322</sup> For this preclusion to be legally meaningful, however, the particularity of conversation requirement must be constitutionally adequate.

At least facially, particularity of conversation in the order is adequately assured by three required components: (1) the identification, if known, of the person(s) to be overheard; (2) a particular description of the type of communication to be intercepted; and (3) specification of the offense(s) to which it relates.<sup>323</sup> This standard requires more than merely specifying, for example, "telephonic communications pertinent to the crime of [designated]."<sup>324</sup> The crime itself must be particularized in a manner relating to the predicate facts establishing probable cause for the person(s) named in the order.<sup>325</sup> For example, if the underlying facts establish probable cause to believe that Citizen *K* would be using the telephone to commit extortion against Victim *A*, a satisfactory corresponding description in the order would be "telephonic communications of Citizen *K* involving his extortion of Victim *A*." In contrast, an unduly open-ended description, *given our hypothetical probable cause predicate*, would be "telephonic communications involving the crime of extor-

<sup>320</sup> 18 U.S.C. § 2518(5) (1976); *see supra* note 319. Although Title III does not explicitly require the investigative objective to be stated, such a condition is implicit to § 2518, as well as to other statutory provisions. *See infra* notes 597, 614, 750-51 & 787 and accompanying text. Termination, of course, is subject to the development of a new objective based upon newly acquired information. *See infra* notes 1009-10 and accompanying text.

<sup>321</sup> 18 U.S.C. § 2518(5) (1976).

<sup>322</sup> Ironically, Title III therefore prohibits the open-ended type of surveillance which was originally recommended in the 1967 President's Commission Task Force Report and its accompanying model statute. TASK FORCE REPORT, *supra* note 111, at 92, 101; *see* NWC REPORT, *supra* note 1, at 63, 126. In contrast, other countries tend to use electronic surveillance primarily for strategic intelligence purposes. Cooper, *Comparative Law Aspects of Wiretapping and Electronic Surveillance*, in COMMISSION STUDIES: SUPPORTING MATERIALS FOR THE REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 62 (1976) [hereinafter cited as COMMISSION STUDIES]. Professor Schwartz has suggested that the statute's limitation on such intelligence gathering is inconsistent with its drafters' goal of providing a means to combat organized crime on a long term basis. Schwartz, *supra* note 15, at 471. As such, he maintained Title III's prohibitions frequently would be "flout[ed]." *Id.* This criticism, however, overlooks the fact that strategic intelligence is often legitimately overheard during the course of tactical surveillance. *See infra* notes 329-30, 335-37, 840 & 1009-15 and accompanying text.

<sup>323</sup> 18 U.S.C. § 2518(1)(b)(i), (1)(b)(iv), 4(a), 4(c) (1976).

<sup>324</sup> Likewise, merely characterizing the communication as "oral" or "wire" would not comply with § 2518(1)(b)(iii) or § 2518(4)(c) because other sections of the statute more directly require a specification in such terms. *See* § 2518(1)(b)(ii), (4)(b) (1976). Moreover, such an approach would be baldly unconstitutional, as unlimited surveillance thereby would occur.

<sup>325</sup> *Cf. supra* note 319.

tion." This obviously would be invalid because it permits the monitors to listen to extortion-related conversations of persons other than Citizen *K* and involving victims other than Victim *A*. If the original probable cause predicate were actually broader, however, so that Victim *B* was included also, the sample satisfactory description would expand accordingly. Similarly, if the underlying probable cause predicate established a widespread extortion scheme involving Citizen *K* and multiple victims, some known and some unknown, the corresponding description would likewise expand as follows: "telephonic communications of Citizen *K* involving his extortion of Victim *A*, Victim *B*, and others as yet unknown." Admittedly, the scope of permissible seizure now has been enlarged drastically, but the expansion is supported by the probable cause predicate. Although the description itself essentially describes a broad category of communications, descriptions of this kind are routinely accepted in searches for documentary evidence where, by analogy, the precise written contents of the item sought rarely can be described in advance.<sup>326</sup> Thus, the standard sanctioned by Title III is constitutionally sound.

Nor does Title III permit continuous, long term, indiscriminate seizures. Surveillance authorities are required to minimize the interception of conversations that are not relevant to the scope of the order;<sup>327</sup> failure to minimize is punishable by suppression.<sup>328</sup> Admittedly, the seizure of some irrelevant conversations (or portions thereof) is inevitable, but this should not automatically make the surveillance unreasonable for fourth amendment purposes. Title III's drafters properly reasoned that, even in a conventional search, law enforcement officers often see many items that are irrelevant to the objective of the war-

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<sup>326</sup> ABA STANDARDS, *supra* note 81, at 89-91; see *Andresen v. Maryland*, 427 U.S. 463, 479-81 (1976); *United States v. Coppage*, 635 F.2d 683, 687 (8th Cir. 1980) (warrant for "books, records, chemical equipment, and personal papers relating to the manufacture and distribution of methamphetamine"); *United States v. Vargas*, 621 F.2d 54, 55-56 (2d Cir.) (warrant for "quantity of cocaine, its containers and documentary evidence relating to the smuggling of said cocaine from Lima, Peru to the United States"), *cert. denied*, 449 U.S. 854 (1980); *United States v. Clancy*, 276 F.2d 617, 624, 629 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961) (search warrants authorizing seizure of books, memoranda, tickets, pads, tablets and papers recording receipt of funds described the articles to be seized with sufficient particularity to comply with fourth amendment restraints); *United States v. Wuageneux*, 683 F.2d 1343, 1349-51 (1982) (warrant for eleven categories of business records); *United States v. Auterbridge*, 375 F. Supp. 418, 420 (S.D.N.Y. 1974) (approving generic descriptions in warrant for documents); Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 AM. CRIM. L. REV. 651, 692 (1977); Project, *White-Collar Crime: Second Annual Survey of Law*, 19 AM. CRIM. L. REV. 173, 200 (1981) (fourth amendment particularity requirements as applied to grand jury subpoenas necessitates only description in terms of categories).

<sup>327</sup> 18 U.S.C. § 2518(5) (1976).

<sup>328</sup> *Id.* § 2515.

rant.<sup>329</sup> This analogy, albeit somewhat imperfect because electronic surveillance results in a simultaneous search *and seizure*,<sup>330</sup> nevertheless demonstrates that the incremental loss of privacy is not drastic. True, the possibility that privileged communications occasionally might be overheard is troublesome, but the only effective alternative—prohibiting any monitoring involving privileged parties—poses far more serious concerns by potentially creating a sanctuary for criminal conversations.<sup>331</sup> To the extent that privileged conversations of criminal defendants are overheard, the sixth amendment right to effective assistance of counsel provides an adequate suppression remedy.<sup>332</sup> In other situations, however, the question of extending protection is essentially a matter of legislative policy.

Concededly, surveillance may be long term, since periodic extensions are available potentially every thirty days. Contrary to some critical interpretations,<sup>333</sup> however, the statute does not authorize automatic extensions; each extension requires a showing of renewed compliance with all original authorization requirements, and is further subject to the judge's discretionary termination authority.<sup>334</sup> Moreover, once probable cause for continued surveillance has been firmly established, the subject's privacy concerns, which society was willing to recognize before surveillance began, are no longer paramount.<sup>335</sup> At times, admit-

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<sup>329</sup> ABA STANDARDS, *supra* note 81, at 90; TASK FORCE REPORTS, *supra* note 111, at 96-97; *see* 2 W. LAFAVE, *supra* note 60, § 4.11(c)-(e). Indeed, conventional searches may actually be more intrusive than a purely audio electronic search. Similarly, the use of undercover agents may occasion greater intrusions than electronic surveillance into a subject's everyday life.

<sup>330</sup> Note, however, that police officers executing search warrants may have occasion to photograph aspects of the premises searched. Although, in a sense, the photographed objects have been simultaneously searched and seized, this procedure is not considered unconstitutional *per se*.

<sup>331</sup> Reported cases have frequently demonstrated that the creation of sanctuaries is a valid concern. *See* *United States v. Loftin*, 518 F. Supp. 839, 844 (S.D.N.Y. 1981); *United States v. Loftin*, 507 F. Supp. 108, 111-12 (S.D.N.Y. 1981); *United States v. Bynum*, 360 F. Supp. 400, 406-08 (S.D.N.Y. 1973), *aff'd*, 485 F.2d 490 (2d Cir.), *vacated*, 417 U.S. 903 (1974).

<sup>332</sup> *Cf. Weatherford v. Bursey*, 429 U.S. 545, 556 (1977) (presence of informant during defendant's meetings with counsel not a basis for suppression only because no information was disclosed to prosecution).

<sup>333</sup> *See* Schwartz, *supra* note 15, at 461-63.

<sup>334</sup> *See* 18 U.S.C. § 2518(1)(e), (5) (1976); LEGISLATIVE HISTORY, *supra* note 111, at 2190-91; NWC REPORT, *supra* note 1, at 97-98.

<sup>335</sup> Assuming that the investigative objective has not yet been achieved, the following observation should be dispositive:

No arbitrary time limit should be placed on how long the device is allowed to operate. If it is productive it should be allowed to remain in operation. Indeed, this situation offers the clearest situation where the balance should be struck for justice. When you are certain, not just probably sure, that evidence can be obtained, there should be no reluctance to authorize the use of the equipment. For in this situation the danger of an invasion of innocent privacy is not present. No one should have a right to commit a crime in private if there is virtually no danger of innocent privacy being invaded.

tedly, these extensions may be used for crimes other than those which originally prompted the surveillance,<sup>336</sup> but use of this information is subject to conformance with statutory and constitutional "plain view" requirements.<sup>337</sup> Thus, electronic surveillance properly may serve a strategic intelligence purpose within the framework of Title III's overall prohibition against indiscriminate eavesdropping.

Finally, the fact that only "named" individuals are guaranteed statutory notice is not constitutionally objectionable. The notice question is not a simple matter. Specifically, Congress realized that at times notice of interception might be a source of considerable distress. For example, eavesdropping targets could be embarrassed if their innocent conversations resulted in disclosure of the surveillance to uninvolved parties.<sup>338</sup> The possibility also existed that notice mailed to one's home or business could cause domestic or professional discomfiture respectively.<sup>339</sup> Accordingly, Congress decided to give notice to those most obviously affected by the investigation; others would receive it upon a proper exercise of judicial discretion.<sup>340</sup>

This review, albeit brief, demonstrates the facial validity of Title III, and explains why the law received immediate and widespread constitutional approval. In fact, the combination of constitutional and statutory protections provided in Title III compares favorably with electronic surveillance laws internationally.<sup>341</sup> The real question today, therefore, is not Title III's facial validity, but the manner in which it has been applied. Congress intended that the statute be strictly enforced

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TASK FORCE REPORT, *supra* note 111, at 102.

Nevertheless, a majority of the National Wiretapping Commission recommended that the extension provision be amended:

In lieu of an arbitrary limitation on the number of extensions of an electronic surveillance authorization, Section 2518 should be amended to require, as a prerequisite to an extension, a showing of some special reason to continue the electronic surveillance, such as the receipt of information indicating (1) the existence of other offenses or potential offenses in addition to the subjects of the current authorization, or (2) that other parties to the offense are still to be uncovered, or (3) that suspects intend to communicate concerning the offense under investigation at a time within the period of the requested extension.

NWC REPORT, *supra* note 1, at 18. It is difficult to discern, however, in what way this proposal differs from current Title III requirements. Moreover, the breadth of proviso three of the Commission's recommendation entirely vitiates the effort to effect a change of existing law. Rather than reform this aspect of Title III, the present provision should be strictly enforced.

<sup>336</sup> It is not uncommon, for example, that electronic surveillance uncovers evidence of other crimes. See *infra* note 840 and accompanying text.

<sup>337</sup> 18 U.S.C. § 2517(5) (1976); see *infra* notes 596-603 & 839-53 and accompanying text.

<sup>338</sup> See NWC REPORT, *supra* note 1, at 101.

<sup>339</sup> *Id.*

<sup>340</sup> See 114 CONG. REC. 14, 485-86 (1968) (statement of Sen. Hart); *id.* at 14, 476 (statement of Sen. Long).

<sup>341</sup> See COMMISSION STUDIES, *supra* note 322 at 62-64; Carr, *Wiretapping in West Germany*, 29 AM. J. COMP. L. 607, 643-45 (1981); Warren, *supra* note 229, at 7-10.

under careful judicial supervision.<sup>342</sup> Indeed, given the many questions raised about its facial validity, the law's ultimate constitutionality was said by some to depend upon such enforcement.<sup>343</sup> Yet, ironically, the Supreme Court, which originally took the initiative in advising Congress as to the drafting of electronic surveillance legislation, has since failed to enforce Title III in a consistently scrupulous manner.

#### IV. THE SUPREME COURT AND THE DEMISE OF STRICT ENFORCEMENT

Since Title III was enacted, the Supreme Court has had numerous opportunities to interpret critical statutory provisions. From the beginning, however, the Court often failed to give Title III issues careful consideration. Important matters were decided without adequate briefing, and statutory language was often either ignored or misinterpreted. Not every case was wrongly decided—but many were—and almost all seemed to emphasize pragmatic considerations rather than the need for careful analysis of legislative design. While the Court periodically proclaimed that Title III had to be strictly enforced by the government, its own decisions established a pattern which suggested the contrary. This development can best be understood by reviewing the Court's major Title III cases in approximate chronological sequence and underscoring, when appropriate, the interrelationships between these decisions.

##### A. *ALDERMAN V. UNITED STATES*

*Alderman v. United States*<sup>344</sup> was not a Title III case—the electronic surveillance at issue occurred before the statute's passage.<sup>345</sup> Nevertheless, the *Alderman* Court referred to Title III for analogical purposes in a manner which had an immediate and profound impact upon subsequent litigation.

Although *Alderman* was principally concerned with the problem of what standards and procedures were to be followed by district courts in determining whether evidence was the product of heretofore established illegal electronic surveillance, a threshold matter for consideration was the question of petitioners' standing to raise a fourth amendment claim.<sup>346</sup> The fourth amendment standing doctrine, of course, was de-

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<sup>342</sup> See *supra* notes 267-71 and accompanying text.

<sup>343</sup> J. CARR, *supra* note 18, at 49-50. See generally Linzer, *supra* note 273, at 209.

<sup>344</sup> 394 U.S. 165 (1969).

<sup>345</sup> *Id.* at 167-70.

<sup>346</sup> *Id.* This issue essentially involved the extent to which illegally obtained electronic surveillance materials had to be disclosed for taint determination purposes. Rejecting the government's argument for in camera inspection, the Court required full disclosure of all illegally obtained conversations that petitioners had standing to challenge. 394 U.S. at 180-85.

veloped by the Supreme Court in an effort to limit the potentially broad impact of the exclusionary rule.<sup>347</sup> Under this limitation, no suppression claim is to be considered unless the moving party was actually a victim of the allegedly unlawful search and seizure; vicarious assertions of constitutional rights are thereby precluded.<sup>348</sup> Since the doctrine obviously limits the scope of suppression, it often has been criticized as being inconsistent with the exclusionary rule's deterrent purpose.<sup>349</sup> Petitioners here asked the Court to abandon the limitation so that illegally obtained evidence would be inadmissible regardless of whether the defendants' constitutional rights had actually been abridged.<sup>350</sup> In an opinion by Justice White, the Court questioned whether the marginal increase in deterrence would be worth the loss of otherwise valid prosecutions, and instead chose to reaffirm the standing doctrine.<sup>351</sup> In so doing, Justice White cited the controlling force of several recent precedents.<sup>352</sup> Had he gone no further, the opinion—at least under *stare decisis*—would have been analytically unobjectionable. Justice White stated, however, that Congress or state legislatures had the authority to remove standing barriers, and that Congress had decided to retain existing doctrine in Title III.<sup>353</sup> Since Title III standing was not at issue in *Alderman*, the question was never even briefed.<sup>354</sup> Nevertheless, notwithstanding express statutory language to the contrary, Justice White's dicta soon was treated as dispositive of this issue in Title III cases.<sup>355</sup>

Unfortunately, no member of the Court expressly questioned Justice White's Title III analysis. In this respect, only Justice Fortas, dissenting from the majority's overall standing conclusion, came close to

<sup>347</sup> See *Wong Sun v. United States*, 371 U.S. 471, 492 (1963); *Goldstein v. United States*, 316 U.S. 114, 121 (1942). For a thorough discussion of standing, see 3 W. LAFAVE, *supra* note 60, § 11.3.

<sup>348</sup> 3 W. LAFAVE, *supra* note 60, § 11.3, at 544, 599.

<sup>349</sup> See Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 22 (1950); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 433 (1974); Grant, *Circumventing the Fourth Amendment*, 14 S. CAL. L. REV. 359, 368-69 (1941); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 335; White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 346-48 (1970).

<sup>350</sup> 394 U.S. at 171.

<sup>351</sup> *Id.* at 171-75.

<sup>352</sup> *Id.*

<sup>353</sup> Justice White stated:

In its recent wiretapping and eavesdropping legislation, Congress has provided only that an "aggrieved person" may move to suppress the contents of a wire or oral communication intercepted in violation of the Act. . . . The Act's legislative history indicates that "aggrieved person," the limiting phrase currently found in Fed. Rule Crim. Proc. 41(e), should be construed in accordance with existent standing rules.

*Id.* at 175 n.9 (citations omitted).

<sup>354</sup> Brief for Petitioners; Brief for United States, *Alderman v. United States*, 394 U.S. 165 (1968).

<sup>355</sup> See *infra* note 366 and accompanying text and note 723 and accompanying text.

addressing the point.<sup>356</sup> While fundamentally opposed to any standing limitations,<sup>357</sup> Justice Fortas argued that the majority should at least recognize that the standing doctrine had been liberalized by recent Supreme Court decisions to include anyone against whom the search had been directed.<sup>358</sup> This expansion effected so-called target standing, which Justice Fortas further implied, governed Title III.<sup>359</sup> Thus, he argued that under current standing law, either the victim of an unlawful search or the investigatory target of the police action had standing to seek suppression.<sup>360</sup>

The source of Justice Fortas' contention was the Supreme Court's 1960 decision in *Jones v. United States*.<sup>361</sup> In fact, *Jones* did involve a significant expansion of standing principles, holding inter alia that persons charged with possessory crimes had automatic standing as to the items allegedly possessed and "that anyone legitimately on the premises where a search occurs may challenge its legality."<sup>362</sup> Justice Fortas main-

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<sup>356</sup> 394 U.S. at 208 n.10 (Fortas, J., concurring in part and dissenting in part). Justice Fortas concurred with aspects of the Court's decision regarding the disclosure issue. *Id.* at 201, 209-11; see *supra* note 346. Justice Douglas concurred with Justice Fortas' standing analysis. 394 U.S. at 187.

<sup>357</sup> *Id.* at 204-07.

<sup>358</sup> *Id.* at 207 (citing *Jones v. United States*, 362 U.S. 257, 261 (1960)).

<sup>359</sup> See *id.* at 208 & n.10. Justice Fortas, however, failed to recognize that this principle had been expressly incorporated into Title III. See *infra* note 366 and accompanying text.

<sup>360</sup> *Id.* at 208-09.

<sup>361</sup> 362 U.S. 257 (1960).

<sup>362</sup> *Id.* at 267; see *id.* at 261-67. At the time, automatic standing was considered important in possessory crimes because defendants who asserted possession were potentially vulnerable to substantive use of their testimony at trial. *Id.* at 263. In later years, after the Court had held that admissions at pretrial hearings could not be admitted on the question of guilt, the automatic standing concept was eliminated. *United States v. Salvucci*, 448 U.S. 83, 89-90 (1980).

The "legitimately on the premises" aspect of *Jones* effected an expansion of the traditional standing rule which conferred the right to seek suppression upon persons who "had a substantial possessory interest in the premises searched." 362 U.S. at 261. This principle had often been a basis for standing in cases not involving a possessory interest in the property seized. *Jones*, however, effectively removed the need for any property interest in the premises searched. Instead, all that was required was a legitimate presence on the premises. This aspect of *Jones*, however, was subsequently discarded when the Supreme Court held that a reasonable expectation of privacy was necessary for standing to be attained. *Rakas v. Illinois*, 439 U.S. 128, 141-43 (1978). Indeed, *Rakas* was another example of the Court using the reasonable expectation of privacy standard to effect reduced constitutional protections. See *also supra* text accompanying notes 169-72.

Significantly, the *Rakas* holding in effect adopted the views expressed by Justice Harlan in his partial dissent from *Alderman*. Justice Harlan agreed that the standing doctrine should be retained, but differed from that aspect of the majority's opinion which had held that standing should be granted to property owners automatically. Specifically, Justice Harlan reasoned that, since a property owner does not necessarily have a privacy interest in all conversations occurring on his premises, conferral of standing should be reconsidered in light of the *Katz* reasonable expectation of privacy standard. *United States v. Alderman*, 394 U.S. at 188-95 (Harlan, J., concurring in part and dissenting in part). Thus, for example, standing

tained, however, that the following language in *Jones* had effected an even greater expansion by creating target standing:

In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search and seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else . . . .

. . . .

Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy.<sup>363</sup>

According to Justice Fortas, the target of a search is "surely 'the victim of an invasion of privacy' and a 'person aggrieved,' even though it is not his property that was searched or seized."<sup>364</sup>

In fact, the Fortas interpretation of *Jones* later was rejected by the Supreme Court in *Rakas v. Illinois*.<sup>365</sup> Nevertheless, there is considerable support for the proposition that Title III draftsmen, having originally read *Jones* in a like manner, incorporated target standing into the statute. Certainly, the statutory language is consistent with this interpretation. Section 2510(11) of Title III authorizes any "aggrieved person" to file a suppression motion, and defines this term as "a person who was a party to any intercepted wire or oral conversation or a person *against whom the interception was directed*."<sup>366</sup> Indeed, this language would probably be dispositive were it not for a confusing reference in the legislative history. The Senate Report accompanying Title III says that this definition "is intended to reflect existing law" and then cites four supporting precedents:<sup>367</sup> *Jones v. United States*,<sup>368</sup> *Goldstein v. United States*,<sup>369</sup> *Wong Sun v. United States*,<sup>370</sup> and *United States ex rel. DeForte v. Mancusi*.<sup>371</sup> Two of these decisions, *Wong Sun* and *Goldstein*, directly enforced traditional standing limitations,<sup>372</sup> while *Jones* and *Mancusi* were ambiguous in this

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should not necessarily be recognized for situations in which a nontrespassory bug has intercepted conversations to which the property owner is not a party. *Id.* at 189.

<sup>363</sup> 394 U.S. at 207-08 (quoting *Jones v. United States*, 362 U.S. at 261) (emphasis added by Justice Fortas).

<sup>364</sup> *Id.* at 208-09 (footnote omitted).

<sup>365</sup> 439 U.S. 128, 136 (1978).

<sup>366</sup> 18 U.S.C. § 2510(11) (1976) (emphasis added).

<sup>367</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2179-80 (citations omitted).

<sup>368</sup> 362 U.S. 257 (1960).

<sup>369</sup> 316 U.S. 114 (1942).

<sup>370</sup> 371 U.S. 471 (1963).

<sup>371</sup> 379 F.2d 897 (2d Cir. 1967), *aff'd sub nom.* *Mancusi v. DeForte*, 392 U.S. 364 (1968).

<sup>372</sup> *Wong Sun v. United States*, 371 U.S. at 491-92; *Goldstein v. United States*, 316 U.S. at 121-22.



regard.<sup>373</sup>

Nevertheless, though not widely recognized,<sup>374</sup> by 1968 the *Jones* dicta suggestive of target standing had gained some support; standing was being conferred on targets "against whom [searches had been] directed."<sup>375</sup> Indeed, the *DeForte* case, decided when Title III was under active consideration, cited *Jones* in emphasizing this concept.<sup>376</sup> Therefore, the drafters' intent to retain "existing law" may have very well included target standing. Admittedly, the reference to *Goldstein* and *Wong Sun* is puzzling, but since section 2510(11) is phrased in the disjunctive,<sup>377</sup> these cases may only have referred to the section's first clause which relates to overheard parties who clearly would have been victimized by unlawful surveillance, and, therefore, would have been granted standing under the traditional rule.

Other aspects of the legislative history also suggest that target standing was intended,<sup>378</sup> but, more fundamentally, from a policy

<sup>373</sup> See generally *United States v. Mapp*, 476 F.2d 67, 71 (2d Cir. 1973); 3 W. LAFAVE, *supra* note 60, § 11.3(n), at 598.

<sup>374</sup> Most commentators have not read *Jones* to have provided target standing. See Amsterdam, *supra* note 349, at 360-61; White & Greenspan, *supra* note 349, at 339.

<sup>375</sup> *Bumper v. North Carolina*, 391 U.S. 543, 548 n.11 (1968); see *United States v. Mosterson*, 383 F.2d 610 (2d Cir. 1967); *United States ex rel. Caffey v. Fay*, 344 F.2d 625, 628-629 (2d Cir. 1965); *Henzel v. United States*, 296 F.2d 650 (5th Cir. 1961); *Binkiewicz v. United States*, 281 F. Supp. 233 (D. Mass. 1968); *United States v. Brown*, 274 F. Supp. 561 (S.D.N.Y. 1967); *United States v. Birrell*, 242 F. Supp. 191 (S.D.N.Y. 1965). Significantly, *Bumper*, which strongly implied target standing, was decided just three weeks before the passage of Title III.

<sup>376</sup> The court remarked:

While the state insists that the search and seizure were conducted against Local 266, we would be blind to reality if we did not recognize that the action by the state officials was actually "directed" at *DeForte*. The allegedly improper activities which the state was attempting to curtail could be halted only by prosecuting *DeForte* and his fellow union officials. Little would have been gained by prosecuting or fining the union alone, or even driving it to extinction, for the guiding culprits would have remained free to conduct their illegal activities through a different proscenium. (Indeed, the union was not even indicted.) That the state recognized this actuality is clearly evidenced by its placing of "monitors" on the local's telephone in order to overhear conversations of the appellant and other individuals operating behind the union facade. In these circumstances we would be myopic not to recognize that appellant was "a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else."

*United States ex rel. DeForte v. Mancusi*, 379 F.2d at 902-03 (quoting *Jones v. United States*, 362 U.S. at 261). The court held, however, that *DeForte* had also had his own privacy rights invaded. *Id.* at 903. *DeForte* was subsequently affirmed by the Supreme Court on this latter basis, 392 U.S. 364, 367-70 (1968). At the time Title III was under consideration, however, the appellate opinion had not been reviewed by the Supreme Court.

<sup>377</sup> See *supra* note 366 and accompanying text.

<sup>378</sup> For example, Title III was derived, at least in part, from model acts prepared by Professor G. Robert Blakey for the ABA, for the President's Crime Commission Task Force on Organized Crime, and for a Notre Dame law review article. Telephone interview with Professor G. Robert Blakey, Notre Dame Law School (Sept. 21, 1982). See LEGISLATIVE HISTORY, *supra* note 111, at 2274, 2284. Both the Task Force and the Notre Dame proposals use

standpoint this interpretation is the only one that would have made sense to Title III legislators. Target standing is the only standing limitation exactly coterminous with the exclusionary rule's deterrence function. Total abolition of standing restrictions would impose a disproportionate penalty upon law enforcement for a single violation and would potentially create insuperable taint problems.<sup>379</sup> However, the *Alderman* rule clearly does not deter sufficiently; rather, there is a direct incentive to sacrifice the case against a minor criminal—by violating his rights—in the hopes of developing a successful prosecution against a major offender.<sup>380</sup> Skeptics have suggested that this argument assumes an undue awareness of standing concepts by the police.<sup>381</sup> Certainly, however, in the context of electronic surveillance, there is a sophisticated understanding of this doctrine, since electronic surveillance under Title III requires prosecutorial approval.<sup>382</sup> Indeed, most organ-

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standing language virtually identical to that of Title III. See TASK FORCE REPORT, *supra* note 111, at 112; Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAW. 657, 664 (1968). The Task Force statute, however, cites only to *Jones*, TASK FORCE REPORT, *supra* note 111, at 104 n.392, whereas the statute in the law review article cites *Jones* and the other three cases listed in Title III's legislative history. Blakey & Hancock, *supra*, at 664 n.14. Accordingly, since the language in both bills is virtually identical, the cases cited in addition to *Jones* probably serve no independent purpose. Moreover, both the ABA and Notre Dame drafts refer to the present "liberal" federal standing rule as drawing the appropriate line between providing too little deterrence and too much. ABA STANDARDS, *supra* note 81, at 117; Blakey & Hancock, *supra*, at 664 n.14. Accordingly, the reference must be to target standing, since there is nothing otherwise "liberal" about the federal rule as applied to the electronic surveillance context, and only target standing is precisely coterminous with deterrence principles. Significantly, Professor Blakey today acknowledges that he had target standing in mind when Title III was drafted. Telephone interview with Professor G. Robert Blakey, Notre Dame Law School (Sept. 21, 1982).

<sup>379</sup> Concerning this, the ABA draft made the following observation:

Most criminal investigations are one shot affairs. They do not immediately relate to other investigations, and they deal with a limited group of suspects. Investigations in the area of organized crime, however, continue over long periods of time and generally involve many of the same or closely related individuals. Existing and proposed systems of intelligence sharing thus must not unnecessarily run the risk of inadvertent wholesale pollution. . . . Particular care must be taken in applying the suppression rule in this area to avoid having the price paid for deterrence disproportionate to its benefit. Nevertheless, the rule embodied in the standard is not intended to be a shield for unlawful activity. The phraseology reflects the present liberal federal rule.

ABA STANDARDS, *supra* note 81, at 117 (citation omitted); see TASK FORCE REPORT, *supra* note 111, at 104. Under Title III, undue taint problems would not be caused by target standing because the target either will be identified in the order, 18 U.S.C. § 2518(4)(a) (1976), or will be apparent, at least in terms of category, from the investigation's objectives. See 18 U.S.C. § 2518(1)(c), (e) (1976); see also *supra* note 320.

<sup>380</sup> See, e.g., White & Greenspan, *supra* note 349, at 351. It is questionable whether Title III's civil and criminal penalties independently serve as effective deterrents.

<sup>381</sup> See 3 W. LAFAVE, *supra* note 60, § 11.3, at 600-01.

<sup>382</sup> 18 U.S.C. § 2516(1) (1976). Significantly, Justice Fortas observed in *Alderman* that electronic surveillance "is usually the product of calculated official decision rather than the error of an individual agent of the state." *Alderman v. United States*, 394 U.S. at 203; see also *supra* note 234.

ized crime investigations involving electronic eavesdropping are directed by experienced attorneys well aware of Supreme Court jurisprudence.<sup>383</sup> Since Title III is drafted in a manner which permits sophisticated "up-the-ladder" type prosecutions against organized crime defendants,<sup>384</sup> it is thus especially appropriate for the statute to contain target standing protection against potential abuses by government lawyers.

This interpretation also harmonizes with the statute's emphasis on deterrence in its unusually broad suppression provision.<sup>385</sup> Quite clearly, a narrow view of standing is incompatible with this expansive remedy. Target standing is also more consistent with the historical development of Title III. The federal statute is essentially an amalgam of Senate Bill 675, which preceded *Berger*, and Senate Bill 2050, which was introduced just two weeks after *Berger*.<sup>386</sup> Senate Bill 675 contained a suppression sanction *without any standing limitation*, but it had to be revised in order to comply with the *Berger* guidelines;<sup>387</sup> Senate Bill 2050 was the preliminary revision. Yet, Senate Bill 2050, which purported to provide extra protections by complying with *Berger*, contained standing language almost identical to Title III's section 2510(11).<sup>388</sup> Did Congress expand the legislative protections, and yet, by imposing a rigid standing requirement, cynically remove the means of policing compliance? The express language of section 2510(11) and its underlying legislative history, at the very least, suggest not.

The fact that target standing was later rejected by the Supreme Court in *Rakas*, of course, is not decisive, as the only relevant inquiry is what Title III's drafters thought they were doing in 1968 by providing a standing limitation which was "intended to reflect existing law."<sup>389</sup> Subsequent changes in constitutional law would not change the statute's meaning retroactively. While arguments contrary to target standing

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<sup>383</sup> See NWC REPORT, *supra* note 1, at 12, 46-47; cf. *United States v. Payner*, 447 U.S. 727, 730 (1980) (IRS acting consciously with knowledge of standing rules). See generally RACKETS BUREAU, *supra* note 205, at 31-32.

<sup>384</sup> See NWC REPORT, *supra* note 1, at 49-51; J. CARR, *supra* note 18, § 1.01, at 5. See generally NWC REPORT, *supra*, at 135-37.

<sup>385</sup> Title III, Pub. L. No. 90-351, § 801(b), 82 Stat. 211 (1968); see NWC REPORT, *supra* note 1, at 11-12; LEGISLATIVE HISTORY, *supra* note 111, at 2156, 2185; see also *supra* note 233 and accompanying text.

<sup>386</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2284.

<sup>387</sup> *Controlling Crime Hearings*, *supra* note 137, at 76. Nor did earlier bills contain standing limitations. *Criminal Laws and Procedures: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 8 (1966) (§ 8g of Senate Bill 2189) [hereinafter cited as *Criminal Law Hearings*]; Donnelly, *Electronic Eavesdropping*, 38 NOTRE DAME LAW. 667, 688 (1963).

<sup>388</sup> *Controlling Crime Hearings*, *supra* note 137, § 2510(4), at 1002.

<sup>389</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2180 (citations omitted).

can be marshalled,<sup>390</sup> the obvious point is that this question was never briefed, and Justice White's seemingly conclusive dicta precluded the issue from ever developing. A generation of cases has since cited *Alderman* as having shaped the contours of Title III standing doctrine.<sup>391</sup>

#### B. *UNITED STATES V. UNITED STATES DISTRICT COURT*

*United States v. United States District Court*<sup>392</sup> gave the Supreme Court its first opportunity to interpret the scope of Title III. At issue was a "delicate question"<sup>393</sup> that *Katz* had specifically declined to reach<sup>394</sup> and which Title III had treated only obliquely:<sup>395</sup> "the President's power . . . to authorize electronic surveillance in internal security matters without prior judicial approval."<sup>396</sup> Procedurally, *District Court* arose when the federal government sought a writ of mandamus to set aside a district court ruling which had held unconstitutional a warrantless national security surveillance of an American citizen.<sup>397</sup> The Supreme Court correctly rejected the government's argument that such eavesdropping was both authorized by statute and constitutionally permissible.<sup>398</sup> The significance of *District Court* for purposes of this Article, however, lay in the mode of analysis which was adopted to resolve the statutory issue; it was a mode of analysis which would differ sharply from the Court's perspective in later years.

Most commentators agreed with the government's argument in *Dis-*

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<sup>390</sup> For example, most commentators did not interpret *Jones* to have established target standing. See *supra* note 374 and materials cited therein. In addition, the legislative history failed to cite *United States v. Jeffers*, 342 U.S. 48, 52 (1951), a case that was strongly suggestive of target standing, notwithstanding *Rakas*' subsequent holding to the contrary. 439 U.S. at 135-36. Finally, Professor Carr notes that a sample surveillance situation discussed by Senator Hart in the legislative history indicates that target standing had been rejected by Title III. J. CARR, *supra* note 18, § 6.02, at 334. Close examination of Senator Hart's comments, however, suggest that the example he used did not involve target standing, LEGISLATIVE HISTORY, *supra* note 111, at 2225, and that he may only have been complaining about difficulties he perceived to be associated with establishing such standing. *Id.* at 2234.

<sup>391</sup> See *infra* note 723 and accompanying text. Two states, however, have adopted broader provisions which confer standing upon persons either named in surveillance orders or having an interest in the premises. CONN. GEN. STAT. § 54-41a(10) (West Supp. 1982); MASS. GEN. LAWS ANN. ch. 272, § 99(B)(6) (West 1970).

<sup>392</sup> 407 U.S. 297 (1972).

<sup>393</sup> *Id.* at 299.

<sup>394</sup> *Katz v. United States*, 389 U.S. at 358 n.23.

<sup>395</sup> ABA STANDARDS, *supra* note 81, at 12 (1971 Supplement).

<sup>396</sup> 407 U.S. at 299.

<sup>397</sup> *Id.* at 301. Since the case did not involve a Title III wiretap, the government could not rely upon the interlocutory appeal provision contained in 18 U.S.C. § 2518(10)(b) (1976). At the time, 18 U.S.C. § 3731 did not give the prosecution the right to an interlocutory appeal in criminal cases. This was accomplished by subsequent amendment. Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 14, 84 Stat. 1880 (1971).

<sup>398</sup> 407 U.S. at 306, 316-17.

*strict Court* that section 2511(3) of Title III was a congressional affirmation of the President's constitutional authority to conduct warrantless domestic security surveillance.<sup>399</sup> In relevant part, section 2511(3) provided as follows:

Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary . . . to obtain foreign intelligence information deemed essential to the security of the United States . . . . Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to *take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government*. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.<sup>400</sup>

This language was positive in tone, and it was supported by a legislative record which, while not specifically authorizing warrantless domestic security eavesdropping, was similarly expansive in effect.<sup>401</sup>

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<sup>399</sup> See J. CARR, *supra* note 18, § 3.06 at 102-03; Linzer, *supra* note 273, at 207 n.52; Schwartz, *supra* note 15, at 491-92. For this reason, however, the commentators believed the provision to be unconstitutional.

<sup>400</sup> 18 U.S.C. § 2511(3) (emphasis added), amended by 18 U.S.C.A. § 2511(2)(f) (1982).

<sup>401</sup> In pertinent part, the legislative history provided as follows:

Paragraph (3) is intended to reflect a distinction between the administration of domestic criminal legislation not constituting a danger to the structure or existence of the Government and the conduct of foreign affairs. It makes it clear that nothing in the proposed chapter or other act amended by the proposed legislation is intended to limit the power of the President to obtain information by whatever means to protect the United States from the acts of a foreign power including actual or potential attack or foreign intelligence activities, or any other danger to the structure or existence of the Government. Where foreign affairs and internal security are involved, the proposed system of court ordered electronic surveillance envisioned for the administration of domestic criminal legislation is not intended necessarily to be applicable. The two areas may, however, overlap. Even though their activities take place within the United States, the domestic Communist party and its front groups remain instruments of the foreign policy of a foreign power. . . . Consequently, they fall within the field of foreign affairs and outside the scope of the proposed chapter. Yet, their activities may involve violation of domestic criminal legislation. . . . These provisions of the proposed chapter regarding national and internal security thus provide that the contents of any wire or oral communication intercepted by the authority of the President may be received into evidence in any judicial trial or administrative hearing. Otherwise, individuals seeking the overthrow of the Government, including agents of foreign powers and those who cooperate with them, could not be held legally accountable when evidence of their unlawful activity was uncovered incident to the exercise of this power by the President. The only limitations recognized on this use is that the interceptions be deemed reasonable based on an ad hoc judgment taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself. . . . The possibility that a judicial authorization for the interception could or could not have been obtained under the proposed chapter would be only one factor in such a judgment. No preference should be given to either alternative, since this would tend to limit the very power that this provision recognizes is not to be deemed disturbed.

The Supreme Court, however, viewed section 2511(3) as "essentially neutral" regarding the President's authority to sanction such eavesdropping;<sup>402</sup> as interpreted, rather than conferring any power, this provision "simply left presidential powers where [Congress had] found them."<sup>403</sup> In context, this analysis was based largely upon the exhaustive nature of Title III. Writing for the Court, Justice Powell, who had played an instrumental role with President Johnson's Crime Commission,<sup>404</sup> observed that "[t]he Act represents a *comprehensive* attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression."<sup>405</sup> As such, Justice Powell noted that section 2511(1) "broadly prohibits the use of electronic surveillance '[e]xcept as otherwise specifically provided in this chapter,'"<sup>406</sup> and that four specific exceptions were listed in section 2511(2), each of which contained the same introductory clause: "'It shall not be unlawful . . . to intercept' the particular type of communication described."<sup>407</sup> By comparison, the introductory clause to section 2511(3), quoted above, seemed to be more of a disclaimer than a declaration of legality.<sup>408</sup>

While this analysis, standing alone, may not have been compelling, Justice Powell then reviewed the requirements of Title III, and reasoned that section 2511(3) must be viewed in the context of a comprehensive statutory design:

In view of these and other interrelated provisions delineating permissible interceptions of particular criminal activity upon *carefully specified conditions*, it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act. We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply *did not legislate with respect to national security surveillances*.<sup>409</sup>

Section 2511(3) thus merely sought to ensure the admissibility of

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LEGISLATIVE HISTORY, *supra* note 111, at 2182-83 (citations omitted).

Nevertheless, Professor G. Robert Blakey, principal draftsman of Title III, states that both the statute and its legislative history were intended to reflect the adoption of a neutral stance on this issue. Telephone interview with Professor G. Robert Blakey, Notre Dame Law School (Jan. 30, 1983); *see also Criminal Law Hearings, supra* note 387, at 11-12.

<sup>402</sup> 407 U.S. at 303.

<sup>403</sup> *Id.*

<sup>404</sup> *See supra* text accompanying note 198.

<sup>405</sup> 407 U.S. at 302 (emphasis added).

<sup>406</sup> *Id.* at 303-04.

<sup>407</sup> *Id.* at 304.

<sup>408</sup> Furthermore, the national security provision was in a separate section from the four specified exceptions.

<sup>409</sup> 407 U.S. at 307 (emphasis added) (footnote omitted).

any evidence obtained from domestic security surveillance, provided that the procedures employed were constitutional.<sup>410</sup> Justice Powell then proceeded to conclude that warrantless security surveillance against American subjects was, in fact, unconstitutional, and denied the government's request for mandamus.<sup>411</sup>

Other Supreme Court decisions would acknowledge the comprehensive nature of Title III.<sup>412</sup> Within seven years, however, Title III's exhaustive legislative design would no longer serve as a determinative basis for analysis.

### C. *GELBARD V. UNITED STATES*

A week after *District Court*, the Supreme Court issued its five to four decision in *Gelbard v. United States*.<sup>413</sup> At stake was the appropriate scope of section 2515, Title III's suppression sanction. The petitioners in *Gelbard* were immunized grand jury witnesses who had been adjudicated

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<sup>410</sup> Justice Powell also cited legislative history. *Id.* at 306-08. Note that the ABA Standards, §§ 3.1, 3.2 commentary at 120-21 (Approved Draft 1968), from which Title III was partially derived, did not originally authorize warrantless domestic security surveillance. *Id.* at 120-21.

<sup>411</sup> This conclusion was based upon a balancing of fourth amendment values and a close reading of the warrant clause. 407 U.S. at 314-21. The opinion was limited to domestic aspects of national security, and did not address surveillance of foreign powers or their agents. *Id.* at 321-22. The Court, however, did suggest that the Constitution's warrant requirements may be more flexible for domestic security surveillance than ordinary criminal surveillance. *Id.* at 322-23.

Another aspect of *District Court* is worthy of note. Having decided that the surveillance was illegal, Justice Powell held that *Alderman* required that illegally obtained conversations be made available to the defense for taint determination purposes. 407 U.S. at 324. This directive, however, ignored language in Title III which provided that disclosure was to be a matter of judicial discretion. 18 U.S.C. § 2518(8)(d), (10)(a)(iii) (1976). *Alderman* had not considered this provision because the illegality at issue had antedated Title III. Nor had the *Alderman* Court articulated whether disclosure was constitutionally required or merely an exercise of judicial supervisory authority. Significantly, in 1970 Congress sought to overrule this aspect of *Alderman* for pre-Title III eavesdropping by passage of Title VII of the Organized Crime Control Act, 18 U.S.C. § 3504(a)(2) (Supp. 1982). S. REP. NO. 617, 91st Cong., 1st Sess. 64; see 116 CONG. REC. 35, 192-93 (1970) (statement of Rep. Poff); 116 CONG. REC. 35, 293-94 (1969) (statement of Rep. Poff). Further amendment of Title III was unnecessary as the original enactment adequately treated the disclosure question for post-Title III surveillance. See 116 CONG. REC. 36, 295 (1970) (statement of Sen. McClellan). A complete historical analysis of this issue is set forth in the Government's initial brief in *District Court*. Brief for the United States at 36-47, *United States v. United States District Court*, 407 U.S. 297 (1972). In *District Court*, however, the Supreme Court, declined to reconsider the merits of its original analysis in *Alderman*. 407 U.S. at 324 n.21. Consequently, the original holding of *Alderman* retained vitality. See *Zerilli v. Smith*, 656 F.2d 705, 707 n.9 (D.C. Cir. 1981); *United States v. Sacco*, 571 F.2d 791, 792 (4th Cir.), cert. denied, 435 U.S. 999 (1978); *United States v. Plotkin*, 550 F.2d 693, 697-98 (1st Cir. 1977).

<sup>412</sup> See *United States v. Donovan*, 429 U.S. 413, 416-17, 422-25, 425 n.14 (1979); *United States v. Giordano*, 416 U.S. 505, 514-17 (1974); *United States v. Kahn*, 415 U.S. 143, 152-53 (1974); *United States v. Gelbard*, 408 U.S. 41, 51 n.10 (1972).

<sup>413</sup> 408 U.S. 41 (1972).

in civil contempt<sup>414</sup> for refusing to answer pertinent questions.<sup>415</sup> They argued on appeal that the questions had been derived from illegal electronic surveillance, thereby giving them "just cause"—a substantive defense under the federal contempt statute—for declining to answer.<sup>416</sup> Normally, grand jury and contempt proceedings are conducted without regard to exclusionary principles, but petitioners were relying upon the protective mantle of section 2515,<sup>417</sup> which provides in relevant part:

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

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<sup>414</sup> Proper analysis requires that civil and criminal contempt be distinguished. In essence, civil contempt is coercive in nature, since it is designed to effect compliance with a court order. Thus, the person being coerced may purge himself of the civil contempt by complying with the order. Until then, subject to possible due process or statutory limitations, he may be kept in confinement. *See Shillitani v. United States*, 384 U.S. 364, 368-72 (1966). In contrast, criminal contempt is punitive in nature, since it is imposed to vindicate the authority of the court. *Id.* Consequently, once criminal contempt has been established, there is no possibility of a purge—the misconduct in question having already occurred. *See, e.g., D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES* 96-98 (1973); *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 441 (1911) (civil contempt as remedial; criminal contempt as punitive). *Compare generally* 28 U.S.C. § 1826 (1976) (civil contempt) *with* 18 U.S.C. § 401 (1976) (criminal contempt). Note, however, that the same conduct may give rise to both criminal and civil contempt. *Shillitani*, 384 U.S. at 368-72.

<sup>415</sup> *Gelbard* involved an investigation of possible violations of federal gambling laws. The Government had told the petitioners that they would be interrogated about third parties and that the questions would be based upon intercepted telephone conversations. Petitioners refused to answer any questions based on the electronic surveillance until they had a chance to challenge its legality. They were held in contempt, and committed to custody under 28 U.S.C. § 1826(a). *Gelbard*, 408 U.S. at 44-45. *Egan v. United States*, decided together with *Gelbard*, involved an alleged plot to kidnap Henry Kissinger and other government officials. The respondents were granted transactional immunity, but refused to testify, claiming that the questions were derived from illegal electronic surveillance. They, too, were held in contempt and committed to custody. *Id.* at 45. In *Egan*, the Government originally did not reply to respondents' charges. Nevertheless, the Solicitor General advised the Supreme Court that no electronic surveillance had occurred. *Id.* at 61 n.23. For a discussion of the political overtones of *Egan*, see E. LAPIDUS, *supra* note 216, at 184; *see United States v. Ahmad*, 347 F. Supp. 912 (M.D. Pa. 1971) (prosecution of Berrigan Brothers).

<sup>416</sup> 408 U.S. at 46. The contempt statute provides in relevant part:

Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses *without just cause* shown to comply with an order of the court to testify . . . the court, upon such refusal. . . may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony . . . No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

28 U.S.C. § 1826(a) (1976) (emphasis added).

<sup>417</sup> Title III provides a uniquely broad suppression sanction. *See supra* notes 232-33 and accompanying text. The Supreme Court later expressly ruled that the Constitution does not require application of the exclusionary rule to grand jury proceedings. *United States v. Callandra*, 414 U.S. 338, 349-55 (1974).



in or before any court [or] *grand jury* . . . if the disclosure of that information would be in violation of this chapter.<sup>418</sup>

As posed, petitioner's substantive question presented the Court with a procedural quandary because section 2518(10)(a), which purports to provide the statutory procedure for exercising the section 2515 exclusionary right, does not extend to grand jury witnesses;<sup>419</sup> consequently, the legality of the electronic surveillance had not been formally adjudicated below. Nevertheless, without explanation, the Court assumed that the questions propounded had, in fact, been based upon illegal electronic surveillance and proceeded "on the premise that section 2515 prohibits the presentation to grand juries of the compelled testimony of these witnesses."<sup>420</sup> This premise soon proved to be determinative of the case; for although Justice Brennan's opinion next said that "[t]he narrow question, then, is whether under these circumstances the witnesses may invoke . . . section 2515 as a defense to contempt charges,"<sup>421</sup> the express language of section 2515 and Congress' emphasis on protecting privacy by a strict exclusionary deterrent obviously precluded a negative response. Not surprisingly, Justice Brennan shortly concluded that "[t]he purposes of section 2515 and Title III as a whole would be subverted were the plain command of section 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception."<sup>422</sup> Section 2515, therefore, provided a "just cause" defense to con-

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<sup>418</sup> 18 U.S.C. § 2515 (1976) (emphasis added).

<sup>419</sup> Section 2518(10)(a) provides in relevant part:

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 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 therefrom, shall be treated as having been obtained in violation of this chapter.

18 U.S.C. § 2518(10)(a) (1976). Title III's legislative history expressly says that this provision limits the operation of § 2515. LEGISLATIVE HISTORY, *supra* note 111, at 2185.

<sup>420</sup> 408 U.S. at 47.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* at 51. Justice Brennan went on to state:

Moreover, § 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also "to protect the integrity of the court and administrative proceedings." Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that § 2515 bars in unequivocal terms is both to thwart the congressional objec-

tempt charges.

This conclusion, flowing from its premise, is clearly unobjectionable.<sup>423</sup> However, it was foregone by Justice Brennan's initial assumption of illegal electronic surveillance. The critical procedural question of how the initial determination of illegality is to be made in grand jury situations was left unanswered.<sup>424</sup> Consequently, Justice Rehnquist and three other justices dissented.<sup>425</sup>

The Rehnquist dissent, noting that the eavesdropping at issue had been by court order,<sup>426</sup> rejected the Court's assumption of illegality and characterized petitioners' defense as an attempt to effect a roaming discovery of government files.<sup>427</sup> To preclude this effort, section 2515 must be given a narrow scope, which, Justice Rehnquist maintained, Congress actually intended. Challenges to evidence presented before a grand jury historically have been severely limited because the institution's purpose and efficiency would otherwise be defeated by technical rules requiring lengthy hearings for resolution.<sup>428</sup> Justice Rehnquist

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tive of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents.

In sum Congress simply cannot be understood to have sanctioned orders to produce evidence excluded from grand jury proceedings by § 2515.

*Id.*

<sup>423</sup> The Court also noted that both the legislative history and the plain language of 18 U.S.C. § 3504 supported the idea that grand jury witnesses could refuse to answer questions based on illegal electronic surveillance. *Id.* at 52-58.

<sup>424</sup> Indeed, the Court declined to address the question of whether a witness may even assert this defense when there has been a court order. *Id.* at 61 n.22.

<sup>425</sup> The other dissenters were Chief Justice Burger and Justices Blackmun and Powell. Justice Douglas concurred on the theory that the Constitution requires that grand jury testimony be subject to the exclusionary rule. *Id.* at 62 (Douglas, J., concurring). This view was later rejected by the Court in *United States v. Calandra*, 414 U.S. 338, 349-59 (1974).

<sup>426</sup> Justice Rehnquist was referring only to the *Gelbard* case. See *supra* note 415. He did not address the companion *Egan* case, *supra* note 414, because it had actually not involved electronic surveillance. *Gelbard*, 408 U.S. at 72 n.1 (Rehnquist, J., dissenting).

<sup>427</sup> *Id.* at 72. Justice Rehnquist said that the real issue in the case was: "[W]hether the granting to these petitioners, at this particular stage of the proceedings, of sweeping discovery as a prelude to a full hearing on the issue of alleged unlawful surveillance can fairly be inferred from the enactment by Congress of the two statutes relied on the Court's opinion." *Id.* at 73.

<sup>428</sup> There have been many historical accounts of the grand jury. See 4 W. BLACKSTONE, COMMENTARIES 302 (1803); G. EDWARDS, THE GRAND JURY 1-44 (1906); 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 321-23 (1956); 1 F. POLLACK & F. MAITLAND, HISTORY OF ENGLISH LAW 151 (1909). The Supreme Court, however, has eloquently summarized the grand jury's historical role and mode of operation:

The institution of the grand jury is deeply rooted in Anglo-American history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." . . . The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether

maintained that Congress sought to continue this practice when it omitted grand jury witnesses from the section 2518(10)(a) suppression procedure;<sup>429</sup> this was purportedly further demonstrated by the legislative commentary to section 2518(10)(a) indicating that previous limitations on challenges to grand jury evidence were being retained. Moreover, Congress had explained the statutory reference to grand juries in section 2515 by stating: "[i]t is the intent of this provision that when a motion to suppress is granted *in another context*, its scope may include use in a future grand jury proceeding."<sup>430</sup> Thus, reasoned Justice Rehnquist, since illegality has never been established—a grand jury witness having no forum for litigating such claims—section 2515 does not afford a defense to a contempt proceeding.

From a historical perspective, this aspect of Justice Rehnquist's argument was compelling.<sup>431</sup> The majority, however, rejected this argument by reading the traditional limitations on grand jury witness rights more narrowly and by reasoning that the grand jury omission from section 2518(10)(a) may have reflected congressional awareness that the section 2515 defense would be independently available at the contempt

there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. . . .

Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."

The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement. A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.

United States v. Calandra, 414 U.S. 338, 342-44 (1974). See generally M. FRANKEL & G. NAFTALIS, *THE GRAND JURY—AN INSTITUTION ON TRIAL* (1977).

<sup>429</sup> *Id.*, 408 U.S. at 78-85.

<sup>430</sup> *Id.* at 82 (emphasis added). The pertinent legislative history provides:

This provision must be read in connection with sections 2515 and 2517. . . which it limits. It provides the remedy for the right created by section 2515. Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable by an individual. . . . There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding.

LEGISLATIVE HISTORY, *supra* note 111, at 2195.

<sup>431</sup> See *Costello v. United States*, 350 U.S. 359, 362 (1956); *Blair v. United States*, 250 U.S. 273, 279-86 (1919); see also *supra* note 428.

hearing;<sup>432</sup> consequently, there had been no need for Congress to provide a suppression remedy in the grand jury setting. On this basis, the case was simply "remanded for further proceedings consistent with this opinion."<sup>433</sup> No instructions were given explaining how the question of illegality was to be determined and to what extent, if any, discovery would be allowed. Ironically, this determination would only be difficult when, as in *Gelbard*, court orders were involved; in other Title III situations, the absence of an order would automatically render the search illegal. Only Justice White's concurring opinion explicitly offered some guidance for handling the court order situation:

there may [then] be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings, . . . [and] the deterrent value of excluding the evidence . . . is marginal at best.<sup>434</sup>

Predictably, immunized grand jury witnesses routinely began to raise the *Gelbard* objection in response to grand jury questions, and as a defense to contempt proceedings. Two competing methods were developed by the courts of appeals regarding the discovery of electronic surveillance materials when court orders were involved. *In re Persico*,<sup>435</sup> a second circuit case, originated the restrictive view that grand jury witnesses were not entitled to any access. This conclusion was based upon the absence of a statutory procedure for grand jury witnesses to exercise their apparent section 2515 grand jury exclusionary right:

These seemingly inconsistent policy determinations can be reconciled only by interpreting the statute as requiring exclusion only when it is clear that a suppression hearing is necessary, as when the Government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent, such as, for example, when no prior court order was obtained, or when the unlawfulness of the Government's surveillance has been established in a prior judicial proceeding. In these situations both statutory policies—the exclusion of illegally acquired evidence and the maintenance of unimpeded grand jury proceedings—are served.<sup>436</sup>

In other situations, the *Persico* court reasoned, Title III would not countenance the inevitable disruption of grand jury procedures;<sup>437</sup> instead, the judge could review any surveillance documents in camera for facial

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<sup>432</sup> 408 U.S. at 59-61.

<sup>433</sup> *Id.* at 61.

<sup>434</sup> *Id.* at 70.

<sup>435</sup> 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974).

<sup>436</sup> *Id.* at 1161.

<sup>437</sup> *Id.* at 1161-62. For other cases following this view, see *In re Gordon*, 534 F.2d 197, 198 (9th Cir. 1976); *In re Grand Jury Proceedings*, 522 F.2d 197, 198 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *Drobach v. United States*, 509 F.2d 625 (9th Cir. 1974), *cert. denied*, 411 U.S. 964 (1975). *But see infra* note 441.

sufficiency. *In re Persico* was welcomed by prosecutors, especially since it often allowed them to handle all matters in camera without revealing whether *any* electronic surveillance had even occurred, as the grand jury witness would not know if the prosecutor had shown the judge a court order or merely an affidavit denying that surveillance had occurred.<sup>438</sup>

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<sup>438</sup> Under such circumstances, the government would give the grand jury witness an affidavit denying that any *illegal* electronic surveillance had taken place. Consequently, he would not know if there had been surveillance, or whether eavesdropping had occurred but had been effected legally. Hence, the witness is thereby deprived of what might otherwise effectively be a license to commit perjury. See generally J. KWITNY, *VICIOUS CIRCLES* 39 (1979). This procedure, albeit in camera, arguably complies with the requirements of 18 U.S.C. § 3504 which provides in relevant part:

(a) In any trial, hearing, or other proceeding in or before any court, grand jury . . . or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall *affirm or deny* the occurrence of the alleged unlawful act;

18 U.S.C. § 3504 (1976) (emphasis added). See *TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME, GRAND JURY INVESTIGATION OF THE RECALCITRANT WITNESS*, § F.11 (G. Blakey, R. Goldstock & A. Campriella eds. (1977)); *United States v. Pacella*, 622 F.2d 640, 640-42 (2d Cir. 1980); cf. *People v. Einhorn*, 74 Misc. 2d 958, 960, 346 N.Y.S.2d 326, 329-30 (N.Y. County Ct. 1973), *aff'd* 35 N.Y.2d 948, 948-49, 365 N.Y.S.2d 171, 171-72, 324 N.E.2d 551, 552 (1974) (state criminal contempt proceeding for which § 3504 inapplicable); *People v. Briendel*, 73 Misc. 2d 734, 739, 342 N.Y.S.2d 428, 434 (N.Y. County Ct. 1973), *aff'd*, 45 A.D.2d 691, 356 N.Y.S. 626 (N.Y. App. Div. 1974), *aff'd*, 35 N.Y.2d 928, 365 N.Y.S.2d 163, 324 N.E.2d 545 (1974) ("the People are under no obligation to disclose to a grand jury witness that the questions about to be propounded are the product of electronic surveillance . . . . Providing an uncooperative or hostile witness with the type of information requested . . . permits him to tailor his testimony to matters already known to the grand jury, thereby defeating the purpose of calling him"). But see *NAT'L LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES* § 12.8(d) (2d ed. 1978) (suggesting § 3504 requires more definitive response, rather than merely prosecutor's opinion).

Since *Gelbard*, federal case law has failed to address this issue. The second circuit has often been able to avoid addressing it by holding that the claim of illegality "may not be based upon mere suspicion but must at least appear to have a 'colorable' basis before it may function to trigger the government's obligation to respond under § 3504." *United States v. Pacella*, 622 F.2d 640, 642 (2d Cir. 1980); see also *United States v. Saade*, 652 F.2d 1126, 1137-38 (1st Cir. 1981) (defendant must make colorable claim of electronic surveillance). Most jurisdictions, however, hold that a mere assertion of illegality is sufficient to trigger a government response. C. FISHMAN, *WIRETAPPING AND EAVESDROPPING* § 226 (1978). Even so, a specific response acknowledging the occurrence of eavesdropping may not be required if the claim of illegality is too general. See generally *United States v. Rubin*, 559 F.2d 975, 989 (5th Cir. 1977). Ultimately, however, most courts apparently assume that § 3504 requires explicit disclosure of whether any electronic surveillance has taken place. See *In re Grand Jury*, 683 F.2d 66, 68-69 (3d Cir. 1982); *United States v. Rubin*, 559 F.2d at 989. This approach ignores both the risk that disclosure will result in perjured testimony and the fact that most witnesses are more interested in gaining assurance that no eavesdropping has occurred than in contesting its legality. The right to such disclosure is not constitutionally protected, *Taglianetti v. United States*, 394 U.S. 316 (1969), nor is it required by the explicit terms of § 3504. Presently, however, such disclosure in the context of *civil* contempt proceedings seems mandated by § 2518(9). See *infra* notes 443-51 and accompanying text.

Other jurisdictions, however, led by the first circuit in *In re Lochiatto*,<sup>439</sup> interpreted *Gelbard* as necessarily allowing at least "a limited challenge" to the electronic surveillance,<sup>440</sup> and consequently have required the disclosure of the application for surveillance, supporting affidavit, court order, and a government affidavit indicating the period of eavesdropping;<sup>441</sup> provision is made for in camera deletion of sensitive information.<sup>442</sup> The defendant is then permitted to mount a facial challenge based upon these documents.

Neither approach, however, and particularly *In re Persico*, is analytically true to the language of Title III. Had the Supreme Court approached *Gelbard* with greater precision, a different analysis would have been considered. In attempting to discount Justice Rehnquist's emphasis on the conflict between section 2515 rights and section 2518(10)(a) suppression procedures, the majority opinion noted congressional awareness that grand jury issues routinely are resolved at contempt proceedings.<sup>443</sup> Justice Brennan, however, failed to pursue explicitly the major implication of his observation that section 2518(10)(a) is independently available to raise the section 2515 defense in a civil contempt proceeding. Specifically, although the section 2515 exclusionary sanction may not be asserted via section 2518(10)(a) in a grand jury setting, the latter provision is still fully applicable "in any . . . proceeding in or before any court . . . of the United States."<sup>444</sup> Since a civil contempt proceeding would clearly fit this definition, the defendant is entitled to assert this right in that forum. Thus, not only was the alleged illegal electronic surveillance a substantive "just cause" defense under the contempt statute, section 2518(10)(a) provides the defendant with a *procedural* means for applying section 2515 to preclude the prosecutor from introducing into evidence at the contempt proceeding the material question upon which the contempt finding must be based.<sup>445</sup>

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<sup>439</sup> 497 F.2d 803 (1st Cir. 1974).

<sup>440</sup> *Id.* at 807.

<sup>441</sup> Cases following this view include *In re Grand Jury Proceedings* (McElhinney), 677 F.2d 738 (9th Cir. 1982); *In re Demonte*, 667 F.2d 590, 599 (7th Cir. 1981); *In re Harkins*, 624 F.2d 1160, 1166 (3d Cir. 1980); *In re Grand Jury Proceedings* (Katasourous), 613 F.2d 1171, 1175 (D.C. Cir. 1979); *Melickian v. United States*, 547 F.2d 416, 420 (8th Cir.), *cert. denied*, 430 U.S. 986 (1977).

<sup>442</sup> *See, e.g., In re Lochiatto*, 497 F.2d 803, 807-08 (1st Cir. 1974).

<sup>443</sup> 408 U.S. at 60-61. *See supra* text accompanying note 432. Traditionally, however, the limited issues that recalcitrant grand jury witness have been permitted to assert at the contempt proceeding have not required extensive litigation. *See generally* M. FRANKEL & G. NAFTALIS, *supra* note 428, at 19-21.

<sup>444</sup> 18 U.S.C. § 2515 (1976) (emphasis added); *see supra* text accompanying note 418.

<sup>445</sup> *See In re Hitson*, 177 F. Supp. 834, 837 (N.D. Cal. 1957), *rev'd on other grounds*, 283 F.2d 355 (9th Cir. 1960) (requiring pertinent question to be introduced into evidence at contempt proceeding). NAT'L LAWYERS GUILD, *supra* note 438, § 16.4(a). Since most civil contempts are uncontested in terms of what actually occurred in the grand jury room, most counsel

Moreover, this analysis provides a more definitive basis for resolving the discovery issue because, under section 2518(9), the government is required to make certain key divulgences as a prerequisite to admissibility or other courtroom disclosure.<sup>446</sup> Thus, at the very least, the defend-

apparently have not realized that the government may have to introduce formal proof on this issue at the contempt proceeding.

The interpretation suggested in the text is consistent with § 2518(a), *see infra* note 446 and accompanying text, and with the most recent congressional pronouncement in this area. Specifically, a similar result is effected by Senate Bill 1630, a bill proposing to recodify the federal criminal code but which, nevertheless, purports to continue most of existing law in the electronic surveillance area. S. 1630, 97th Cong., 2d Sess. §§ 11, 3107(d) (1982). *See REPORT OF THE SENATE COMM. ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1981*, S. REP. NO. 307, 97th Cong., 1st Sess. 1075, 1087-89 (1981) [hereinafter cited as *REPORT ON CRIMINAL CODE REFORM*]; *see also infra* notes 928-33 and accompanying text.

<sup>446</sup> Section 2518(9) provides:

The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

18 U.S.C. § 2518(9) (1976). Presumably, the notice provisions governing civil and criminal contempt proceedings would have to accommodate this ten day rule. *See* FED. R. CRIM. P. 42(b), 45(d); FED. R. CIV. P. 6(d); *cf.* *United States v. Alter*, 482 F.2d 1016, 1023 (9th Cir. 1973). Significantly, § 2518(a) is consistent with the proposed interpretation of § 2518(10)(a).

Note that, to some extent, there is a conflict between the ten day rule and the flexibility provided for in § 2518(8)(d) with respect to postponing delivery of inventory notice for "good cause" shown. Since the flexibility of § 2518(8)(d) is designed to preserve the investigation's secrecy, the disclosure rule of § 2518(9) would appear somewhat inconsistent with this policy. However, once a grand jury inquiry has commenced and targets have been subpoenaed, the investigation's secrecy has already been compromised. At that point, further eavesdropping would rarely prove effective since the targets suspecting surveillance can be expected to act with extreme caution. (Under some circumstances, however, witnesses may be subpoenaed for purposes of stimulating conversations—i.e. "tickling the wire." *See* NWC REPORT, *supra* note 1, at 151).

The proposed analysis was rejected as "superficially plausible" but "unrealistic" in *In re Persico*. The Second Circuit viewed the contempt hearing as "so intimately connected with the grand jury proceedings in which testimony is desired as to be really a part of those proceedings." 491 F.2d at 1162. *In re Persico* noted that Title III's legislative history provides that "[i]t is the intent of [§ 2518(10)(a)] only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding." *Id.* at 1161. Based upon this language, the Second Circuit reasoned that Congress did not intend the suppression sanction to extend to "a contemporaneous civil contempt proceeding." *Id.* at 1162. This analysis, however, directly ignores the language of § 2518(10)(a). While the contempt action may be contemporaneous with the grand jury inquiry, it is nevertheless a functionally distinct proceeding within the clear language of § 2518(10)(a). *See* *Hale v. Henkel*, 201 U.S. 43, 61 (1906) (grand jury not appointed for the prosecutor or for the court). Moreover, the court's reliance upon the legislative history's reference to future grand jury proceedings is mistaken. In relative terms, once the contempt issue has been resolved, any subsequent grand jury action would be a future proceeding within the meaning of Title III's legislative history. *See supra* note 430. Furthermore, this aspect of the legislative history is concerned with negating sup-

ant would have to be provided a copy of the court order and accompanying application. Disclosure of other materials would then be left to the judge's discretion under Title III's regular discovery rule.<sup>447</sup> Similarly, the judge would determine the scope of the suppression hearing which, in appropriate cases, could be narrowly restricted by virtue of a defendant's limited discovery rights; consequently ancillary grand jury proceedings would not be unduly interrupted.<sup>448</sup> In practice, the procedure would be closely akin to *In re Lochiatto*<sup>449</sup> but would have the virtue of statutory precision. From a prosecutor's tactical perspective, the proposed analysis is undesirable because it virtually guarantees grand jury witnesses a means of determining whether electronic surveillance has taken place, thereby allowing them to tailor their testimony accordingly.<sup>450</sup> Moreover, it gives immunized witnesses important information that can be shared with criminal compatriots.<sup>451</sup> Nevertheless, this result seems compelled by the statutory language of both section 2518(9) and section 2518(10)(a).

In *Gelbard*, however, the Court instead chose to make an unexplained critical assumption which, under any statutory circumstances, would be directly dispositive of the case. This was accomplished in a manner that both overlooked applicable provisions of Title III and gave

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pression motions in a grand jury proceeding, whereas the proposed analysis is concerned with such a motion in a contempt proceeding. *But see In re Gordon*, 534 F.2d 197, 198-99 (5th Cir. 1976).

<sup>447</sup> Section 2518(8)(d) provides in relevant part: "[T]he 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." 18 U.S.C. § 2518(8)(d) (1976); *see also* 18 U.S.C. § 2518(10)(a) (1976).

<sup>448</sup> For a survey of differing approaches taken with respect to discovery rights, *see* J. CARR, *supra* note 18, at 416-18. In this respect, Title III drafters indicated that suppression motions were not intended to serve as vehicles for unlimited discovery. LEGISLATIVE HISTORY, *supra* note 111, at 2195-96.

<sup>449</sup> Under the proposed analysis, the defendant does not receive automatic access to the affidavit supporting the application or to an affidavit disclosing the length of surveillance. Even under *In re Lochiatto*, however, disclosure is potentially subject to secrecy limitations. *See supra* notes 439-42 and accompanying text.

<sup>450</sup> *In re Special February, 1977 Grand Jury*, 570 F.2d 674, 678 (7th Cir.), *cert. denied* 437 U.S. 904 (1978). Conceivably, however, the *In re Persico* approach would retain vitality when criminal, rather than civil, contempt proceedings are contemplated. Criminal contempt, of course, is designed to punish previous misconduct before the court rather than to compel compliance with a pending judicial directive. This would be dependent upon whether the jurisdiction involved requires disclosure of the predicate question at a separate judicial hearing as a prerequisite to a criminal contempt prosecution. If not, the recalcitrant witness would not be able to rely upon § 2518(10)(a) until the actual criminal contempt trial (when the predicate question must be introduced into evidence), or, more appropriately, until a pretrial suppression motion can be filed. By then, however, it would no longer be possible to purge himself of the original misconduct. *See Skinner v. White*, 505 F.2d 685, 688-89 (5th Cir. 1974); D. DOBBS, REMEDIES 97-98 (1973). As yet, no court has addressed this issue.

<sup>451</sup> *In re Special February, 1977 Grand Jury*, 570 F.2d at 678; J. CARR, *supra* note 18, at 30.



the lower courts no direction on how to handle a procedural dilemma which potentially precluded effective implementation of the statutory scheme.

D. *UNITED STATES V. GIORDANO* AND *UNITED STATES V. CHAVEZ*

The Supreme Court had the opportunity to give lower courts direction in a substantive context with its decisions in *United States v. Giordano*<sup>452</sup> and *United States v. Chavez*.<sup>453</sup> Each case arose by virtue of the Department of Justice's failure to comply, during Title III's early years, with section 2516(1)'s requirement that any federal eavesdropping application initially be approved by the Attorney General or a specially designated Assistant Attorney General.<sup>454</sup> From 1968 through late 1971, Justice Department eavesdropping applications professed to have been authorized by Will Wilson, Attorney General Mitchell's specially designated Assistant Attorney General.<sup>455</sup> When litigation later established that Wilson had never reviewed or authorized any of these applications, the Justice Department maintained that they had actually been sanctioned by Attorney General Mitchell—either directly or through his executive assistant.<sup>456</sup> However, because government memoranda filed in Court suggested that Attorney General Mitchell had merely designated Wilson as the authorizing official, defense attorneys throughout the country doubted that Attorney General Mitchell had really authorized these applications;<sup>457</sup> moreover, counsel contended that those applications purportedly approved through Attorney General Mitchell's executive assistant improperly exceeded the Attorney General's scope of delegation under section 2516(1). Hence, the *Giordano* litigation developed when it became apparent that Attorney General Mitchell's signa-

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<sup>452</sup> 416 U.S. 505 (1974).

<sup>453</sup> 416 U.S. 562 (1974).

<sup>454</sup> Section 2516(1) provides in pertinent part:

The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications. . . . 18 U.S.C. § 2516(1) (1976). See *supra* notes 237-38 and accompanying text.

<sup>455</sup> For a detailed description of Justice Department authorization procedures, see Pulaski, *supra* note 15, at 755-61. Professor Pulaski's article also provides an excellent comprehensive discussion of issues related to this case.

<sup>456</sup> *Id.* at 759-60, 762-64.

<sup>457</sup> The memorandum signed by Attorney General Mitchell purported only to designate Wilson as the authorizing official, but in each case the Department of Justice nevertheless maintained that the memorandum constituted the actual grant of authorization for application. Inconsistencies in the Justice Department position are superbly critiqued by Professor Pulaski. *Id.* at 768 n.51, 794-802, 794 n.184, 789 n.203, 810, 817. The government may have devised this explanation when it became apparent that any other approach would lead to total suppression.

ture on a so-called authorization memorandum had been affixed by order of his executive assistant, who routinely reviewed and approved authorization requests when Mitchell was away from Washington.<sup>458</sup> By contrast, in *Chavez* the Justice Department contended that Attorney General Mitchell in fact had personally approved the surveillance request at issue.<sup>459</sup> Defendants maintained, however, that the resulting wiretap was nevertheless illegal under section 2518(1) because the application had misrepresented the authorizing official to be Wilson.<sup>460</sup> Since the Department of Justice had regularly followed these procedures between 1968 and 1971, *Giordano* and *Chavez* stood to have substantial immediate impact: Attorney General Mitchell's failure personally to authorize applications involved sixty cases and 626 defendants; misidentification of the authorizing official had occurred in ninety-nine other cases involving 807 defendants.<sup>461</sup> Beyond that, however, *Giordano* and *Chavez* potentially raised a question of long term consequences: whether suppression is mandated for all Title III violations without regard to severity of the wrong.

The government's argument in *Giordano*—that, under the delegation powers of 28 U.S.C. § 510,<sup>462</sup> authorization by the Attorney General's executive assistant constituted compliance with Title III—was promptly and correctly rejected by a unanimous Court.<sup>463</sup> Emphasizing that the statute's comprehensive nature was indicative of Congress' concern that electronic surveillance be used with restraint, Justice White observed that the section 2516 authorization requirement was designed to impose "[t]he mature judgment of a particular responsible Department of Justice official . . . as a critical precondition to any judicial order."<sup>464</sup> This interpretation was supported by abundant legislative history which clearly viewed section 2516 as promoting restraint by centralizing eavesdropping responsibility in a politically accountable government official.<sup>465</sup> Since the Attorney General's executive assistant does not fall into this category, Justice White concluded that the pur-

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<sup>458</sup> *Giordano*, 416 U.S. at 510. See Pulaski, *supra* note 15, at 763-66.

<sup>459</sup> 416 U.S. at 512-13.

<sup>460</sup> *Id.* at 564-69. Section 2518(1) provides in relevant part: "Each application shall provide the following information: (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application. . . ." 18 U.S.C. § 2518(1) (1976) (emphasis added).

<sup>461</sup> 416 U.S. at 599 (Douglas, J., concurring).

<sup>462</sup> Section 510 provides: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency, of the Department of Justice of any function of the Attorney General," 28 U.S.C. § 501 (1976).

<sup>463</sup> 416 U.S. at 512-23.

<sup>464</sup> *Id.* at 515-16.

<sup>465</sup> See *supra* note 238 and accompanying text.

pose of section 2516 would be defeated by allowing the Attorney General to delegate his authority in a manner inconsistent with the narrowly tailored mandate of section 2516.<sup>466</sup>

This resolution generated a critical suppression issue because the government next argued that Title III did not mandate exclusion for statutory violations of this kind.<sup>467</sup> This contention was based upon a very restricted reading of section 2518(10)(a), the procedural counterpart to section 2515. Section 2518(10)(a) allowed suppression motions to be made on the following grounds: "(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."<sup>468</sup> Improper authorization, the government maintained, was not a basis for suppression because it does not fall within the statutory violations specified in paragraphs (ii) and (iii). Paragraph (i) was also deemed inapplicable as supposedly reaching only constitutional violations.<sup>469</sup> The limited scope of paragraph (i) was, of course, basic to this argument, but the government insisted that any broader interpretation extending that provision to statutory violations would render paragraphs (ii) and (iii) redundant.<sup>470</sup>

While ready to acknowledge that this argument had "substance,"<sup>471</sup> the Court nevertheless found it unavailing:

[I]t does not necessarily follow, and we cannot believe, that no statutory infringements whatsoever are also unlawful interceptions within the meaning of paragraph (i). 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*.<sup>472</sup>

Accordingly, since authorization by the Attorney General or a specially designated Assistant Attorney General was considered "central" to the statutory scheme, suppression was mandated.<sup>473</sup> This analysis ultimately

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<sup>466</sup> 416 U.S. at 523.

<sup>467</sup> *Id.* at 524.

<sup>468</sup> 18 U.S.C. § 2518(10)(a) (1976). For the full text of § 2518(10)(a), see *supra* note 419.

<sup>469</sup> 416 U.S. at 526.

<sup>470</sup> *Id.*

<sup>471</sup> *Id.* at 527.

<sup>472</sup> *Id.*

<sup>473</sup> *Id.* at 528-29. On this basis, derivative evidence flowing from an extension order of the original authorization was likewise suppressed. *Id.* at 529-33. The Court seemed to adopt a "per se" taint analysis, without examining whether the extension order in fact had been independently derived. See J. CARR, *supra* note 18, at 369. The underlying rationale for this approach, which deviates from traditional attenuation analysis, is set forth and properly criticized in Professor Carr's treatise. *Id.* See generally *Wong Sun v. United States*, 371 U.S. 471,

was dispositive of *Chavez* as well, albeit with a different result. There, the Court acknowledged that misrepresenting the authorizing official in the electronic surveillance application violated the identification requirement of section 2518(10)(a), but denied suppression because this provision was not considered central to the statutory scheme: "No role more significant than a reporting function designed to establish on paper that one of the major procedural protections of Title III had been properly accomplished is apparent."<sup>474</sup> Furthermore, *Chavez* suggested that even violations of so-called central requirements do not compel suppression so long as the statutory purpose underlying that provision has still been met.<sup>475</sup>

Justice Douglas, joined by three other justices, dissented in *Chavez*, largely because he feared that the decision would allow lower courts to suppress for statutory violations on a "pick and choose" basis.<sup>476</sup> According to Justice Douglas, the exclusionary language of section 2515 is unqualified in terms of the violation involved, especially when read in light of section 2511(1) and section 2517(3), which similarly prohibited disclosure unless there had been compliance with every statutory requirement.<sup>477</sup> This interpretation was further supported by a legislative history which emphasized the need for strict enforcement of the statute.<sup>478</sup> Moreover, Justice Douglas also had a persuasive response to the

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488 (1963) (recognizing prevailing standard: "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint").

<sup>474</sup> 416 U.S. at 579.

<sup>475</sup> *Id.* at 572-74; see *United States v. Chun*, 503 F.2d 533, 542 (9th Cir. 1974).

<sup>476</sup> 416 U.S. at 584-85 (Douglas, J., dissenting). The other dissenters were Justices Brennan, Marshall, and Stewart.

<sup>477</sup> Specifically, after citing the broad language of § 2515, Justice Douglas further argued:

The Court . . . 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." 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 585 (Douglas, J., dissenting). Similarly, Professor Carr has suggested that § 2517(3) is the "obverse" of § 2515, and is, therefore, a prerequisite to admissibility. J. CARR, *supra* note 18, §§ 6.03(1), 7.04(3). While some sections of Title III are actually evidentiary prerequisites to admissibility, see *supra* note 446 and *infra* notes 867 & 918 and accompanying text, neither § 2515 nor § 2517(3) may be characterized in this manner, since both are limited by the procedural scope of § 2518(10)(a). See *supra* note 419.

<sup>478</sup> 416 U.S. at 596-98; see *supra* notes 270-71 and accompanying text.

majority's concern that any other analysis would have rendered paragraphs (ii) and (iii) redundant:

The choice seems to be between attributing to Congress a degree of excessive cautiousness which led to some redundancy in drafting the protective provisions of section 2518(10)(a), or foolishness which led Congress to enact statutory provisions for law enforcement officials to scurry about satisfying when it did not consider the provisions significant enough to enforce by suppression. In view of the express prohibition by section 2515 of disclosure of information "in violation of" the chapter, I would opt for the conclusion that Congress was excessively cautious and that "unlawfully intercepted" means what it says.<sup>479</sup>

Finally, Justice Douglas argued that even under the majority's centrality test, suppression was warranted as the identification requirement, in fact, "directly and substantially" implemented an important congressional limitation on the use of electronic surveillance.<sup>480</sup>

Commentators uniformly agreed with Justice Douglas' analysis.<sup>481</sup> The government's narrow construction of section 2518(10)(a) was rejected as unduly rigid,<sup>482</sup> and the Court's response was criticized for neither eliminating the apparent redundancy<sup>483</sup> nor abiding by language in *Gelbard* which had recognized that disclosure under Title III was contingent upon conformity with all of the statute's "stringent conditions."<sup>484</sup> Other aspects of the opinion's analysis were also criticized. For example, the Court uncritically assumed that Attorney General Mitchell had, in fact, authorized the *Chavez* application, rather than merely having designated Assistant Attorney General Will Wilson to perform this function;<sup>485</sup> likewise, the apparently intentional nature of the government's violation was given virtually no consideration.<sup>486</sup>

Most of these criticisms were quite valid. At the very least, the Court should not have countenanced a violation which may have been criminal in nature.<sup>487</sup> The court of appeals in *Chavez* had found that the

<sup>479</sup> 416 U.S. at 586.

<sup>480</sup> *Id.* at 587.

<sup>481</sup> See J. CARR, *supra* note 18, § 6.02(3); Pulaski, *supra* note 15, at 787-88.

<sup>482</sup> See J. CARR, *supra* note 18, at 344-45; Pulaski, *supra* note 15, at 783.

<sup>483</sup> For example, unless paragraphs (ii) and (iii) are limited to noncentral statutory violations, the Court's analysis still deprives them of independent significance. See Pulaski, *supra* note 15, at 783-84. Subsequent cases, however, have nevertheless interpreted paragraph (ii) as applying only to central violations. See *United States v. Swan*, 526 F.2d 147, 149 (9th Cir. 1975); *United States v. Acon*, 513 F.2d 513, 518-19 (3d Cir. 1975).

<sup>484</sup> Pulaski, *supra* note 15, at 782; see *Gelbard v. United States*, 408 U.S. 41, 46 (1972).

<sup>485</sup> See *supra* note 457.

<sup>486</sup> Pulaski, *supra* note 15, at 789-98.

<sup>487</sup> Section 2511 provides in pertinent part:

Except as otherwise specifically provided in this chapter, any person who  
(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept  
or endeavor to intercept, any wire or oral communication . . .

. . . .

government's misrepresentation had been executed carefully in a manner which created an illusion of statutory compliance.<sup>488</sup> Similarly, courts in other cases condemned Justice Department documents filed between 1968 and 1971 for creating an elaborate "paper charade"<sup>489</sup> designed to mislead the judiciary.<sup>490</sup> One commentator has suggested that this pattern of institutional deception was motivated by a desire "to foster the appearance of scrupulous compliance with section 2516(1) while actually employing a procedure which it regarded as more bureaucratically desirable than that which the statute required."<sup>491</sup> The Supreme Court, however, could conceive of no motive for deliberate misrepresentation, and chose to ignore the possibility that *both* the interceptions and disclosure in court may have constituted separate violations of Title III's *criminal* prohibitions.<sup>492</sup> The fact that conventional search warrants had been suppressed in some jurisdictions for intentional misrepresentations of nonmaterial facts was never considered.<sup>493</sup> Nevertheless, while this aspect of *Chavez* may properly be condemned, the centrality test established in *Giordano* was actually consistent with legislative design. In *Giordano*, however, the standard was derived from a fundamentally mistaken mode of analysis, forced upon the Court by its desire to avoid a statutory redundancy. Moreover, in *Chavez*, the

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(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication in violation of this subsection . . .

Shall be fined no more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2511 (1976).

<sup>488</sup> 416 U.S. at 590-91 (Douglas, J., dissenting).

<sup>489</sup> *United States v. Lanese*, 385 F. Supp. 525, 529 (N.D. Ohio 1974).

<sup>490</sup> *Pulaski*, *supra* note 15, at 778-79, 789-92; *see United States v. Chavez*, 478 F.2d 512, 515 (9th Cir. 1973), *rev'd in part*, 416 U.S. 562 (1974); *United States v. King*, 478 F.2d 494, 502 (9th Cir.) *cert. denied*, 414 U.S. 846 (1973); *United States v. Marder*, 362 F. Supp. 484, 486 (S.D. Fla. 1973), *rev'd*, 496 F.2d 1405 (5th Cir. 1974); *United States v. Sklaroff*, 362 F. Supp. 478, 483-84 (S.D. Fla. 1973), *rev'd*, 500 F.2d 1183 (5th Cir. 1974); *United States v. Stanley*, 360 F. Supp. 1112, 1114 (N.D. Ga. 1973), *rev'd*, 496 F.2d 1406 (5th Cir. 1974); *United States v. Robinson*, 359 F. Supp. 52, 55 (S.D. Fla. 1973), *rev'd per curiam*, 496 F.2d 225 (5th Cir. 1974) (*en banc*).

<sup>491</sup> *Pulaski*, *supra* note 15, at 792. For what seems to be a more plausible explanation, see *supra* note 457.

<sup>492</sup> *See supra* note 487.

<sup>493</sup> *See supra* note 486. Subsequently, the Supreme Court held that proof of intentional or reckless misrepresentations would not require suppression of evidence seized under a traditional search unless the misstatement was essential to the probable cause determination. *Franks v. Delaware*, 438 U.S. 154, 171-76 (1978). Therefore, by analogy, it now appears clear that the fourth amendment does not require suppression for intentional nonmaterial violations of Title III. Nevertheless, at least on its face, Title III does not make such a distinction. *See* 18 U.S.C. §§ 2511, 2515, 2517. In any event, the alleged intentional misconduct in *Chavez* hardly can be said to pertain to a nonmaterial statutory provision. *See infra* notes 505-10 and accompanying text.

standard was blatantly misapplied.<sup>494</sup>

Professor Carr's treatise accurately observes that the centrality test represented acceptance of the "harmless error concept proposed by a 1968 draft of the *American Bar Association's Standards Relating to Electronic Surveillance* but discarded prior to final adoption."<sup>495</sup> Professor Carr is generally critical of the centrality test,<sup>496</sup> and notes that the harmless error principle "was implicitly rejected for constitutional violations by *Mapp v. Ohio*."<sup>497</sup> Both Carr and other commentators suggest that virtually any statutory violation should be a basis for suppression.<sup>498</sup> Nevertheless, a sound basis existed for applying a harmless error analysis to electronic surveillance litigation—albeit a basis not recognized by the Supreme Court in *Giordano* and *Chavez*. Although Title III was intended to be exclusive with regard to electronic surveillance, it did not restrict the independent operation of the federal harmless error statute. Thus, the language of 28 U.S.C. § 2111 seems directly applicable: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."<sup>499</sup>

Admittedly, Title III does not contain any harmless error language. The existence of 28 U.S.C. § 2111, however, obviously made such a provision unnecessary. Since Title III was derived, at least in part, from the ABA Standards,<sup>500</sup> the following analysis contained in the ABA report may explain why Congress would have regarded a harmless error approach desirable:

While recognizing the validity of the principle of a suppression sanction, the standard also recognizes that not all violations of rules and procedures should be treated in the same fashion. Some go to the essence of privacy, for example, resort to a magistrate. . . . Others in comparison are only of peripheral significance, for example, presenting the showing of probable cause orally rather than in writing. . . . "It is a kind of quackery in government," as 4 *Blackstone Commentaries* 16 (Beacon ed.) says, "and argues a wont of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty." Consequently, the standard

<sup>494</sup> See Pulaski, *supra* note 15, at 783-85; see also *supra* notes 468-74 & 479 and accompanying text.

<sup>495</sup> J. CARR, *supra* note 18, at 355.

<sup>496</sup> *Id.* at 355-57.

<sup>497</sup> *Id.* at 355.

<sup>498</sup> See Pulaski, *supra* note 15, at 782-83. Professor Carr, however, would not require suppression in cases of "de minimis" violations such as obvious clerical mistakes. See J. CARR, *supra* note 18, at § 6.03(3)(a).

<sup>499</sup> 28 U.S.C. § 2111 (1976); cf. FED. R. EVID. 103(a) (adopted in 1975 but said to reflect pre-existing law). For a brief discussion of the legislative history underlying this provision, see *Kotteakos v. United States*, 328 U.S. 750, 757-63 (1946).

<sup>500</sup> See Schwartz, *supra* note 15, at 456-57; see also *supra* notes 232 & 378.

embodies a harmless error rule . . . . [28] U.S.C. section 2111 (1964). The rule is designed to apply, of course, not at trial, but during the process of the use of the electronic surveillance techniques themselves.<sup>501</sup>

A harmless error provision was omitted from the ABA's Final Standards, but only because a specific provision was considered unnecessary; individual determinations were to be handled on a case by case basis.<sup>502</sup> Moreover, the deletion was not effected until 1971; consequently, the provision in the 1968 draft version may still have impacted upon Title III draftsmen.<sup>503</sup> Finally, the Supreme Court's implicit rejection of the harmless error doctrine with respect to constitutional violations committed during the investigative process has no bearing in this instance, since the doctrine is being applied only to statutory violations of non-constitutional dimension.

Nor does the legislative history suggest that harmless error, as codified in 28 U.S.C. § 2111, was inapplicable to Title III.<sup>504</sup> Certainly, emphasis on strict enforcement does not compel suppression for every statutory violation, however minor. Even given the broad deterrence remedy provided by Title III, strict judicial enforcement requires only that the significance of each violation be carefully evaluated in terms of its underlying policy considerations; neither general nor specific deterrence are furthered by suppressing for minor violations which occasioned no prejudice and were not marked by prosecutorial bad faith.<sup>505</sup>

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<sup>501</sup> ABA STANDARDS, *supra* note 81, at 119 (some citations omitted). By analogy, in 1966, the American Law Institute took a similar position with regard to illegally obtained statements: A statement "shall not be excluded from evidence if the court finds that the violation which would render the statement otherwise inadmissible was insubstantial and resulted from error excusable under the circumstances." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 9.10 commentary at 77-78 (Tent. Draft No. 1, 1966). The Institute reasoned that the exclusionary rule could not deter minor accidents and oversights occasioned in good faith. *See id.* The "substantiality test" devised by the Code, however, was somewhat broader than the "harmless error" doctrine that traditionally applied to evidence erroneously admitted at trial. Thus, the "substantiality test" took into consideration the "effect upon the system," whereas "harmless error" was concerned only with "the prejudicial effect, or lack thereof, of erroneously allowing such evidence to be used in a particular case." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.3 commentary at 407 (1975); *see also* TASK FORCE REPORT, *supra* note 111, at 104.

<sup>502</sup> ABA STANDARDS, *supra* note 81, at 9 (Proposed Final Draft, 1971).

<sup>503</sup> *Cf.* FED. R. CRIM. P. 52 (providing for harmless error standards comparable to § 2111).

<sup>504</sup> On the contrary, the legislative history indicates that the scope of the suppression sanction is not to be expanded in every respect. LEGISLATIVE HISTORY, *supra* note 111, at 2185; *see supra* note 232.

<sup>505</sup> The Supreme Court, for example, has indicated that the exclusionary principle "is a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect." *United States v. Calandra*, 414 U.S. 338, 348 (1974) (emphasis added). Hence, "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.*; *see Rakas v. Illinois*, 439 U.S. 128, 134 n.3 (1978). This approach is also reflected in the American Law Institute's most recent commentary on criminal procedure. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 150.5, 290.2 com-



Unfortunately, the Supreme Court's analysis in *Giordano* and *Chavez* did not expressly reflect any of these considerations. Section 2111 was not mentioned, and no explicit consideration was given to questions of prejudice and willfulness, both factors which should normally be important in determining whether substantial rights have been violated.<sup>506</sup>

mentary at 394-401, 563 (1975) (declining to suppress for insubstantial violations); *see also supra* note 501.

Note that there is a possible argument that the drafters of Title III intended to suppress only for willful statutory violations. Under this construction, § 2515 is not triggered unless there has been a willfully wrong interception (and knowledge thereof by the disclosing party) within the meaning of Title III's criminal prohibition set forth in § 2511(1)(c). *See* Pulaski, *supra* note 15, at 786-87. Professor G. Robert Blakey, principal draftsman of Title III, maintains that this is what Congress intended when the statute was written, and, indeed, this approach clearly had been adopted in Senate Bill 675, one of Title III's main predecessors. *See* S. 675, 90th Cong., 1st Sess. (1967); *Controlling Crime Hearings*, *supra* note 137, §§ 3, 4, at 75-76. *Criminal Law Hearings*, *supra* note 387, at 6 (§ 3 of Senate Bill 2198). According to Professor Blakey, since the § 2515 suppression remedy applies when "disclosure [of the surveillance] information would be in violation of this chapter," reference must then be made to § 2511 as the parallel provision which defines when disclosure is in violation of Title III. Professor Blakey further states that although § 2518(10)(a) does not expressly refer to willfulness, the provision is procedural in nature, and, therefore, merely assumes the substantive law elsewhere in Title III. Telephone interview with Professor G. Robert Blakey, Notre Dame Law School (Mar. 6, 1982). In some respects, this approach is actually broader than the centrality test because suppression appears to be mandated regardless of whether the violation is minor in nature. Most often, however, this analysis would serve to save evidence from suppression, since relatively few violations are willful. Nevertheless, Professor Blakey asserts that this result is desirable: "We agree that strict liability is bad for defendants. Why then do we impose strict liability standards upon the police?" *Id.* Professor Blakey indicates, however, that since the Supreme Court has not adopted a good faith exception to the exclusionary rule, the willfulness approach was only intended to apply to violations of nonconstitutional dimensions. *Id.* *See generally*, LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and Good Faith*, 43 *PITT. L. REV.* 307 (1982).

Regardless of the possible merits of this approach from a policy standpoint, it is inconsistent with important language in Title III. For example, § 2517, which governs when disclosure may occur, is not qualified by any willfulness language. Similarly, § 2518(10)(a), while procedural in nature, lists bases for suppression which clearly seem to be operative regardless of subjective good faith. 18 U.S.C. § 2518(10)(a)(ii)(iii) (1976). *See supra* note 419. Given the dramatic shift from traditional analysis this approach would have occasioned, it is likely that Congress would have made its intent clear, both in the statutory language and the legislative history, had such a result been intended. While this approach does appear in Senate Bill 675, it is not present in Senate Bill 2050, the other major congressional predecessor to Title III. S. 2050, 90th Cong., 1st Sess. (1967); *Controlling Crime Hearings*, *supra* at 1001. *See generally* ABA STANDARDS, *supra* note 81, at 113; TASK FORCE REPORT, *supra* note 111, at 108-11.

Finally, from a policy standpoint, the willfulness analysis ignores the potential prejudice to a victim of a nonconstitutional violation, thereby diminishing statutory protections. *See* NWC HEARINGS, *supra* note 166, at 1055 (statement of Professor Richard Uviller); J. CARR, *supra* note 18, at 670. This question must be considered anew in the context of recent proposals to effect a good faith exception to the exclusionary rule. *See* LaFave, *supra*, at 336-37. Interestingly, at least one state adopting such an approach has specifically exempted electronic surveillance from its operation. ARIZ. REV. STAT. ANN. § 13-3925(e), *noted in* 31 *CRIM. L. REP. (BNA)* 2101 (Apr. 20, 1982).

<sup>506</sup> *See* MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 290.2(4) commentary at 406-07, 565-66 (1975).

Moreover, the Court's conclusion in *Chavez* that no central provision had been abridged reflected a disingenuously narrow statutory interpretation. As Justice Douglas established in his dissent, immediate and accurate certification of responsibility for eavesdropping authorization is important to prevent subsequent disavowals.<sup>507</sup> In *Chavez*, Attorney General Mitchell acknowledged after the fact that he had authorized the surveillance, but he had every reason to do so; the surveillance had been successful and otherwise properly executed.<sup>508</sup> Moreover, had Mitchell not acknowledged his authorization in these cases and others, hundreds of defendants might have gone free.<sup>509</sup> The purpose of the immediate identification requirement, however, was to fix responsibility for the surveillance without regard to its significance as subsequently developed.<sup>510</sup> Thus, the requirement was hardly minor to the statutory scheme.

Concerning potential ramifications of its centrality standard, the Justices cautioned "that strict adherence by the Government 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."<sup>511</sup> Nevertheless, it was now clear that not all Title III violations were suppressible, and critics predicted that the centrality test would not be uniformly applied by lower courts.<sup>512</sup> Indeed, the Supreme Court soon had difficulty in *United States v. Donovan*<sup>513</sup> in applying that standard to Title III's target identification and inventory requirements. The statutory issue in *Donovan*, however, was foreshadowed by some unexpected constitutional dicta in *United States v. Kahn*.<sup>514</sup>

#### E. *UNITED STATES V. KAHN* AND *UNITED STATES V. DONOVAN*

The Supreme Court granted certiorari in *Kahn* "to resolve a seemingly important issue" of statutory construction,<sup>515</sup> but its ultimate disposition of the case had constitutional implications beyond that of any prior Title III decision. Title III requires that, if known, the identity of targets to be intercepted must be specified in the application and order.<sup>516</sup> Consequently, federal agents investigating gambling activity in Chicago had obtained an eavesdropping order authorizing the intercep-

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<sup>507</sup> 416 U.S. at 590-94.

<sup>508</sup> *Id.* at 591.

<sup>509</sup> See *supra* note 461 and accompanying text.

<sup>510</sup> J. CARR, *supra* note 18, at 164-66; Pulaski, *supra* note 15, at 754-55.

<sup>511</sup> 416 U.S. at 580.

<sup>512</sup> See Pulaski, *supra* note 15, at 821.

<sup>513</sup> 429 U.S. 413 (1977). See *infra* notes 561-95 and accompanying text.

<sup>514</sup> 415 U.S. 143 (1974).

<sup>515</sup> *Id.* at 150.

<sup>516</sup> 18 U.S.C. §§ 2518(1)(b)(iv), (4)(a) (1976).

tion of "wire communications of Irving Kahn and others as yet unknown."<sup>517</sup> During the course of surveillance, two gambling related calls made by Irving Kahn from Arizona to his wife in Chicago were intercepted; agents also intercepted gambling related calls made by Mrs. Kahn to a third party in Chicago.<sup>518</sup> On appeal, the Kahns maintained that none of these calls properly were subject to surveillance since Mrs. Kahn was, in fact, known to the agents and, therefore, could not have been unknown within the meaning of Title III or the order.<sup>519</sup> A further argument, concerning the third party calls made by Mrs. Kahn, maintained that the eavesdropping order only authorized the seizure of calls to which Mr. Kahn was a party.<sup>520</sup> The constitutionality of the "others as yet unknown" clause was not before the Supreme Court.<sup>521</sup>

Two subsections of section 2518 had to be interpreted to determine whether Mrs. Kahn was a person "as yet unknown" under Title III. In pertinent part, section 2518(1)(b)(iv) provides that "[e]ach application shall include . . . the identity of the person, if known, committing the offense and whose communications are to be intercepted";<sup>522</sup> a corresponding provision for orders, section 2518(4)(a), requires that "[e]ach order . . . shall specify . . . the identity of the person, if known, whose communications are to be intercepted."<sup>523</sup> In an effort to limit the scope of surveillance, the court of appeals had interpreted these subsections, as applied to the language in the *Kahn* order, to mean that a person was not unknown if prior careful investigation would have revealed that he was probably using the subject telephone for illegal activities.<sup>524</sup> "Known," in other words, meant actual knowledge or reasonably discoverable complicity;<sup>525</sup> once a person was "known" under this standard, his conversations could not be seized unless his identity had been specified in both the application and order. The court of appeals ac-

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<sup>517</sup> 415 U.S. at 147 (emphasis added).

<sup>518</sup> *Id.*

<sup>519</sup> *Id.* at 149-50. The thrust of this argument was twofold. First, since Mrs. Kahn was arguably "known," her conversations were not subject to seizure under Title III unless she was named in the surveillance application and order. Second, since Mrs. Kahn was "known," she was not an "unknown" person within the terms of the warrant. Therefore, none of her conversations could be lawfully seized.

<sup>520</sup> *Id.* at 149. Mrs. Kahn's third argument, premised upon the marital privilege, had been rejected by the court of appeals, and was not pursued in the Supreme Court. See *United States v. Kahn*, 471 F.2d 191, 194-95 (7th Cir. 1972), *rev'd*, 415 U.S. 143 (1974).

<sup>521</sup> In support of their statutory arguments, however, the parties briefed the question of whether the fourth amendment requires the surveillance target to be identified. Brief for Petitioner at 27-31; Brief for Respondent at 7-20. Nevertheless, this issue was beyond the scope of the certiorari grant, and, consequently, was not analyzed in depth.

<sup>522</sup> 18 U.S.C. § 2518(1)(b)(iv) (1976).

<sup>523</sup> *Id.* § 2518(4)(a).

<sup>524</sup> 471 F.2d at 196.

<sup>525</sup> 415 U.S. at 151.

cordingly concluded that Mrs. Kahn must be considered "known," and, therefore, should have been named in the application and order, because the government had failed to show that further investigation would not have implicated her.<sup>526</sup> Consequently, the seizure of Mrs. Kahn's conversations was ruled illegal as beyond the purview of the eavesdropping order.

The Supreme Court, however, read the statute more literally. Ironically, the comprehensiveness of Title III was now used to the government's advantage, as Justice Stewart, writing for the Court, observed that Congress surely would have explicitly qualified the term "known" had a discoverability standard been intended.<sup>527</sup> Instead, the "statutory language would plainly seem to require the naming of a specific person in the . . . application only when law enforcement officials believe that such an individual is actually committing one of the offenses specified."<sup>528</sup> Since no such belief was held when this application was filed, Mrs. Kahn was properly unknown within the meaning of Title III and the surveillance order.<sup>529</sup> Admittedly, law enforcement officials knew of Mrs. Kahn's existence and probable use of her home telephone; nevertheless, she was still legally "unknown" because there was no probable cause to believe that she was using the telephone for criminal purposes.<sup>530</sup>

This aspect of *Kahn* was properly decided. It was consistent with the statutory language, and it avoided a result which would have both increased investigatory burdens and potentially occasioned greater intrusions into privacy by requiring the government to investigate any non-target who might be overheard on the subject telephone.<sup>531</sup> In attempting to allay fears that permitting interception of unidentified parties would, in effect, resurrect general warrants for eavesdropping, however, the Supreme Court actually indicated that it would countenance many seizures of generalized scope. According to Justice Stewart, unlimited seizures would not result because surveilling officers still had to minimize the interception of conversations unrelated to the designated crime and respect the order's time limitations.<sup>532</sup> The Constitution, he suggested, affords no further protections; conventional warrants,

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<sup>526</sup> 471 F.2d at 196-98.

<sup>527</sup> 415 U.S. at 153.

<sup>528</sup> *Id.* at 152.

<sup>529</sup> *Id.* at 152, 155.

<sup>530</sup> *Id.*

<sup>531</sup> Justice Stewart observed: "[I]n the case at hand, the Court of Appeals' holding would require the complete investigation, not only of Mrs. Kahn, but also of the two teenaged Kahn children and other frequenters of the Kahn residence before a wiretap could be applied for." *Id.* at 153.

<sup>532</sup> *Id.* at 154.

by analogy, may properly be issued without even describing the owner of the premises to be searched: "[t]he Fourth Amendment requires a warrant to describe only 'the place to be searched, and the persons or things to be seized,' not the persons from whom things will be seized."<sup>533</sup> Indeed, Justice Stewart reasoned, Title III drafters must have recognized this possibility since the statutory language directly implies the availability of an eavesdropping order against unknown subjects, and because the Senate rejected an amendment limiting the admissibility of surveillance evidence to persons specified in the order.<sup>534</sup>

This analysis was fundamentally mistaken from both a constitutional and legislative perspective. Constitutionally, the Court's reliance upon the conventional search warrant analogy was misdirected.<sup>535</sup> In a standard premises search and seizure, the scope of the search is adequately limited by describing with particularity the item(s) to be seized and the place to be searched.<sup>536</sup> Once probable cause has been found regarding the target place, this description also serves to protect *third parties* by prohibiting searches of *other places*. Under such circumstances, describing the person whose place is to be searched adds little third party protection beyond ensuring that the correct place is actually searched. Moreover, any other users of the place specified in the warrant neither deserve nor need any further protection, since the search is

<sup>533</sup> *Id.* at 155 n.15 (quoting *United States v. Fiorella*, 468 F.2d 688, 691 (2d Cir. 1972), *cert. denied*, 417 U.S. 917 (1974)).

<sup>534</sup> 415 U.S. at 157 n.18.

<sup>535</sup> The Court borrowed the following unfortunate analogy from the government's brief:

If a warrant had been issued, upon a showing of probable cause, to search the Kahn residence for physical records of gambling operations, there could be no question that a subsequent seizure of such records bearing Minnie Kahn's handwriting would be fully lawful, despite the fact that she had not been identified in the warrant or independently investigated.

415 U.S. at 155 n.15. *See* Brief for Petitioner at 29. This analogy is inapplicable to *Kahn*. The discovery of Minnie Kahn's gambling records would be lawful under the plain view doctrine because the initial entry into the Kahn residence was properly authorized by the warrant. If eavesdropping warrants constitutionally must identify the criminal targets to be overheard, however, surveillance officers would not have effected a valid initial intrusion by listening to a conversation between two unnamed parties. The officer, of course, must be given leeway to determine whether the persons intercepted are those named in the order (and plain view principles would properly operate during this process). Nevertheless, once the monitoring agent realizes that no party on the line has been named in the order, interception must cease. After this period, subject to occasional spot monitoring to determine if the parties on the phone have changed, seizure of further conversations may not be cured by plain view because the predicate intrusion is outside the scope of the surveillance order. "A closer search and seizure analogy would therefore be the discovery of Minnie Kahn's records in Irving Kahn's garage, under a warrant limited to a search of the residence of Irving Kahn." Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 STAN. L. REV. 1411, 1431 n.103 (1974). For a detailed discussion of the minimization and plain view principles underlying this analysis, see *infra* notes 596-660 & 839-75 and accompanying text.

<sup>536</sup> *See* 2 W. LAFAVE, *supra* note 60, § 4.10; *see also supra* note 304 and accompanying text.

primarily directed against the place *and they normally cannot be searched personally*.<sup>537</sup> In contrast, for an electronic search to achieve the same type of protection for third parties, its scope must be limited by describing with particularity the conversation to be seized, the telephone or place to be surveilled, and the persons to be overheard.<sup>538</sup> Here, too, the purpose of the description is not only to protect the target of the surveillance, as to whom a showing of probable cause has already been made, but also to shield third parties against interception. Since this type of search is primarily directed against a person rather than a place, third party users in conversations between two unnamed parties are not adequately protected merely by a description of the place or telephone under surveillance; multiple users of a single telephone, for example, are vulnerable to seizure of their conversations unless the eavesdropping order limits surveillance to specified parties.<sup>539</sup> True, law enforcement agents are required to refrain from listening to conversations not perti-

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<sup>537</sup> In *Ybarra v. Illinois*, 444 U.S. 85 (1979), a valid search warrant authorized police to search the premises and person named in the warrant for certain specified items. Standing alone, the warrant did not confer the authority to search unnamed persons who happened to be on the target premises when the search occurred:

It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person, *Sibron v. New York* . . . . Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. See *Rakas v. Illinois*, . . . *Katz v. United States* . . . .

Each patron who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth Amendment protection possessed by the proprietor of the tavern or by "Greg." Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search "Greg," it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.

*Id.* at 91-92 (citation omitted). Admittedly, *Ybarra* was a post-*Kahn* case, but the Court's citation to pre-*Kahn* authority indicates that new constitutional authority was not being propounded. Applying the *Ybarra* analysis to electronic surveillance, it is apparent that an order authorizing the interception of A's gambling wire communications does not constitutionally permit interception of third party conversations between B and C. Cf. Annot. 49 A.L.R.2d 1209 (1956) (person to be searched must be identified with reasonable certainty).

<sup>538</sup> "Naming the person to be subjected to an electronic surveillance intrusion provides merely the same protection given to the subject of a conventional search—there, protection takes the form of a particular description of the place to be searched. Both descriptions serve to limit an otherwise limitless search." J. CARR, *supra* note 18, at 37. The only situation in which this analysis would not apply is when there is probable cause to believe that every person using the phone or facility will be doing so for the specified criminal purpose.

<sup>539</sup> See NWC REPORT, *supra* note 1, at 82. See generally Comment, *An Examination of the Naming Requirement of Title III in Light of United States v. Donovan—A Case for Suppression*, 24 VILL. L. REV. 73, 81-83 (1978).

nent to the crime specified in the warrant, but even this procedure exposes third party users to a limited intrusion without a prior showing of probable cause.<sup>540</sup> Moreover, given the difficulty of both particularizing the target conversation and achieving effective minimization,<sup>541</sup> an identification requirement is a constitutional necessity. Indeed, even this approach would not protect second parties conversing with the target individual, although that is a consequence which does not rise to constitutional significance.<sup>542</sup>

Prior to *Kahn*, the Supreme Court had given no intimation that the identification requirement was not constitutionally mandated. Rather, *Berger v. New York* twice suggested that specificity of person was a constitutional absolute.<sup>543</sup> Similarly, in *Katz* the Supreme Court seemed to emphasize that the Constitution protects people and not just places.<sup>544</sup> Moreover, it is certain that Congress believed this to be so, and consequently did not intend to sanction surveillance between exclusively unnamed parties—especially since the concept of indiscriminate third party eavesdropping had long been a major source of opposition to electronic surveillance.<sup>545</sup> The legislative history expressly noted that identification seemed to be required by *Berger*,<sup>546</sup> and concluded that by linking together a specific person, offense, and place, the statutory requirements “are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity.”<sup>547</sup>

Admittedly, the language of section 2518(1)(b)(iv) and section 2518(4)(a) suggests that if a person is unknown, a surveillance order may

<sup>540</sup> Under the proffered analysis, officers must terminate interception, subject to spot monitoring, as soon as they recognize that unnamed parties are conversing. Hence, the agents would not be permitted to listen further to determine the conversation's potential pertinency. See *supra* note 535. For a detailed discussion of minimization procedures, see *infra* notes 596-669 & 839-75 and accompanying text.

<sup>541</sup> See *supra* notes 323-26 and *infra* notes 596-670 and accompanying text.

<sup>542</sup> See *infra* notes 553-54 and accompanying text.

<sup>543</sup> 388 U.S. 41, 56, 58 (1967). The Court did state that the New York statute's identification requirement merely specified the person whose rights were to be infringed by the surveillance, *id.* at 59, but this simply meant that additional particularity safeguards were needed rather than that the naming requirement was unnecessary. See Comment, *supra* note 539, at 86 n.114.

<sup>544</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>545</sup> See, e.g., Schwartz, *supra* note 101, at 162 (“Sometimes, it is said that innocent people have nothing to fear from their conversations being overheard. But this ignores the [private] nature of conversation . . . . The unedited quality of conversation is essential” to a free society); Westin, *supra* note 39, at 188 & n.111 (“wiretapping is dragnet in its nature”); see also *supra* notes 145-46 and accompanying text.

<sup>546</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2161; see Scott, *supra* note 118, at 17.

<sup>547</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2191; see *United States v. Kahn*, 415 U.S. 143, 161 n.4 (1974) (Douglas, J., dissenting).

still be available.<sup>548</sup> However, the legislative history's concern with the constitutional mandate of *Berger* and *Katz* belies such a conclusion. A careful analysis of these subsections suggests that Congress intended to require identification by name, if known, and otherwise at least some other description—perhaps by voice or manner of speech—of the person to be surveilled.<sup>549</sup> The Senate Report indicates this by its citation to *West v. Cabell*,<sup>550</sup> in which the Supreme Court both criticized vague arrest warrants for failing to protect third party interests, and endorsed a Texas statute that required warrants by name but otherwise allowed their issuance upon “some reasonably definite description” of the suspect.<sup>551</sup> Nor does the Senate's rejection of an amendment limiting admissibility to named parties suggest a different conclusion. The proposed amendment was simply too broad, as it would have precluded admissibility against unnamed second parties overheard conversing with a properly identified target individual.<sup>552</sup> Such seizures do not violate the fourth amendment; each party received the benefit of a prior judicial determination evaluating both probable cause and particularity as to crime, conversation, and person, so that the resulting warrant was appropriately limited in scope.<sup>553</sup> The second party's situation is comparable to someone whose illegal goods are seized during a warrant authorized search of another's properly described premises. Seizure of third party conversations, in contrast, is more akin to a search of nonspecified premises under a warrant with too broad a description. Alternatively, seizure of the second party's end of the conversation may be analogized to traditional plain view seizures.<sup>554</sup> Consequently, the Senate's rejection

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<sup>548</sup> See *supra* notes 522-23 and accompanying text. Both provisions superficially suggest that identification is required only if the person is known.

<sup>549</sup> Note, *supra* note 524, at 1425 & n.73 (order should specify all known information relating to a target's identity, especially if his or her name is not known). See generally MASS. GEN. LAWS ANN. ch. 272 § 99(I)(3) (West 1970) (order must name or describe person and place to be surveilled). Cf. *United States v. Principie*, 531 F.2d 1132, 1138 (2d Cir. 1975), *cert. denied*, 430 U.S. 930 (1977) (order identifying a target by first name held to comply with naming requirement).

<sup>550</sup> 153 U.S. 78 (1894), cited in LEGISLATIVE HISTORY, *supra* note 111, at 2191.

<sup>551</sup> 153 U.S. at 87.

<sup>552</sup> 114 CONG. REC. 14,718 (1968); see also *Bryant v. Yetter*, 447 U.S. 352, 376 (1980) (“failure to enact suggested amendments . . . not . . . most reliable indication of Congressional intention”).

<sup>553</sup> The second party's conversations, however, are properly intercepted only if they come within the scope of the probable cause predicate. For example, if probable cause establishes only that pertinent conversations will occur between *A* and *B*, discussions between *A* and *C* would not be subject to seizure. Cf. *United States v. LaGorga*, 336 F. Supp. 190, 195-96 (W.D. Pa. 1971). But if the probable cause predicate is broader—establishing, for example, that *A* will speak with others as yet unknown—conversations between *A* and unknowns could be intercepted. Cf. *supra* notes 325-26 and accompanying text and *infra* notes 833-37 and accompanying text.

<sup>554</sup> For a discussion of plain view principles, see *infra* notes 839-74 and accompanying text.



tion of the proposed amendment no doubt reflected the drafters' desire to retain admissibility against unknown second party conversants. This desire, however, did not necessarily translate into acceptance of unidentified, third party eavesdropping as approved in *Kahn*.<sup>555</sup>

For these reasons, the *Kahn* dicta was not expected.<sup>556</sup> Remarkably, the Court once again pronounced significant new law without having given the parties an opportunity to brief the point in depth.<sup>557</sup> Somewhat forlorn, Justice Douglas warned that the Court had created a constitutional dragnet clause that would hereupon be incorporated into all eavesdropping applications and orders.<sup>558</sup> There were other implications as well: if the Constitution does not require party identification in surveillance orders, a fortiori persons may be named in the order (or left unnamed) without regard to probable cause limitations.<sup>559</sup> Al-

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It must be emphasized that this observation is merely by analogy to the plain view situation. If anything, the analysis is on an a fortiori basis as plain view involves seizure of items not specified in the warrant, whereas the situation described involves seizure of conversations specified in the warrant.

<sup>555</sup> See Note, *supra* note 535, at 1431. Similarly, it is apparent that pre-*Kahn* cases, which held the naming requirement not to be constitutionally required, were addressing themselves only to the situation where unnamed persons had been conversing with named parties. These opinions did not address the interception of conversations between two unknown participants. See *United States v. Fiorella*, 468 F.2d 688, 691 (2d Cir. 1972), *cert. denied*, 417 U.S. 917 (1974); *United States v. Curreri*, 368 F. Supp. 757, 760-62 (D. Md. 1973), *aff'd sub nom. United States v. Bernstein*, 509 F.2d 996 (4th Cir. 1975), *vacated on other grounds*, 430 U.S. 902 (1977); *United States v. King*, 335 F. Supp. 523, 538-40 (S.D. Cal. 1971), *modified on other grounds*, 478 F.2d 494 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973); *United States v. Perillo*, 333 F. Supp. 914, 919-21 (D. Del. 1971); *United States v. Sklaroff*, 323 F. Supp. 296, 324-25 (S.D. Fla. 1971).

<sup>556</sup> Indeed, Professor G. Robert Blakey, principal draftsman of Title III, has indicated that the *Kahn* dicta was completely unexpected. Telephone interview with Professor G. Robert Blakey, Notre Dame Law School (Mar. 6, 1982).

<sup>557</sup> See *supra* note 521.

<sup>558</sup> *United States v. Kahn*, 415 U.S. 143, 163 (Douglas, J., dissenting). The insertion of a "dragnet clause" and the "and others as yet unknown" language has become routine practice in surveillance applications and orders. See C. FISHMAN, *supra* note 438, § 51. See generally *United States v. Dorfman*, 690 F.2d 1217, 1220 (7th Cir. 1982) (fourteen month surveillance involving interceptions of hundreds of persons besides five defendants, although it is not clear how many intercepts occurred purely under warrant's dragnet clause); *United States v. Dorfman*, 542 F. Supp. 345, 370 (N.D. Ill.) (warrant included "and others yet unknown"), *aff'd*, 690 F.2d 1217 (7th Cir. 1982). It should be noted, however, that such clauses were often deployed before *Kahn* as well. See *United States v. King*, 478 F.2d 494, 499 (9th Cir.), *cert. denied*, 414 U.S. 842 (1973); *United States v. Bowdach*, 474 F.2d 812, 813 (5th Cir. 1973), *aff'd after remand*, 501 F.2d 220 (5th Cir. 1974), *cert. denied*, 420 U.S. 948 (1975). The legitimacy of this practice apparently was not questioned.

<sup>559</sup> For example, one court has intimated that naming someone in the order without probable cause does not present a basis for suppression. See *United States v. DePalma*, 461 F. Supp. 800, 816 (S.D.N.Y. 1978). See generally *United States v. Martin*, 599 F.2d 880, 884-85 (9th Cir.), *cert. denied*, 441 U.S. 962 (1979); *United States v. Dorfman*, 542 F. Supp. 345, 377 n.30 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (7th Cir. 1982). But see generally *United States v. Dietz*, 622 F.2d 476, 479-81 (10th Cir. 1980); *United States v. Kirk*, 534 F.2d 1262, 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 901 (1977); J. CARR, *supra* note 18, at 49 (Supp. 1982).

though Title III still requires party identification based upon probable cause,<sup>560</sup> *Kahn* had made this provision constitutionally insignificant, and, as a mere statutory safeguard, it was vulnerable to the vicissitudes of the *Giordano-Chavez* centrality test.

The impact of *Kahn* was plainly demonstrated in *United States v. Donovan*.<sup>561</sup> Although not apparent from the decision's text, the legitimization of dragnet clauses may have been determinative of *Donovan's* outcome. *Donovan* was a gambling prosecution against multiple defendants who had been incriminated by a series of wiretaps.<sup>562</sup> Two separate issues were raised on appeal. First, *Donovan* and two co-defendants maintained that one of the eavesdropping warrants was void because the application and order had failed to name them, despite the existence of probable cause to believe that they would be overheard discussing illegal gambling on the target telephone.<sup>563</sup> Second, two other defendants, Merlo and Lauer, acknowledged that they need not have been named in the application and order, but argued that all eavesdropping evidence pertaining to them should have been suppressed because they had not been served with inventory notice under section 2518(8)(d); since neither had been named, inventory notice was discretionary by the judge,<sup>564</sup> but Merlo and Lauer protested that the court never had a chance to exercise this discretion because the government had omitted their names from a list of overheard persons.<sup>565</sup> The government's appeal from adverse determinations below brought the case before the Supreme Court.

The government conceded that there was probable cause as to *Donovan*,<sup>566</sup> but argued that Title III only required the identification of persons who would be using the target phone directly to place or receive calls.<sup>567</sup> Under this view, incoming callers, such as *Donovan*, did not have to be named. From a constitutional standpoint, naming *Donovan*

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<sup>560</sup> See *supra* notes 522-23 and accompanying text. Note that the statutory naming requirement creates an unfortunate dilemma for prosecutors. Inevitably, persons named in the warrant contend that there was no supporting probable cause, while persons unnamed argue that they should have been specified because probable cause existed as to them. See NWC REPORT, *supra* note 1, at 66; J. CARR, *supra* note 18, at 174-75. See generally *United States v. Martin*, 599 F.2d 880, 885 (9th Cir.), *cert. denied*, 414 U.S. 962 (1979). The impact of this dilemma, however, was substantially diminished by the Supreme Court's holding in *United States v. Donovan*, 429 U.S. 413 (1977), that suppression for naming violations usually would not be required. See *infra* notes 571-74 and accompanying text; see also *United States v. Principie*, 531 F.2d 1132, 1137 (2d Cir. 1976); cf. *infra* note 887.

<sup>561</sup> 429 U.S. 413 (1977).

<sup>562</sup> *Id.* at 421.

<sup>563</sup> *Id.* at 419-21.

<sup>564</sup> *Id.* at 422; see *supra* notes 263 & 338-40 and accompanying text.

<sup>565</sup> 429 U.S. at 420.

<sup>566</sup> *Id.* at 419 n.5.

<sup>567</sup> *Id.* at 424 & nn.13-14.

normally would not have been required, so long as he was only being monitored while conversing with a properly named party.<sup>568</sup> The Supreme Court correctly noted, however, that since Title III apparently requires identification in the application of each person for whom probable cause exists, a statutory violation had occurred.<sup>569</sup> Similarly, Justice Powell, writing for the Court, found that the government had violated Merlo's and Lauer's Title III rights by failing to provide the supervising judge with sufficient information with which to exercise inventory notice discretion.<sup>570</sup> Accordingly, the next question was whether suppression was required for these transgressions.

Disposition of the identification violation turned upon an application of the *Giordano-Chavez* centrality test. While acknowledging that the target identification requirement was important,<sup>571</sup> the Court nevertheless declined to suppress for this infringement. Once all other Title III requirements have been met, Justice Powell reasoned, "the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization."<sup>572</sup> At worst, he suggested, the only consequence of this omission is to make the issuing judge unaware that others might be overheard.<sup>573</sup> On this basis, the identification requirement was deemed peripheral and, in the absence of prejudice, suppression was denied.<sup>574</sup>

This broad analysis plainly disregarded any limits on the scope of surveillance that might be effected by the identification requirement.<sup>575</sup> The scope of the surveillance was admittedly not directly at issue in *Donovan*; as each of the unnamed "known" parties was overheard discussing gambling with an identified target, the range of interception had not been improperly expanded. Justice Powell's broad language, however, seemed equally applicable to situations where the unnamed "known" individual had spoken to another unnamed person. Such a conclusion is suggested by *Kahn*.<sup>576</sup> Prior to *Kahn*, conversations be-

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<sup>568</sup> See *supra* notes 543 & 552-54 and accompanying text.

<sup>569</sup> 420 U.S. at 428.

<sup>570</sup> *Id.* at 432.

<sup>571</sup> *Id.* at 434.

<sup>572</sup> *Id.* at 435.

<sup>573</sup> *Id.* at 436.

<sup>574</sup> *Id.* at 439-40. The Court implied that its decision might have been different if *Donovan*, *Robbins*, and *Buzzacco* had not received inventory notice or if the government's failure to identify them had been in bad faith. *Id.* at 436 n.23; see *infra* note 594. This suggestion potentially represented a significant expansion upon the centrality test formulated in *Giordano* and *Chavez*. See *supra* notes 452-74 and accompanying text.

<sup>575</sup> See *supra* notes 535-41 and accompanying text.

<sup>576</sup> Furthermore, the Court reaffirmed its *Kahn* dicta that the Constitution does not require target identification. 429 U.S. at 427 n.15; see *supra* notes 543 & 555 and accompanying text.

tween two unnamed parties arguably were not subject to interception, since neither party had been identified in the surveillance order.<sup>577</sup> However, since *Kahn* had sanctioned surveillance over two unnamed parties, the failure to identify a known person was no longer significant; the scope of interception had already been expanded by *Kahn*, and, thus, the conversation would have been subject to seizure regardless. *Kahn*, therefore, seems to have deprived improperly unnamed parties of the argument that, because identification potentially limits the scope of surveillance, the naming requirement is central under *Giordano* and *Chavez*.

Even given *Kahn*, however, the Court should still have found the party identification requirement to be central. Justice Powell found the identification requirement to be peripheral, despite Congress' perception of it as constitutionally necessary.<sup>578</sup> Beyond that, however, virtually every court of appeals considering the matter had decided that target identification "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures."<sup>579</sup> As Justice Marshall stated in his *Donovan* dissent, the identification requirement serves as a "statutory 'trigger'" by virtue of its relationship to other Title III provisions.<sup>580</sup> Disclosure of prior eavesdropping applications under section 2518(1)(e), for example, is required only for persons listed in the present application.<sup>581</sup> This disclosure is necessary because judges have complete discretion to deny surveillance requests for policy reasons;<sup>582</sup> consequently, revelation of prior applications is important in determining whether the present application is an effort to circumvent a restrictive ruling by a previous judge or possibly to harass the eavesdropping target. Moreover, identification ensures that judges reviewing future eavesdropping requests will learn that the application

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<sup>577</sup> In fact, however, since dragnet clauses were often used in eavesdropping warrants, such seizures probably occurred with frequency. See *supra* note 558.

<sup>578</sup> See *supra* notes 546-49 and accompanying text. Justice Powell's majority opinion conceded that Congress might have believed that the Constitution mandates the naming requirement, but suggested that Congress did not intend suppression to follow for all violations of this statutory provision. 429 U.S. at 437 n.25. This comment might mean that suppression would be granted for violations involving conversations between two unnamed parties.

<sup>579</sup> *United States v. Giordano*, 416 U.S. 505, 527 (1974); see *United States v. Scully*, 546 F.2d 255, 265 (9th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977); *United States v. Civella*, 533 F.2d 1395, 1404 (8th Cir. 1976), *cert. denied*, 430 U.S. 1056 (1977); *United States v. Moore*, 513 F.2d 485, 497-98 (D.C. Cir. 1975), *vacated*, 556 F.2d 77 (D.C. Cir. 1977); *United States v. Donovan*, 513 F.2d 337, 340 (6th Cir. 1975), *rev'd*, 429 U.S. 413 (1977); *United States v. Bernstein*, 509 F.2d 996, 1003-04 (4th Cir. 1975), *vacated*, 430 U.S. 903, *rev'd*, 556 F.2d 244 (4th Cir. 1977).

<sup>580</sup> 429 U.S. at 446-47 (Marshall, J., dissenting).

<sup>581</sup> 18 U.S.C. § 2518(1)(e) (1976).

<sup>582</sup> 429 U.S. at 447-48 (Marshall, J., dissenting); see *supra* note 263 and accompanying text.

then under consideration was not the first.<sup>583</sup> Finally, the identification requirement triggers mandatory inventory notice, thereby guaranteeing notification of interception.<sup>584</sup>

Thus, as in *Chavez*, the Court misapplied its own centrality test. Indeed, the *Chavez* and *Donovan* decisions suggest that too flexible a standard is being allowed. If the Court is to enforce this principle in a manner consistent with legislative intent, the centrality question should simply turn on a harmless error analysis. Hence, only minor, nonprejudicial violations should be excused.<sup>585</sup> In *Donovan*, once Justice Powell conceded that the identification requirement was important, no further inquiry should have been necessary; instead, suppression should have automatically followed.

Justice Powell likewise considered the inventory requirement important, but peripheral, to the statutory scheme.<sup>586</sup> Inventory notice, he maintained, was a post-interception procedure which Congress did not intend "to serve as an independent restraint on resort to [electronic surveillance]." <sup>587</sup> Consequently, since Merlo and Lauer had received notice before trial, and therefore had not been prejudiced, suppression was not required.<sup>588</sup> Although this analysis was somewhat imprecise, Justice Powell's conclusion actually cannot be faulted. Although inventory notice serves an important function by making the statute's civil remedies more meaningful—and thereby discouraging unlawful surveillance<sup>589</sup>—failure to comply is, in fact, a *post*-interception violation. Thus, it

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<sup>583</sup> This is because disclosure, as required by § 2518(1)(e), applies only to those prior interceptions in which the present target had been named in the application. See *United States v. Easterling*, 554 F.2d 195, 196 (5th Cir. 1977); *United States v. Florea*, 541 F.2d 568, 576 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); *United States v. Chiarizio*, 388 F. Supp. 858, 874 (D. Conn.), *aff'd*, 525 F.2d 289 (2d Cir. 1975); *State v. Assuntino*, 180 Conn. 345, 350-51, 429 A.2d 900, 903 (1980). On occasion, however, courts have properly held that disclosure is also required as to prior intercepts in which the present target should have been named. See *State v. Rowman*, 116 N.H. 41, 45, 352 A.2d 737, 739 (1976).

<sup>584</sup> 18 U.S.C. § 2518(8)(d) (1976).

<sup>585</sup> Cf. *Chapman v. California*, 386 U.S. 18, 24 (1967) (government has burden of proving beyond a reasonable doubt that violation did not contribute to verdict). See generally *supra* note 505 and accompanying text.

<sup>586</sup> 429 U.S. at 434, 438-39. Prior to *Donovan*, most courts of appeals had found this provision to be central, but had declined to suppress absent a showing of prejudice. See, e.g., *United States v. Lawson*, 545 F.2d 557, 565 (7th Cir. 1975); *United States v. Cirillo*, 499 F.2d 872, 881-82 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States v. Iannelli*, 477 F.2d 999, 1002 (3d Cir. 1972), *aff'd on other grounds*, 400 U.S. 770 (1975).

<sup>587</sup> 429 U.S. at 439. Defendants can rarely, if ever, demonstrate prejudice. See generally *United States v. Harrigan*, 557 F.2d 879, 884 (1st Cir. 1977); *United States v. Cirillo* 499 F.2d 872, 881-82 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974). Consequently, critics have argued that, at the very least, the burden should be on the government to show an absence of prejudice. See, e.g., J. CARR, *supra* note 18, at 356-57; Comment, *supra* note 539 at 87-88.

<sup>588</sup> 429 U.S. at 439.

<sup>589</sup> See *supra* note 264 and accompanying text.

should not retroactively illegitimize an otherwise lawful surveillance, provided, of course, that proper notice is given prior to use at trial.<sup>590</sup> The language of Title III consistently suggests that its section 2515 suppression provision is not to be applied to such violations;<sup>591</sup> other sanctions are available.<sup>592</sup> Accordingly, suppression for violation of the inventory notice requirement was not warranted.

Nevertheless, the quality of analysis in both *Kahn* and *Donovan* was hardly consistent with careful judicial supervision. Together, these decisions reduced the identification requirement from a constitutional precept to an insignificant statutory chore. Ironically, the *Donovan* Court once again called for strict enforcement of the statute,<sup>593</sup> and for the first time intimated that intentional violations would be treated more severely.<sup>594</sup> Despite this, just a year later, in *Scott v. United States*<sup>595</sup> the Court would decline to suppress even for purposeful misconduct.

#### F. *SCOTT V. UNITED STATES*

After years of controversy,<sup>596</sup> the Supreme Court granted certiorari in *Scott* to address the meaning of Title III's so-called minimization requirement. Section 2518(5) requires that "the authorization to intercept . . . shall be conducted in such a way as to *minimize* the interception of communications not otherwise subject to interception . . . ."<sup>597</sup> The limits of permissible surveillance are defined by the identified target (subject to use of the dragnet clause), specified crime, and particularized description of conversation contained in the eavesdropping order. In theory, conversations not pertinent to the warrant may not be inter-

<sup>590</sup> 18 U.S.C. § 2518(9) (1976); see *infra* note 592.

<sup>591</sup> The text of § 2515 speaks in terms of unlawful disclosure. See *supra* note 232. Unlawful disclosure is addressed in § 2511(1) and § 2517 in terms of information having been improperly obtained. 18 U.S.C. §§ 2511(1), 2517 (1976). Further, § 2518(10)(a) applies only to unlawful interceptions. See *supra* note 419. Professor Carr disagrees with this analysis because he believes that too many post-interception violations would, consequently, go unpunished. J. CARR, *supra* note 18, at 352-53. He fails to realize, however, that other sanctions are available to deter misconduct in this context. See *infra* notes 592, 865-67 & 917-20 and accompanying text.

<sup>592</sup> For example, inventory violations are punishable by contempt. 18 U.S.C. § 2518(8)(c) (1976). Furthermore, proper notice is a prerequisite to admissibility at trial. 18 U.S.C. § 2518(9) (1976). Admittedly, the scope of notice under § 2518(9) is not as broad as § 2518(8)(d)'s inventory notice requirements, but the judge has discretion to rectify this deficiency. 18 U.S.C. § 2518(8)(d) (1976). For a discussion of other independent sanctions, see *infra* notes 865-67 & 917-20 and accompanying text.

<sup>593</sup> 429 U.S. at 439-40.

<sup>594</sup> *Id.* at 439 n.26; see *supra* note 574 and accompanying text.

<sup>595</sup> 436 U.S. 128 (1978).

<sup>596</sup> See generally Fishman, *The Minimization Requirement in Electronic Surveillance: Title III, The Fourth Amendment, and The Dread Scott Decision*, 28 AM. U.L. REV. 315 (1979); Note, *supra* note 258; Note, *supra* note 535.

<sup>597</sup> 18 U.S.C. § 2518(5) (1976) (emphasis supplied).

cepted; perfection, of course, cannot be achieved, but surveilling officers are required to minimize interception to the extent possible.<sup>598</sup>

Minimization was incorporated into Title III in an effort to respond to historical concerns that electronic surveillance was by nature inevitably indiscriminate.<sup>599</sup> The Supreme Court in *Berger* had shared this concern. Among other reasons, the New York law had been struck down because it allowed "general searches by electronic devices" and permitted broad interceptions "without regard to their connection to the crime under investigation."<sup>600</sup> In effect, the statute gave law enforcement "a roving commission to 'seize' any and all conversations."<sup>601</sup> This procedure conflicted sharply with the constitutional maxim that governmental intrusions must be accomplished by the least drastic means possible.<sup>602</sup> Thus, Title III's minimization requirement is actually constitutional in origin.<sup>603</sup>

Since the statute, however, neither defined minimization nor provided criteria for its implementation,<sup>604</sup> critics were quick to suggest

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<sup>598</sup> See *infra* notes 610-21 and accompanying text. Critics of electronic surveillance argue that law enforcement officers cannot conduct electronic surveillance without seizing nonpertinent conversations. This may be so, but the Constitution does not require perfection. See *supra* notes 314, 317 & 329-71 and accompanying text. Moreover, it should be noted that, from the law enforcement perspective, minimization often causes the loss of incriminating conversations. See NWC HEARINGS, *supra* note 166, at 575, 715; COMMISSION STUDIES, *supra* note 322, at 121; Note, *supra* note 258, at 96. Skeptics suggest that this factor will prompt officers to avoid the minimization directive either by monitoring without recording or by using bootleg cassettes to record the full conversation. See Schwartz, *supra* note 15, at 475. These are realistic concerns. Nevertheless, proper supervision should deter the use of bootleg cassettes, and equipment can be obtained which makes listening without recording more difficult to effect. See NWC HEARINGS, *supra*, at 88, 683. Abuses certainly have occurred, see NWC REPORT, *supra* note 1, at 92; *id.* at 182 (minority report); NAT'L COMM'N, ELECTRONIC SURVEILLANCE, NWC STAFF STUDIES AND SURVEYS 10 (1976) [hereinafter cited as NWC STAFF STUDIES]; see generally *infra* notes 622-30 and accompanying text. There have also been, however, numerous examples of proper minimization. See, e.g., *United States v. Armocida*, 515 F.2d 49, 53 (3d Cir. 1975) (officers terminated calls pertaining to another crime); Fishman, *supra* note 596, at 349 n.21. Indeed, at times highly cautious monitors may have overminimized. See NWC STAFF STUDIES, *supra*, at 266.

<sup>599</sup> See *supra* notes 145-46 and accompanying text.

<sup>600</sup> *Berger v. New York*, 388 U.S. 41, 58-59 (1967).

<sup>601</sup> *Id.* at 59.

<sup>602</sup> See, e.g., *id.* at 94-101; J. CARR, *supra* note 18, at 257. See generally *infra* note 757 and accompanying text.

<sup>603</sup> See *Berger v. New York*, 388 U.S. at 59; J. CARR, *supra* note 18, at 256; Note, *supra* note 258, at 96-97. Some authorities have failed to realize that the minimization requirement is constitutionally premised. See *United States v. Cox*, 462 F.2d 1292, 1300 (8th Cir. 1972) ("the touchstone for deciding the issue is that it rests on a statutory command and therefore turns on the intent of Congress in issuing that directive"); Note, *Minimization: In Search of Standards*, 8 SUFFOLK U.L. REV. 60, 63 (1973). The Department of Justice, for example, mistakenly asserts in its procedural manual that minimization is merely a statutory requirement. U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL title 9, 46-48 (1979).

<sup>604</sup> By comparison, the Foreign Intelligence Surveillance Act provides somewhat more guidance in this respect. 50 U.S.C. § 1801(h) (1976 & Supp. IV 1981); see Schwartz, *Oversight of*

that indiscriminate eavesdropping would not be curtailed.<sup>605</sup> Definitional and procedural problems arose almost immediately. What was meant, for example, by the term "intercept"? Defined by statute simply as "the aural acquisition of the contents of a wire or oral communication through the use of any electronic, mechanical or other device,"<sup>606</sup> interception could mean any of the following: (1) listening to conversations; (2) recording conversations; (3) *both* listening to *and* recording conversations; or (4) *either* listening to *or* recording conversations. Under alternatives (1), (2), and (3), statutory protections would be significantly reduced because, depending upon the alternative, no interception occurs if agents either record without listening (alternatives (1) and (3)), or listen without recording (alternatives (2) and (3)).<sup>607</sup> Moreover, once interception was appropriately defined, standards had to be developed for determining when conversations were to be considered pertinent and, therefore, properly subject to interception. Although the Supreme Court had essentially decreed minimization to be a constitutional necessity, it chose to leave the lower courts with the responsibility for resolving these questions. Prior to its 1978 decision in *Scott*, certiorari had routinely been denied in all minimization cases.<sup>608</sup>

*Scott* can best be understood in the context of the lower court standards which preceeded it. These standards in large part were designed to encourage flexibility. While most courts sought to maximize privacy by defining "intercept" broadly in terms of *either* listening *or* recording

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*Minimization Compliance under the Foreign Intelligence Surveillance Act: How the Watchdogs are Doing Their Jobs*, 12 RUTGERS L. REV. 405, 405-14 (1981).

<sup>605</sup> NWC REPORT, *supra* note 1, at 15, 82, 91; Spritzer, *supra* note 15, at 187-89; Note, *supra* note 535, at 1432.

<sup>606</sup> 18 U.S.C. § 2510(4) (1976).

<sup>607</sup> The statute should thus be amended to define "intercept" as including either listening or recording. See J. CARR, *supra* note 18, at 261; Note, *supra* note 535, at 1415; Note, *supra* note 258, at 104; see also *United States v. Bynum*, 487 F.2d 490, 502 n.6 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903, *aff'd on rehearing*, 387 F. Supp. 449 (S.D.N.Y. 1974), *aff'd*, 513 F.2d 533 (2d Cir.), *cert. denied*, 423 U.S. 952 (1975); *Spence v. State*, 275 Md. 88, 90-91, 338 A.2d 289-92 (1975); COMMISSION STUDIES, *supra* note 322, at 24, 366.

<sup>608</sup> See *United States v. Abascal*, 563 F.2d 821 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978); *United States v. Losing*, 560 F.2d 906 (8th Cir.), *cert. denied*, 434 U.S. 969 (1977); *United States v. Hinton*, 543 F.2d 1002 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977); *United States v. Chavez*, 533 F.2d 491 (9th Cir.), *cert. denied*, 426 U.S. 911 (1976); *United States v. Turner*, 528 F.2d 143 (9th Cir.), *cert. denied*, 423 U.S. 997 (1975); *United States v. Armocida*, 515 F.2d 29 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States v. Capra*, 501 F.2d 267 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. James*, 494 F.2d 1007 (D.C.Cir.), *cert. denied*, 417 U.S. 936 (1974); *United States v. Bynum*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903, *aff'd on rehearing*, 386 F. Supp. 449 (S.D.N.Y. 1974), *aff'd*, 513 F.2d 533 (2d Cir.), *cert. denied*, 423 U.S. 952 (1975).



conversations (alternative (4) above),<sup>609</sup> the judiciary accommodated law enforcement by developing liberal guidelines which purported to reflect the difficulties inherent to the minimization process. Thus, perfection was not required, since the courts realized that each interception inevitably involved the seizure of some innocent conversation before a minimization decision could be made.<sup>610</sup> Moreover, the standards reflected the recognition that achieving minimization was often not easy; neither speaker identification nor subject relevance were always apparent.<sup>611</sup>

<sup>609</sup> Most decisions actually assumed this definition without expressly adjudicating the point. *See, e.g.*, *United States v. Leta*, 332 F. Supp. 1357, 1360 (M.D. Pa. 1971).

<sup>610</sup> For example, the following observation was quoted with approval:

[I]t is often impossible to determine that a particular telephone conversation would be irrelevant and harmless until it has been terminated.

It is all well and good to say, after the fact, that certain conversations were irrelevant and should have been terminated. However, the monitoring agents are not gifted with prescience and cannot be expected to know in advance what direction the conversation will take.

*Cox v. United States*, 462 F.2d 1293, 1301 (8th Cir. 1972); *see* NWC REPORT, *supra* note 1, at 92; Note, *supra* note 258, at 96-97; Note, *supra* note 535, at 1432 n.118 (implicit in the concept of minimization is the assumption that some conversations will be inadvertently seized, even when they are, in hindsight, not pertinent).

<sup>611</sup> *See United States v. Bynum*, 360 F. Supp. 400, 405 (S.D.N.Y.), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); C. FISHMAN, *supra* note 438, at 201. For example, the following extract from an eavesdropping warrant should demonstrate the difficulty of discerning subject relevance:

8. Conversations intercepted pursuant to the Order of April 14th reveals that Matteo DiLorenzo a/k/a "Uncle Marty" has spoken in very guarded terms to several persons including "Fishell" (true name unknown) concerning planned meetings and other arrangements in what is apparently an extortionate credit transaction. A conversation between DiLorenzo and Fishell (TNU), which occurred on April 24, 1972, is set forth in paragraph 9 below:

9. Marty (in) to Fishell (out).

F Hello.

MD Fishell?

F Yeah, hello. Marty, how are you?

MD All right, I got tied up, I couldn't afford much time.

F I contacted his wife, you know?

MD Yeah, right.

F And she in turn, is gonna contact him, and bring him back.

MD Oh very good.

F Because, I relayed the message that, I sez look, come back and whatever could be done will be done for you, ya know.

MD Of course, yeah.

F So, I'm gonna wait to hear from him now.

MD Very good.

F And-ah-I think you can handle the situation because it's just two people besides yourself and another guy that could be discarded until you get—your first, anyway.

MD O.K.

F You know what I'm trying to say?

MD Yeah, we'll try to get everything, yeah.

F That's right that's right.

This difficulty was compounded by the frequent use of foreign languages and codes.<sup>612</sup> Finally, the courts also realized that minimization

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MD Yeah, we'll try to get it squared away.  
 F I told her to tell him, look everything will be done in my house, I don't even have to be there, he sits with him himself and fix his own situation.  
 MD Yeah, very good.  
 F You know what I mean?  
 MD Yeah.  
 F O.K.  
 MD Very good.  
 F And as soon as I get word, I'll call you, if not, I'll wait until I hear from you anyway—I know he'll call me.  
 MD Very good.  
 F You know what I mean.  
 MD O.K.  
 F And if this Monday, stop by, you'll get it.  
 MD O.K. Fish.  
 F O.K.?  
 MD O.K. Take care.  
 F Bye bye.

NWC HEARINGS, *supra* note 166, at 456. Not surprisingly, defense lawyers have frequently questioned the monitors' ability to discern relevant conversations: "There is something to be said for not trusting the constable who sits there day after day with earphones, eating salami sandwiches, and having him pick out a conversation which he thinks may be pertinent or impertinent." NWC HEARINGS, *supra*, at 613 (statement of Stanley Arkin).

<sup>612</sup> See, e.g., *United States v. Abascal*, 564 F.2d 821, 827 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978); *United States v. Clerkley*, 556 F.2d 709, 717 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978); *United States v. Armocida*, 515 F.2d 29, 38-39 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States v. James*, 494 F.2d 1007, 1019 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974). The following is a typical example of a coded conversation:

*Conversation A*

ALDO: I called. I talked to him.  
 GAZAL: We're out of tires.  
 ALDO: Huh?  
 GAZAL: We don't have *no* tires.  
 ALDO: I know.  
 GAZAL: Huh.  
 ALDO: Well let me see—said he'd be up Sunday.  
 GAZAL: Why don't you call him tonight. Meet him tonight. He could tell you the same story tonight.  
 ALDO: Yea, I know it.  
 GAZAL: And find out what's what.  
 ALDO: Yea.  
 GAZAL: Why does he have to wait until Sunday to tell you a story.  
 ALDO: Yea, alright, I'll call him in a little while.  
 GAZAL: Yea, tell him you want to see him and then he can explain to you what's wrong.  
 ALDO: Don't worry—OK.

*Conversation B*

SONNY: Hello.  
 GAZAL: Sonny?  
 SONNY: Yeah?

poses an inherent dilemma for executing officers: if they fail to minimize enough, defendants will argue the statute has been violated; if police minimize too much, defendants may contend that exculpatory evidence was not recorded.<sup>613</sup>

Given this need for flexibility, a multifaceted approach was developed for assessing minimization compliance. Five basic factors were typically included in the matrix: (1) the nature and scope of the investigation (extent of leeway directly to reflect complexity of crime and breadth of conspiracy);<sup>614</sup> (2) character of the target facility (greater flexibility allowed for telephone used primarily for criminal purposes,

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GAZAL: Yeah, you said to call you.

SONNY: Yea.

GAZAL: Alright?

SONNY: Okay.

GAZAL: I was talking to the *shoe salesman*, and he said he's going to give that guy a call today. He was waiting to hear from him, you know.

SONNY: Yeah.

GAZAL: He said I think I'll—I better give him a call. Okay?

SONNY: Yeah, I'll call that kid.

GAZAL: Okay.

SONNY: Alright.

United States v. Armocida, 515 F.2d 29, 37 nn.13-14 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975) (emphasis added). The reference to "tires" and the "shoe salesman" respectively pertain to narcotics and the narcotics supplier. *See id.* One lawyer told the National Wiretapping Commission that the use of coded language makes it easier to defend cases because there are "alternative explanations" for the defendant's conversations. NWC HEARINGS, *supra* note 166, at 620 (statement of James K. O'Malley); *see* COMMISSION STUDIES, *supra* note 322, at 122, 431.

<sup>613</sup> NWC REPORT, *supra* note 1, at 93. This was somewhat analogous to aspects of the defense offered by Senator Harrison Williams in his Abscam trial. *See* STAFF OF SENATE SELECT COMM. ON ETHICS, 97TH CONG., 1ST SESS., TRIAL PROCEEDINGS (TRIAL TRANSCRIPT EXCERPTS AND TAPE RECORDING TRANSCRIPTS) IN THE CASE OF THE UNITED STATES OF AMERICA V. HARRISON A. WILLIAMS, JR., ET AL. IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK CRIM. NO. 80 CR-00575 3882-83 (Comm. Print 1981) (defendant Williams maintaining that video recordings were conducted in a manner that did not permit him to make exculpatory statements); *see also* R. GREENE, THE STINGMAN 280-81, 284-85 (1981); Latham, *Anatomy of a Sting: John DeLorean Tells His Story*, 391 ROLLING STONE, March 17, 1983, at 18, 20, 25, 28. *But see* NWC REPORT, *supra*, at 94 (defense attorneys suggesting that claims of exculpatory materials being minimized out are rarely made). The resulting dilemma for law enforcement has prompted some jurisdictions to use a dual recorder system. One recorder intercepts all conversations in their entirety, while the other is used to minimize. Then, unless a claim is made that exculpatory information has been minimized out, law enforcement officials are not given access to the nonminimized tape recording. *See* NWC HEARINGS, *supra* note 166, at 682 (statements of Messrs. Ronald G. Martin, James Foody, Richard Belton, and Donald Brandon, New York State Police); C. FISHMAN, *supra* note 438, at 205-06. The validity of this approach, however, has not been established definitively. NWC REPORT, *supra*, at 93-94. The procedure is well analyzed in Note, *supra* note 258, at 106.

<sup>614</sup> NWC REPORT, *supra* note 1, at 68; *see, e.g.*, United States v. Hyde, 574 F.2d 856, 869 (5th Cir. 1978); United States v. Armocida, 515 F.2d 29, 44 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975) (when the enterprise under investigation is a large scale conspiracy, it may be necessary for the government to intercept more conversations than in the case of a more limited

special precautions necessary for public places,<sup>615</sup> and more latitude for wider ranging bugs than for relatively narrow wiretaps);<sup>616</sup> (3) the period in surveillance (early in surveillance agents may monitor approximately two minutes of every call so that parties and subjects can be classified into categories of nonpertinence; thereafter, such nonpertinent conversations may not be intercepted);<sup>617</sup> (4) clarity of language (greater freedom to intercept when parties conversing in code);<sup>618</sup> and (5) extent of judicial supervision (considerable deference shown to judge who has actively overseen interception process).<sup>619</sup> Although not explicitly expressed, the first four standards generally reflected the proposition that a monitoring official was initially entitled to listen to any conversation

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criminal undertaking); *United States v. James*, 494 F.2d 1007, 1019-20 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974).

<sup>615</sup> See *United States v. James*, 494 F.2d at 1020 ("Where . . . a telephone is used exclusively to conduct illegal business and is located in a place which serves no residential or business purpose in the sense in which those terms are ordinarily used, then the users of that telephone do not have the expectation of privacy which society accepts and less stringent minimization standards are both reasonable and permitted by Title III"); see also *United States v. Hyde*, 574 F.2d at 869; *United States v. George*, 465 F.2d 772, 774 (6th Cir. 1972); *Commonwealth v. Vitello*, 367 Mass. 224, 244 n.21, 327 N.E.2d 814, 842 n.21 (1975).

<sup>616</sup> NWC REPORT, *supra* note 1, at 15. The Commission explained the basis for the problem associated with bugs:

[D]epending upon their location, bugs can create difficult minimization problems. Some witnesses testified that minimization with a bug was virtually impossible, because bugs are indiscriminate and overhear all speakers. Unlike a telephone conversation, which involves only two persons, except in the rare instance of a conference call, the number of persons in a conference room or social club who may be overheard with a bug is unlimited. In such circumstances, minimization can be very difficult. . . .

*Id.* at 44. Professor Fishman has made similar observations:

The task of defining minimization standards and practices is even more complex for bugging devices than it is for wiretaps. Face-to-face conversations cannot be divided into "discrete units" or "assessed on an individual basis." Unless voice-activated tape recorders are utilized, there may be no way of knowing when a conversation is taking place. If visual surveillance of the bugged premises is impracticable, monitors may be unable to establish, aside from the listening device, whether the premises is [sic] unoccupied, occupied by only one individual, or by several. In addition, conversants may discuss diverse matters, swiftly and unexpectedly moving from one topic to another.

Fishman, *supra* note 596, at 344; see *United States v. Clerkley*, 556 F.2d at 717; *United States v. Dorfman*, 542 F. Supp. 345, 392, 397 n.65 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (7th Cir. 1982).

<sup>617</sup> See Note, *supra* note 258, at 114; see also *United States v. Chavez*, 533 F.2d 491, 493-94 (9th Cir.), *cert. denied*, 426 U.S. 911 (1976); *United States v. Focarile*, 340 F. Supp. 1033, 1048-50 (D. Md. 1972), *aff'd*, 469 F.2d 522 (4th Cir.), *aff'd sub nom.* *United States v. Giordano*, 414 U.S. 505 (1974).

<sup>618</sup> See, e.g., *United States v. Armocida*, 515 F.2d at 53; *United States v. Quintana*, 508 F.2d 867, 874 n.6 (7th Cir. 1975); *United States v. James*, 494 F.2d at 1019; *United States v. Tortorello*, 480 F.2d 764, 783 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

<sup>619</sup> See, e.g., *United States v. Losing*, 560 F.2d 906, 909 (8th Cir.), *cert. denied*, 434 U.S. 969 (1977); *United States v. Armocida*, 515 F.2d at 44-45; *United States v. Quintana*, 508 F.2d at 875 ("Where the judge has required and reviewed such reports at frequent intervals, courts have been more willing to find a good-faith attempt to minimize unnecessary interception"); *Spease v. State*, 21 Md. App. 269, 279, 319 A.2d 560, 566 (Md. Ct. Spec. App. 1973); *People v. Floyd*, 41 N.Y.2d 245, 253, 392 N.Y.S. 2d 257, 264, 360 N.E. 2d 935, 943 (1976).

until he no longer had probable cause to believe that it was pertinent, and the fifth presumed that judicial supervision ensured that this was being done.<sup>620</sup> Once deemed nonpertinent, the agent was required to terminate transmission, although occasional spot monitoring was permitted to verify that a seemingly nonpertinent conversation had not later taken a pertinent turn.<sup>621</sup>

In theory, these standards were well suited for addressing a complex modern problem. In application, however, they often served as bases for boilerplate affirmations of minimization practices rather than as a framework for careful analysis. Leading commentators uniformly agree that, prior to *Scott*, many courts handled the minimization requirement permissively.<sup>622</sup> Apparently concerned that too rigid an approach would handicap law enforcement,<sup>623</sup> "the cases [showed] a strong inclination to find pertinent any conversation that [had] any conceivable connection to the investigation, no matter how remote."<sup>624</sup> Several decisions, for example, sustained as reasonable "minimization" efforts that had resulted in total interception of every conversation;<sup>625</sup> on occasion, fewer than ten percent of these calls were actually pertinent.<sup>626</sup> Other courts found compliance despite minimization having occurred on only a small fraction of calls.<sup>627</sup> In conspiracy cases, the judiciary tended to be particularly lenient, often ruling that wide leeway had to be given to identify all participants,<sup>628</sup> and, at times, even suggesting that every

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<sup>620</sup> See generally *United States v. Dorfman*, 542 F. Supp. at 391. Moreover, the standards are indicative of greater tolerance for situations in which minimization is difficult to achieve.

<sup>621</sup> See *supra* note 258 and accompanying text.

<sup>622</sup> Note, *supra* note 258, at 108-09; see *J. CARR, supra* note 18, at 266; *Fishman, supra* note 596, at 340; Note, *supra* note 535, at 1411.

<sup>623</sup> For example, one court has stated that "[a]n overly restrictive interpretation of the minimization requirement could make it impossible to use [electronic surveillance] in connection with the investigation of organized criminal conspiracies." *United States v. Cox*, 567 F.2d 930, 933 (10th Cir. 1977).

<sup>624</sup> Note, *supra* note 258, at 108-09.

<sup>625</sup> See *United States v. Abascal*, 564 F.2d 821 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978); *United States v. Clerkley*, 556 F.2d at 716-19; *United States v. Chavez*, 533 F.2d at 495; *United States v. Quintana*, 508 F.2d at 873-75 (7th Cir. 1975); *United States v. James*, 494 F.2d at 1019-22; *United States v. Manfredi*, 488 F.2d 588, 598-99 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *State v. Dye*, 60 N.J. 518, 534-36, 291 A.2d 825, 833-34, *cert. denied*, 409 U.S. 1090 (1972).

<sup>626</sup> *United States v. Quintana*, 508 F.2d at 873; *United States v. Manfredi*, 488 F.2d at 599; *State v. Dye*, 60 N.J. at 529, 291 A.2d at 830.

<sup>627</sup> See *United States v. Losing*, 560 F.2d 906, 909 (8th Cir.), *cert. denied*, 434 U.S. 969 (1979); *United States v. Kirk*, 534 F.2d 1262, 1269, 1276 n.3 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977); *United States v. Turner*, 528 F.2d 143, 156-58 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975). See generally *NWC HEARINGS, supra* note 166, at 1083.

<sup>628</sup> See, e.g., *United States v. Capra*, 501 F.2d 267, 274 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Bynum*, 360 F. Supp. 400, 417 n.15 (S.D.N.Y.), *aff'd* 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *State v. Molinaro*, 117 N.J. Super. 276, 291, 284 A.2d 385, 393 (1971), *rev'd per curiam*, 122 N.J. Super. 181, 299 A.2d 750, *cert.*

conversation between co-conspirators could be seized in full.<sup>629</sup>

Certainly, in cases of total interception "[t]he assertion that the agents were unable to screen out a single conversation despite a reasonable minimization effort strains credulity."<sup>630</sup> Even where some minimization had been effectively accomplished, the courts clearly were not enforcing their own standards with appropriate judicial scrutiny. Broad interceptions, for example, were frequently justified because a "far flung" conspiracy was under investigation, but the cases never explicitly examined whether there was probable cause both to believe such an extensive conspiracy existed and would be discussed on the telephone.<sup>631</sup> Similarly, judicial supervision was often cited as a basis for approval without thoroughly examining its qualitative contribution to the minimization process.<sup>632</sup> Moreover, the courts tended to apply the standards in general terms, without analyzing whether a particular conversation could, nevertheless, have been reasonably minimized.<sup>633</sup> For example, the mere fact that a conversation was between co-conspirators does not

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*denied*, 62 N.J. 574, 303 A.2d 327 (1973). Nonminimized surveillance on this basis conceivably could continue throughout the authorization period, especially since the Department of Justice has indicated that identification of all co-conspirators is not always possible. UNITED STATES ATTORNEYS' MANUAL title 9, *supra* note 603, at 31 (1979) (cautioning, however, that "blind reliance" should not be placed on this ground). There is, however, no more reason to allow agents to listen to seemingly nonpertinent calls in the hope that co-conspirators will be named, than to allow them to listen to such calls for any other investigative purpose. Once a call appears to be nonpertinent, spot monitoring should commence.

<sup>629</sup> See *United States v. Scott*, 516 F.2d 751, 755 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976); *United States v. Bynum*, 360 F. Supp. at 416; *United States v. King*, 335 F. Supp. 523, 542 (S.D. Cal. 1971), *modified*, 478 F.2d 984 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973); NWC REPORT, *supra* note 1, at 93; Note, *supra* note 258, at 107 n.74.

<sup>630</sup> Note, *supra* note 258, at 112 n.95; C. FISHMAN, *supra* note 438, at 229 n.8, 299. Investigations, however, have often been successful despite compliance with the minimization directive. *Id.* See generally *United States v. Turner*, 528 F.2d at 156-58; *United States v. Armocida*, 515 F.2d at 142-46.

<sup>631</sup> For example, *United States v. Quintana*, 508 F.2d at 873, barely addresses the question of probable cause. Similarly, in *United States v. Scott*, 516 F.2d at 759, there is minimal discussion of this issue. Although probable cause may have been assumed implicitly—and even properly decided—careful analysis demands thorough coverage of this issue.

<sup>632</sup> See C. FISHMAN, *supra* note 438, at 264; see also NWC REPORT, *supra* note 1, at 93-94. In *Scott*, the judge was never advised that agents had not been minimizing, nor that the conspiracy was smaller than originally anticipated. See *United States v. Scott*, 516 F.2d at 759-60; see also *United States v. Dalia*, 426 F. Supp. 862, 867-70 (D.N.J. 1977), *aff'd*, 575 F.2d 1344 (3d Cir.), *aff'd*, 441 U.S. 238 (1979) (agents' progress reports contained intentional misrepresentations). But see *United States v. Sisca*, 361 F. Supp. 735, 745 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974) (suppression despite appearance of judicial supervision). Significantly, the Department of Justice uses progress reports as predicates for establishing that close judicial supervision occurred. UNITED STATES ATTORNEYS' MANUAL title 9, *supra* note 603, at 18 (1979). While such reports are designed to serve an important role, see *infra* notes 814-16 and accompanying text, they should not be used as part of the minimization analysis unless they are qualitatively sound. Significantly, deficiencies in these reports are rarely a basis for reversal. See *infra* notes 817-21 and accompanying text.

<sup>633</sup> Fishman, *supra* note 596, at 353-55.

necessarily mean that minimization was impossible.<sup>634</sup> Similarly, use of codes should not automatically result in approving an interception, since the code may have been deciphered.<sup>635</sup> Likewise, the existence of even extensive judicial supervision, or perhaps a wide ranging bug instead of a wiretap, does not preclude the possibility that more effective minimization could reasonably have been achieved.<sup>636</sup> Nevertheless, these factors were rarely considered—at least explicitly—by the reviewing courts.<sup>637</sup>

This was the state of the law prior to *Scott*. In part, the Supreme Court was responsible for this situation by its denial of certiorari in several questionable cases.<sup>638</sup> *Scott*, however, provided the Court with an opportunity to rectify the consequences of its prior neglect. Further, as the agents in *Scott* had “purposely and knowingly” made no effort to minimize any of the 384 conversations that were intercepted during a month long surveillance,<sup>639</sup> the case posed another question for the Supreme Court as well: is an intentional failure to comply with the minimization requirement automatically a statutory violation? Although the question seemed almost rhetorical, the Supreme Court remarkably held that intentional misconduct does not necessarily constitute a mini-

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<sup>634</sup> Minimization in such circumstances may be difficult but not necessarily impossible. Certainly, the difficulty does not justify failure to attempt compliance.

<sup>635</sup> Note, *supra* note 535, at 1419 n.42.

<sup>636</sup> A bug can be minimized on the following basis: monitors may listen continuously until a conversation starts to occur; once discussion commences, spot monitoring should be initiated as soon as the subject matter appears to be nonpertinent. Professor Fishman similarly acknowledges that bugging does not preclude minimization. Fishman, *supra* note 596, at 344. Courts, however, have tended to ignore this possibility. In *United States v. Clerkley*, the court uncritically assumed that bugging does not allow the same selectivity as telephone tapping for minimization: “[c]onversation may range over many subjects, shifting instantaneously, and without warning. Because of this uncertainty, we cannot say that anything less than continuous monitoring would suffice.” *United States v. Clerkley*, 556 F.2d at 717. See generally *United States v. DePalma*, 461 F. Supp. 800, 824 (S.D.N.Y. 1978).

<sup>637</sup> Some courts, however, have stated that there is not unlimited leeway with respect to early categorization of nonpertinent conversations. Once categories of nonpertinence are established, minimization must commence. See *United States v. Scott*, 516 F.2d at 754-58; *United States v. Quintana*, 508 F.2d at 874-75. But see *United States v. Hinton*, 543 F.2d at 1012 (agents were allowed to listen for five minutes to ascertain pertinence).

<sup>638</sup> See, e.g., *United States v. Manfredi*, 488 F.2d at 593, 599 (1,595 calls intercepted entirely; approximately 150 pertinent); *State v. Dye*, 60 N.J. at 536-39, 291 A.2d at 835 (105 hours of conversation intercepted, two and one-half hours thereof relevant to the investigation). In one case, the suspect's babysitter made totally innocent calls which accounted for fourteen and one-half hours of the intercept, an additional nineteen hours of innocent calls, lasting at least ten minutes each, were intercepted, and sixty-seven telephone communications with lawyers were intercepted, forty-two of which, at least arguably, fell within the attorney-client privilege. The monitoring agents were not advised of other developments in the investigation so that they could determine whether further surveillance was necessary. *United States v. Bynum*, 513 F.2d 533 (2d Cir.), *cert. denied*, 423 U.S. 952, 954-56 (1975) (Brennan, J., dissenting).

<sup>639</sup> *United States v. Scott*, 436 U.S. 128, 145 (1978) (Brennan, J., dissenting).

mization violation.<sup>640</sup> Critical to its analysis was the following distinction advanced by the Department of Justice:

[P]etitioners' argument fails to properly distinguish between what is necessary to establish a statutory or constitutional violation and what is necessary to support a suppression remedy once a violation has been established. In view of the deterrent purposes of the exclusionary rule, consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate *after* a statutory or constitutional violation has been established. But the existence *vel non* of such a violation turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.<sup>641</sup>

Writing for the Court, Justice Rehnquist reasoned that the fourth amendment's proscription against "unreasonable" intrusions necessarily implies that an objective standard is to be employed in determining whether a constitutional right has been abridged.<sup>642</sup> Hence, he maintained, recent cases confirm that fourth amendment questions initially must be examined "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved."<sup>643</sup> By analogy, Justice Rehnquist concluded, an objective test must also apply to alleged statutory minimization violations.<sup>644</sup> This holding was not considered inconsistent with congressional intent; according to Justice Rehnquist, use of the word "conducted" in section 2518(5), Title III's minimization provision, was purportedly indicative of a "focus . . . on the agents' actions not their motives;"<sup>645</sup> moreover, the legislative history to section 2515, the statutory exclusionary rule, was said to state that the law "was not intended 'generally to press the scope of suppression beyond present search and seizure law.'"<sup>646</sup> On this basis, Justice Rehnquist ruled that motive became a factor only after a violation had been objectively established.<sup>647</sup> According to the Court, however, no such violation had occurred. Instead, application of the traditional minimization factors was held to have established that the total seizure of all conversations for a one month period was not objectively unreasonable.<sup>648</sup> Justice Rehnquist, however, applied these

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<sup>640</sup> *Id.* at 135.

<sup>641</sup> *Id.* at 135-36.

<sup>642</sup> *Id.* at 137.

<sup>643</sup> *Id.* at 138.

<sup>644</sup> This analogy was not made explicitly, but was apparent from Justice Rehnquist's reference to fourth amendment principles.

<sup>645</sup> 436 U.S. at 139.

<sup>646</sup> *Id.* The remainder of the legislative history, however, makes clear that the availability of the suppression remedy has been expanded to new situations. See *supra* note 232 and accompanying text.

<sup>647</sup> 436 U.S. at 136.

<sup>648</sup> *Id.* at 139-43.



factors in a mechanistic and conclusory manner. No apparent effort was made to determine whether, given the knowledge and expertise of the agents involved, minimization could still reasonably have been achieved.<sup>649</sup> Nor was a comprehensive analysis of individual calls explicitly undertaken to determine whether the agents had failed to suspend surveillance despite the expiration of probable cause to believe those calls were pertinent.<sup>650</sup>

From a constitutional standpoint, the Court's statement that alleged fourth amendment violations were to be objectively evaluated without reference to subjective intent was of questionable validity; as applied to conventional searches, scholars frankly disagree.<sup>651</sup> Given the greater intrusion occasioned by electronic surveillance, however, the fourth amendment's reasonableness clause would seem to require such searches to be undertaken in good faith.<sup>652</sup> Moreover, from a statutory perspective, the holding directly contravened basic Title III principles. Section 2518(5) requires that execution of the order be "*conducted* in such a way as to minimize the interception of [nonpertinent] communications."<sup>653</sup> Given the broad deterrent purpose underlying Title III, there is no reason to read the term "conducted" as excluding subjective intent. On the contrary, the requirement of good faith in section 2517(5), a related provision which requires proper minimization in the context of plain view seizures, suggests that intent is likewise an important minimization factor.<sup>654</sup> Furthermore, provision for criminal prohibitions in sec-

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<sup>649</sup> *Id.*; see *United States v. Scott*, 516 F.2d at 759.

<sup>650</sup> It is possible that such an analysis was undertaken. If so, this should have been made explicit in the opinion.

<sup>651</sup> Compare 1 W. LAFAYE, *supra* note 60, § 1.2, at 7-18 (Supp. 1982) with Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 74-81 (1982). See also *Washington v. Chrisman*, 455 U.S. 1 (1982) (suggesting that objective test still controls).

<sup>652</sup> Professor Fishman makes the following compelling argument:

[I]n assessing the constitutionality of the failure to minimize, the Court completely ignored the distinction between an isolated physical search and seizure and a continuing series of surreptitious interceptions. A considerable body of case law has developed under the fourth amendment that strictly circumscribes the circumstances under which, and the procedures by which, a physical search can be conducted. This is true even though a physical search is of limited duration and usually is conducted with the knowledge of the suspect. A prolonged investigation utilizing electronic surveillance presents increased opportunities for abuse; those utilizing the telephone or premises under surveillance can neither observe nor complain about the conduct of the police during the course of the search because they are unaware of it. Such factors would seem to dictate more rigorous procedures to meet constitutional requirements.

Fishman, *supra* note 596, at 335. See generally *State v. Catania*, 85 N.J. 418, 436, 427 A.2d 537, 547 (1981) (holding that under state statute minimization requires subjective good faith); *People v. Calogero*, 75 A.D. 2d 455, 459, 420 N.Y.S. 2d 970, 973 (1980) (implicitly assuming a good faith requirement).

<sup>653</sup> 18 U.S.C. § 2518(5) (1976).

<sup>654</sup> 18 U.S.C. § 2517(5) (1976). For the text of this provision, see *infra* text accompanying note 848.

tion 2511(1), outlawing willful misconduct, demonstrates that intent was an integral aspect of the overall statutory scheme—indeed, by “willfully” intercepting or “endeavor[ing]” to intercept in a manner unauthorized by Title III, the agents appear to have committed statutory felonies.<sup>655</sup> Nor, as Justice Rehnquist otherwise suggested, is this interpretation inconsistent with Congress’ expression of intent regarding the scope of Title III’s exclusionary rule. Simply put, the scope of section 2515 is irrelevant when determining whether a violation has occurred.<sup>656</sup>

Ironically, prior to *Scott* there was uniform agreement in minimization cases that, “on the whole, the agents [must] have shown a high regard for the right to privacy and have done all they reasonably could to avoid unnecessary intrusion.”<sup>657</sup> This principle seems to be compelled by a straightforward statutory analysis, but it may additionally reflect awareness that enforcement of a judicial directive is also at stake.<sup>658</sup> Yet, this was a consideration that Justice Rehnquist ignored.<sup>659</sup> Certainly, conformance to a court order should be evaluated in subjective terms. For example, assume that, for the sake of efficiency, surveillance agents decide to put their equipment on “automatic record,” thereby allowing them to devote their energies to other aspects of the investigation.<sup>660</sup> Even if all the resulting interceptions could be justified subsequently under prevailing minimization standards, would any judge be satisfied that the authorization had been “conducted” in compliance with his order? Similarly, if agents inform a judge that they “purposely and knowingly” made no effort to minimize, the judge obviously would be impelled to conclude that his directive had been violated.<sup>661</sup> When there has been no minimization, it is a non sequitur to

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<sup>655</sup> 18 U.S.C. § 2511 (1976). Significantly, the statute’s use of the word “endeavors” in § 2511 eliminates any prospect of a legal impossibility defense. *See Osborn v. United States*, 385 U.S. 323, 333 (1966) (continuous validity of complex impossibility doctrine need not be resolved, as doctrine inapplicable to statute outlawing endeavors rather than attempts); *LEGISLATIVE HISTORY, supra* note 111, at 2181.

<sup>656</sup> § 2515 is triggered only after a violation has been established. 18 U.S.C. § 2518(10)(a) (1976).

<sup>657</sup> *United States v. James*, 494 F.2d at 1018; *United States v. Tortorello*, 480 F.2d at 784; *United States v. Focarile*, 340 F. Supp. at 1046 (establishing that intentional misconduct would be violative of Title III); *NWC REPORT, supra* note 1, at 14.

<sup>658</sup> *United States v. Scott*, 436 U.S. at 131. The text of the relevant court orders is provided in the Record on Appeal at 95, 118, *United States v. Scott*, 436 U.S. 128 (1978) (United States Supreme Court Appendix).

<sup>659</sup> Thus, the case should have been analyzed under § 2518(10)(a)(ii) rather than § 2518(10)(a)(i). *See supra* note 419.

<sup>660</sup> This practice was routine prior to the enactment of Title III. *See NWC HEARINGS, supra* note 166, at 1083.

<sup>661</sup> If agents inform the judge of their intent not to minimize during the application process, it is unlikely that any judge would grant the surveillance order. To avoid the *Scott*

surmise that the minimization was reasonable.

Finally, the Court's willingness to embrace a purely objective test was troublesome from an analytical viewpoint. Even though minimization standards are purported to be applied contemporaneously, without reference to post-interception information which may retrospectively demonstrate a conversation's pertinence,<sup>662</sup> the analysis inevitably is influenced by post-interception considerations. At that time, the nature of the offense and the defendant's criminal background, as well as the incriminating nature of the tapes, may subtly influence judicial review.<sup>663</sup> This possibility is facilitated by broad minimization standards that make it relatively easy to justify the seizure of any conversation. Accordingly, when resort to the vagueness of post-interception judicial review can readily be avoided because a clear case of intentional misconduct has been presented, the opportunity to do so should promptly be seized.

Nor did the Supreme Court suggest in *Scott* that minimization standards should be applied with careful scrutiny. If anything, the Court's approach was directly contrary to one which would inquire whether, notwithstanding facial compliance with prevailing standards, minimization could still reasonably have been achieved. Like its lower court predecessors, the Supreme Court apparently assumed "that in complex cases effective minimization and successful investigations are mutually exclusive."<sup>664</sup> Indeed, despite its decision negating intent as a factor in evaluating compliance, the Court's superficial application of prevailing standards actually created an interesting irony: regardless of whether minimization was actually possible, surveillance agents could now argue that they had acted in good faith by intercepting any conversation whose seizure could be justified by judicial guidelines.<sup>665</sup>

In dissent, Justice Brennan rebuked the Court for effectively emasculating the minimization requirement.<sup>666</sup> *Kahn*, he reminded, had emphasized that allowing conversations of "others as yet unknown" to be

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scenario, Professor Fishman suggests that judges include a "good faith" directive in the eavesdropping warrant. Fishman, *supra* note 596, at 356.

<sup>662</sup> See, e.g., *United States v. Scott*, 516 F.2d at 756 n.10; Note, *supra* note 535, at 1420-21. Retrospective analyses always seem to find a higher percentage of pertinent calls. See *United States v. Bynum*, 360 F. Supp. at 417 n.15; *United States v. King*, 335 F. Supp. at 542-43.

<sup>663</sup> *State v. Catania*, 85 N.J. at 442-43, 436-39, 427 A.2d at 549-50, 546-48. For this reason, New Jersey has rejected the *Scott* approach. See N.J. STAT. ANN. 2A:156A-12(f) (West 1980); see also *People v. Calogero*, 75 A.2d at 459, 429 N.Y.S.2d at 973.

<sup>664</sup> Fishman, *supra* note 596, at 349.

<sup>665</sup> For example, the Department of Justice procedural manual, while emphasizing the need for good faith, simply suggests that any conversation fitting the minimization standards may be seized. UNITED STATES ATTORNEYS' MANUAL title 9, *supra* note 603, at 46-47 (1979).

<sup>666</sup> 436 U.S. at 143 (Brennan, J., dissenting) (minimization requirement has been eviscerated).

intercepted did not constitute an impermissible general warrant because agents still had to minimize the seizure of nonpertinent material.<sup>667</sup> Since "the Court's holding permits Government agents deliberately to flout the duty imposed upon them by Congress," Justice Brennan maintained that reconsideration of *Kahn* was now mandated.<sup>668</sup> In terms of constitutional theory, Justice Brennan was quite correct. Together, *Kahn* and *Scott* had made Title III safeguards against indiscriminate electronic surveillance potentially meaningless. In effect, the scope of interception was now essentially subject to the monitor's discretion rather than strictly governed by the watchful eye of an impartial magistrate.<sup>669</sup>

For Justice Brennan, *Scott* must have been particularly frustrating. Fifteen years earlier, his remarks in *Lopez* had provided the impetus for constitutionalizing and legislating electronic surveillance standards.<sup>670</sup> Since then, the Court's composition had changed dramatically,<sup>671</sup> and subsequent electronic surveillance decisions had deviated substantially from both Warren Court principles and Title III's expression of legislative intent. This deviation, of course, had evolved over time. In the

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<sup>667</sup> *Id.* at 147-48. Justice Brennan also made the following penetrating remarks:

Beyond the inconsistency of today's decision with the reasoning of *Kahn*, the Court manifests a disconcerting willingness to unravel individual threads of statutory protection without regard to their interdependence and to whether the cumulative effect is to rend the fabric of Title III's "congressionally designed bulwark against conduct of authorized electronic surveillance in a manner that violates the constitutional guidelines announced in *Berger v. New York* . . . and *Katz v. United States* . . . ." This process of myopic, incremental denigration of Title III's safeguards raises the specter that, as judicially "enforced," Title III may be vulnerable to constitutional attack for violation of Fourth Amendment standards, thus defeating the careful effort Congress made to avert that result.

*Id.* (citations omitted).

<sup>668</sup> *Id.* at 145.

<sup>669</sup> See, e.g., *Marron v. United States*, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible, and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant").

<sup>670</sup> See *supra* note 81-90 and accompanying text.

<sup>671</sup> The change in Court composition has had a clear effect on electronic surveillance decisions. Since there was only one change between *Lopez* and *Berger*, the latter case provides a more suitable basis for comparison. When *Scott* was decided, four members of the *Berger* majority, Justices Warren, Clark, Douglas and Fortas, were no longer on the Court. Although Justice Clark was replaced by Justice Marshall, Republican presidents replaced Justices Warren, Fortas, and Douglas with Justices Burger, Blackmun and Stevens, all members of the *Scott* majority. Furthermore, the conservative wing of the Court maintained its strength with the appointments of Justices Rehnquist and Powell. Justice Powell, in particular, given his previous interest in electronic surveillance and organized crime, see *supra* note 198 and accompanying text, has undoubtedly had a strong impact in this area. See generally Fleck, *Changing Voting Patterns in the Burger Court: The Impact of Personnel Change*, 17 SAN DIEGO L. REV. 1021 (1980); Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics* (pts. 1-3), 1941 WIS. L. REV. 172, 343, 461.

Supreme Court's most recent Title III case, *Dalia v. United States*,<sup>672</sup> the extent to which the Court's mode of statutory analysis had changed since 1972 would become readily apparent.

G. *DALIA V. UNITED STATES*

As with most matters involving statutory construction, Title III litigation has often involved questions of legislative intent. In resolving these issues, early Supreme Court cases occasionally relied upon the statute's apparently comprehensive character to provide a basis for analysis. Indeed, in *District Court*, Justice Powell had ruled that given the careful and exhaustive manner in which Title III had been drafted, "it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph."<sup>673</sup> In other words, anything not specifically sanctioned by Title III was not authorized. This interpretation was consistent with both the statute's overall prohibitory format and congressional emphasis on strict enforcement.<sup>674</sup>

In 1979, *Dalia v. United States* raised a statutory issue that was analytically similar to the one addressed in *District Court* seven years earlier.<sup>675</sup> Specifically, petitioner Dalia argued that, since Title III did not expressly authorize any buggings effected by covert entry, no electronic surveillance of that kind was permissible under the statute.<sup>676</sup> Accordingly, Dalia maintained, the eavesdropping order that federal agents had obtained to bug his business premises was null and void.<sup>677</sup> If anything, this claim was even stronger than the one successfully made in *District Court*. While Title III at least made some reference to national security seizures,<sup>678</sup> there was no mention whatsoever to covert entries. Petitioner Dalia was not the first to raise this question. By 1979, the issue had been raised several times and the circuits were sharply di-

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<sup>672</sup> 441 U.S. 238 (1979).

<sup>673</sup> *United States v. United States District Court*, 407 U.S. at 297, 306 (1972). See generally *United States v. Donovan*, 429 U.S. 441 (1977) (Burger, C.J., concurring); *United States v. Giordano*, 416 U.S. 505, 506-07, 515 (1974); *United States v. Kahn*, 415 U.S. 143, 152-53 (1974); *United States v. Gelbard*, 408 U.S. 41, 51 n.10, 61 (1972).

<sup>674</sup> See *supra* notes 229-33 & 267-71 and accompanying text.

<sup>675</sup> See *supra* notes 392-412 and accompanying text.

<sup>676</sup> 441 U.S. at 249. Dalia also made two other arguments. First, he maintained that the Constitution per se prohibited covert entries to effect electronic surveillance. *Id.* at 246. Second, he argued that even if Title III permitted covert entries, "the authorizing court must explicitly set forth its approval of such entries before the fact." *Id.* at 254-55. Both of these grounds were rejected. *Id.* at 247-48, 257-59. Congress, however, is presently considering legislation that would require specific authorization as a prerequisite to covert entry. See, e.g., SENATE COMM. ON THE JUDICIARY, AMENDMENTS TO THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, S. REP. NO. 319, 97th Cong., 1st Sess. 2-6 (1982).

<sup>677</sup> 441 U.S. at 238.

<sup>678</sup> See *supra* note 400-01 and accompanying text.

vided.<sup>679</sup> Their disagreement was easily explainable, as there were persuasive arguments on both sides. Those judges sustaining the government found implicit authorization via a pragmatic statutory interpretation: Congress was obviously aware that most bugs necessitated covert entries; therefore, specific provision for such surveillance was unnecessary since authorization was already implicit to the statutory scheme.<sup>680</sup> Opposing courts, however, could not justify inferring authority for such drastic intrusions from a comprehensive statute which apparently was explicit in all other respects.<sup>681</sup> Given this situation, one commentator made the following realistic observation:

Lacking any reliable indications of legislative intent, a court facing the issue could plausibly accept any of three possible interpretations of Congress' attitude toward forcible entries: Congress may have meant to prohibit such activities by omitting them from an otherwise comprehensive statute; it may have assumed that such activities were valid without mention of them in the Act; or, Congress may have not considered the matter at all.<sup>682</sup>

Absent any definitive indications of congressional purpose, a path of judicial restraint was accordingly urged:

When legislation affects matters of constitutional concern, the Supreme Court may demand a "clear statement" of the act's scope. This ensures that courts will not sanction constitutionally questionable practices before the legislature explicitly articulates an intent to approve them. This requirement also derives from a respect for the different institutional responsibilities of the courts and the legislature: Congress must develop and formulate policy before the judiciary can properly fulfill its reviewing role. When a court is faced with a statute that is vague or silent with respect to a constitutionally sensitive issue, it should not undertake the legislature's obligation to articulate a policy; to do so would discourage the proper functioning of political processes and undermine the protection of individual rights advanced by those processes. As Professor Bickel wrote, "[t]he more fundamental the issue, the nearer it is to principle, the more important it is that it be decided in the first instance by the legislature." Once the policy is fully stated, the rights and duties arising from the statute—and, if appro-

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<sup>679</sup> Compare, e.g., *United States v. Scafidi*, 564 F.2d 633, 639-40 (2d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978) and *In re United States*, 563 F.2d 637, 642-44 (4th Cir. 1977) with *United States v. Finazzo*, 583 F.2d 837, 842-45 (6th Cir. 1978), *vacated*, 441 U.S. 29 (1979) and *United States v. Santora*, 583 F.2d 453, 457 (9th Cir. 1978), *vacated*, 441 U.S. 939 (1979).

<sup>680</sup> See *United States v. Scafidi*, 563 F.2d at 639; *United States v. Ford*, 414 F. Supp. 879, 883 (D.D.C. 1976), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977).

<sup>681</sup> See *United States v. Finazzo*, 583 F.2d at 845-46, 848-52; *United States v. Santora*, 583 F.2d at 458, 463-64.

<sup>682</sup> Comment, *The Illegality of Eavesdrop-Related Break-ins: United States v. Finazzo and United States v. Santora*, 92 HARV. L. REV. 919, 924 (1979) [hereinafter *Eavesdrop-Related Break-ins*]. See generally Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982). There have been those, however, who have argued that legislative intent is an "absurd fiction." Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). But see Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886 (1930).

priate, its constitutionality—can be adjudicated without conjecture.<sup>683</sup> In effect, such was the philosophy underlying Justice Powell's opinion in *District Court*.<sup>684</sup> In *Dalia*, however, Justice Powell deviated from this perspective. Though his opinion argues that, in fact, Title III did contain a clear statement of congressional purpose, Justice Stevens' dissent demonstrates otherwise.

According to Justice Powell, despite the absence of a specific reference to covert entries, "[t]he language, structure, and history" of Title III demonstrates that Congress was sanctioning, subject to prior judicial review, the execution of eavesdropping warrants by means of trespassory covert entries.<sup>685</sup> The statutory language, he argued, treated bugs and wiretaps identically, without "any indication that the authority of courts . . . is limited to approving those methods of interception that do not require covert entry for installation of the intercepting equipment."<sup>686</sup> Moreover, Justice Powell asserted, a 1970 Title III amendment authorizing courts to direct third parties, such as landlords, to assist in accomplishing the interception "*unobtrusively*" confirms that covert entries were anticipated.<sup>687</sup> Regarding the legislative history, Justice Powell maintained that covert entries were not addressed specifically because Congress intended to treat all electronic surveillance identically. The Senate Report, for example, refers to *Katz* and *Berger* without distinguishing that the latter involved a trespass.<sup>688</sup> Testimony before various subcommittees considering electronic surveillance acknowledged "that covert entries were a necessary part of most . . . bugging operations."<sup>689</sup> Furthermore, statements made on the floor of Congress also demonstrated such an awareness.<sup>690</sup> Finally, since most bugs, in fact, do require a covert entry, reading the statute to exclude this technique would defeat Title III's purpose of providing new evidence gathering methods for organized crime control.<sup>691</sup>

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<sup>683</sup> *Eavesdrop-Related Break-ins*, supra note 682, at 926 (footnotes omitted).

<sup>684</sup> Justice Powell has since affirmed this philosophy in other cases. See *New Haven Bd. of Educ. v. Bell*, 102 S.Ct. 1912, 1930 (1982) (Powell, J., dissenting) ("Only rarely may legislative history be relied upon to read into a statute operative language that Congress itself did not include"); *Middlesex City Sewage v. National Sea Clammers*, 453 U.S. 1, 14-15 (1981).

<sup>685</sup> 441 U.S. at 249.

<sup>686</sup> *Id.* at 250.

<sup>687</sup> *Id.* at 250 n.10.

<sup>688</sup> *Id.* at 251.

<sup>689</sup> *Id.*

<sup>690</sup> For example, Justice Powell cited the following remarks by Senator Tydings:

"Surveillance is very difficult to use. Tape [sic] must be installed on telephones, and wire strung. Bugs are difficult to install in many places since surreptitious entry is often impossible. Often, more than one entry is necessary to adjust equipment." 114 Cong. Rec. 12986 (1968) (emphasis added).

*Id.* at 252.

<sup>691</sup> *Id.* at 252-53.

Justice Stevens, however, argued that the statute must be limited by the scope of its terms, and that neither legislative intent nor statutory purpose were inconsistent with this approach. According to Justice Stevens, congressional grants of authority permitting search warrant intrusions upon fourth amendment rights historically have been specific and limited in scope; there is no indication that Title III was intended to be different in this respect.<sup>692</sup> The statutory language does not refer to covert entries and "it is most unrealistic to assume that Congress granted such broad and controversial authority to the Executive without making its intention to do so unmistakably plain."<sup>693</sup> Moreover, he maintained, given Title III's otherwise exhaustive coverage, "[t]his is the paradigm case in which 'the exact words of the statute provide the surest guide to determining Congress' intent.'" <sup>694</sup> Indeed, inferring authorization for covert entries would be fundamentally inconsistent with legislative design, since a statute which closely regulates the Attorney General, prosecuting attorneys, and district judges throughout the issuance process would then be giving investigative personnel carte blanche in executing the order.<sup>695</sup> As covert entries give executing officials virtually unlimited access to the target premises and its contents,<sup>696</sup> the absence of a provision regulating these procedures cannot be explained away, especially "since the sponsors of the legislation expressly stated that they had specified 'every possible constitutional safeguard' for the rights of individual privacy."<sup>697</sup> Justice Stevens conceded that the 1970 amendment allowed "*unobtrusive*" surreptitious entries, but contended that this did not signify an intent to condone "unlimited and unauthorized breaking and entering by police officers."<sup>698</sup> Next, characterizing the legislative history in this respect as "meager,"<sup>699</sup> Justice Stevens advanced alternative interpretations to the statements cited by Justice Powell,<sup>700</sup> and

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<sup>692</sup> *Id.* at 264-65.

<sup>693</sup> *Id.* at 266.

<sup>694</sup> *Id.*

<sup>695</sup> *Id.* at 266-71. Note that the absence of a provision in Title III requiring the application and order to specify the need for covert entry is inconsistent with language in *Katz* suggesting that the judge must be apprised of the precise intrusion involved. *See Katz v. United States*, 389 U.S. 347, 354 (1967).

<sup>696</sup> J. CARR, *supra* note 18, at 59-60 (Supp. 1982).

<sup>697</sup> 441 U.S. at 274.

<sup>698</sup> *Id.* at 271 n.21. Specifically, Justice Stevens argued:

A Congress that was careful to limit the temporal extent of electronic surveillance and the opportunity for it to infringe on protected (i.e., noncriminal) conversations, and one so quick to amend the statute to provide for "unobtrusive" entry through the aid of private persons (i.e., "custodians" and "landlords") who already have a degree of access to the property, surely cannot have condoned unlimited and unauthorized breaking and entering by police officers with the aid of nothing but a burglar's tools.

*Id.*

<sup>699</sup> *Id.* at 271.

<sup>700</sup> *Id.* at 271-73. Justice Stevens argued that statements made by eavesdropping oppo-



concluded that Congress had never considered the possibility of covert entries; indeed, outspoken Title III opponents had not even bothered to address this issue.<sup>701</sup> Admittedly, Title III and its legislative history contemplated the use of bugs, but limiting this authority to exterior bugs, Justice Stevens posited, would have reflected congressional purpose more appropriately.<sup>702</sup> In the face of this comprehensive statutory design and ambiguous legislative history, he concluded, the Court should not automatically presume that Congress intended to give law enforcement any authority not otherwise prohibited by Title III or the Constitution. Rather, he insisted, when constitutional rights are involved, congressional silence should be construed in favor of privacy rather than as an affirmative grant of authority to law enforcement.<sup>703</sup>

Not surprisingly, after *Dalia* another commentator acknowledged that both Justices had made compelling arguments.<sup>704</sup> In all likelihood, the majority's pragmatic analysis more closely reflected congressional intent; despite the absence of detailed references to covert entries in the legislative record, it is inconceivable that, after years of debate, Congress would have failed to realize that most bugs necessitate covert entries.<sup>705</sup> Indeed, there is some basis for concluding that, by leaving the subject untreated, the drafters sought to avoid the risks inherent in debating explicitly a potentially explosive issue; instead they may have hoped that the necessary authority might be read into the statute implicitly.<sup>706</sup>

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nents could not be read as an endorsement of covert entries and that other remarks cited by Justice Powell had been taken out of context. *Id.* Here, however, Justice Stevens' reading of the legislative history is probably unduly narrow. At the very least, remarks by eavesdropping opponents regarding covert entries served to demonstrate that such methods were contemplated as a necessary incident to surveillance by means of a bug. Moreover, there is no evidence that any remarks were cited out of context. Justice Stevens maintained that a statement by Senator Tydings mentioning that "surreptitious entry is often impossible" suggests that Title III prohibited such methods since, according to Justice Stevens, "surreptitious entry is by no means impossible (indeed it is hardly difficult) if it may be effected by whatever means the police—unhampered by the provisions of the criminal law—can bring to their disposal." *Id.* at 273. Given the practical difficulties associated with the installation of bugs, however, it is apparent that Senator Tydings was referring to logistical rather than legal barriers to successful implementation.

<sup>701</sup> *Id.* at 271-75.

<sup>702</sup> *Id.* at 278-79 & n.33. Justice Stevens also rejected Justice Powell's reliance upon Congress' identical treatment of bugs and wires. References to Supreme Court decisions in the legislative history, Justice Stevens argued, were not meaningful because all but one of these cases involved nontrespassory conduct, and the one which did involve a trespass had been severely criticized by the Court. It was, therefore, unreasonable to assume from these citations that Congress was sanctioning covert entry. *Id.* at 276-78.

<sup>703</sup> *Id.* at 278-79; see also Comment, *Sneaking through the Castle Gate: Covert Entry by Police to Plant Bugging Devices*, 67 GEO. L.J. 1429 (1979).

<sup>704</sup> Note, *Breaking and Entering into Private Premises to Effect Electronic Surveillance: Dalia v. United States*, 39 MD. L. REV. 754, 779-80 (1980).

<sup>705</sup> See NWC REPORT, *supra* note 1, at 15, 43, 86 n.19.

<sup>706</sup> Professor G. Robert Blakey, principal draftsman of Title III, acknowledges that this

Nevertheless, as enacted the statute contained a potential defect which had to be remedied. Ultimately, in *Dalia*, judicial process was used to rectify this legislative interstice.<sup>707</sup>

Hence, the true significance of *Dalia* lay not in the Court's holding that Title III conferred authority to effect covert entries, but in the manner in which this decision was made. Notwithstanding Title III's comprehensive structure and the Burger Court's reluctance in other contexts to cure statutory omissions through liberal constructions of legislative history,<sup>708</sup> *Dalia* abandoned the mode of analysis adopted in *District Court* to remedy what Congress might otherwise have made explicit. In the process, the Court's statutory perspective seems to have undergone a fundamental change: although Title III had been designed to constitute a blanket prohibition against electronic surveillance, subject to narrowly tailored statutory exceptions,<sup>709</sup> Justice Powell's analysis now suggested that the law conferred a general grant of authority subject to narrowly

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issue was purposely left unaddressed. Telephone Interview with Professor G. Robert Blakey, Notre Dame Law School (July 1, 1982). In contrast, the issue was specifically treated in the Foreign Intelligence Surveillance Act. 50 U.S.C.S. § 1805(b)(1)(D) (Law. Co-op. 1980).

<sup>707</sup> From a jurisprudential perspective, the Burger Court's willingness to assume what was, in effect, a legislative role raises fundamental separation of powers concerns. In this regard, Judge Learned Hand's words most eloquently make the point:

In our country we have always been extremely jealous of mixing the different processes of government, especially that of making law, with that of saying what it is after it has been made. This distinction, if I am right, cannot be rigidly enforced; but like most of those ideas, which the men who made our constitution believed in, it has a very sound basis as a guide, provided one does not try to make it into an absolute rule, like driving to the right. They wanted to have a government by the people, and they believed that the only way they could do it, was by giving the power to make laws to assemblies which the people chose, directly or at second hand. They believed that such assemblies would express the common will of the people who were to rule. Never mind what they thought that common will was. . . . It is enough that they did not mean by it what any one individual, whether or not he was a judge, should think right and proper. They might have made the judge the mouthpiece of the common will, finding it out by his contacts with people generally; but he would then have been ruler, like the Judges of Israel.

[T]he judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.

L. HAND, *THE SPIRIT OF LIBERTY* 108-09 (I. Dillard 3d ed. 1960); see *id.* at 216-17 (drafters of statute "presumably said no more than they wanted"); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533-35 (1947); see also *infra* text accompanying note 925.

<sup>708</sup> See *Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979); *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 620-26 (1978). See generally *Federenko v. United States*, 449 U.S. 490, 513 (1981) ("we are not at liberty to imply a condition which is opposed to the explicit terms of a statute . . . . To [so] hold . . . is not to construe the Act but to amend it").

<sup>709</sup> See *supra* notes 229-31 and accompanying text.

tailored prohibitions.<sup>710</sup> Thus, analytically and perhaps philosophically, *Dalia* symbolized the extent to which the Supreme Court had changed direction since 1968 when Title III was enacted. Accordingly, it is now appropriate to consider the Court's impact upon Title III jurisprudence elsewhere.

#### V. AFTEREFFECTS: ENFORCEMENT IN THE LOWER COURTS

In recent years, defense counsel have lamented the demise of Title III. As drafted, they maintain, the statute may have been sufficiently protective of privacy rights, but courts have declined to enforce the law strictly as Congress intended.<sup>711</sup> The preceding review of Supreme Court Title III cases confirms that, even at the highest level of judicial review, the statute has neither been carefully analyzed nor strictly enforced. Both constitutional and statutory protections have declined as a result.

Ironically, however, two of the most severely criticized cases, *Gior-dano* and *Chavez*, have not been responsible for an overall decline in

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<sup>710</sup> See *supra* text accompanying note 686.

<sup>711</sup> For example, one prominent defense counsel voiced the following complaint:

I would just like to say [that], if there had been strict interpretation of the wiretap laws [as] written by Professor Blakey and his cohorts, there would be no tapping in the United States. The statute is impossible to follow as it is strictly written. Since June of 1969, when wiretaps were first used in the federal courts, the courts have done the following. You do not have to instruct the monitors how to minimize. You do not have to minimize the interception if you only intercept all the calls for 9½ days. You do not have to minimize even when the U.S. Attorney instructs the monitors to intercept all of the calls. The recordings of the conversations are not intercepted if they are stored and never listened to. You do not have to identify the persons intercepted even if they are known. You do not have to serve an inventory on time. You do not have to seal the tapes immediately upon termination of the interception. You do not have to file the application and obtain the order to use the interception pertaining to other crimes not mentioned in the order. You do not have to date the order of interception, even when the interception can only continue for 15 days after the day of the order.

You can tap [for] 18 days when there are only 15 days on the order; this is under Rule 45 where you do not include Sundays or holidays and you do not include the first day. The prosecutor [is allowed] to lie under oath as to who the person was who authorized the interception (Now, the prosecutor really did not know, when he was swearing to the judge under oath, that Will Wilson had authorized the interception; he really did not know Will Wilson had never seen the papers). It allows breaking and entering by the police to install, repair, and remove the bug. . . . It allows probable cause to be shown even where probable cause was shown 21 days before the order [was] signed; it was not stale because there was a continuing criminal conspiracy.

These are just some of the cases [which] have interpreted the wiretap laws as we have them now. . . . But personally, I think we are giving up too much of our individual rights [with] the way [wiretaps] are being used now, especially in the state courts.

ELECTRONIC SURVEILLANCE: TWO VIEWS, *supra* note 218, at 94-96.

Some defense counsel have maintained that the high manpower and economic cost of electronic surveillance have deterred courts from suppressing evidence obtained in violation of Title III. NWC REPORT, *supra* note 1, at 130. For this reason and others, the concept of strict judicial enforcement has been characterized as illusory. H. SCHWARTZ, *supra* note 216, at 22-24.

strict enforcement. Although the centrality test they established was derived from an incorrect premise, it was actually consistent with the pre-existing legislative concept of harmless error.<sup>712</sup> Moreover, although the Supreme Court may have had difficulty applying this standard in *Donovan*,<sup>713</sup> the harmless error analysis has worked effectively and fairly in the lower courts. Thus, for example, facially deficient warrants have not automatically occasioned suppression when the defect was neither constitutional in nature nor prejudicial in effect.<sup>714</sup> Moreover, most jurisdictions have supplanted *Giordano* and *Chavez* by recognizing that intentional violations of even peripheral provisions may mandate suppression.<sup>715</sup> As yet, no case has interpreted *Scott* to the contrary; nor should *Scott* have an impact here, since it reached only the narrow question of whether a violation had occurred.<sup>716</sup> Nevertheless, *Scott*'s willingness to tolerate intentional misconduct in the context of minimization

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<sup>712</sup> See *supra* notes 493-505 and accompanying text.

<sup>713</sup> See *supra* notes 571-92 and accompanying text.

<sup>714</sup> Citing either *Giordano* or *Chavez*, courts have often focused on whether there has been "substantial compliance" with statutory requirements. See *United States v. Vento*, 533 F.2d 838, 860-61 (3d Cir. 1976); *United States v. Cirillo*, 499 F.2d 872, 880 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974). Though neither *Giordano* nor *Chavez* spoke in terms of "substantial compliance," the term is implicit to the centrality test and consistent with the harmless error analysis. Those few state jurisdictions which have stressed the need for absolute compliance with even purely technical requirements are being unduly rigid. See *State v. Baldwin*, 289 Md. 635, 643-44, 426 A.2d 916, 921-22 (1981) (omission of progress report directive mandates suppression under Maryland law, despite reports actually having been submitted). See *generally* *State v. Maloof*, 114 R.I. 380, 383-91, 333 A.2d 676, 678-82 (1975) (suppression for improper termination clause; opinion not clear but possibly mere typographical error).

<sup>715</sup> See *United States v. Caggiano*, 667 F.2d 1176, 1179 (5th Cir. 1982) (government's failure to seal the original wiretap application and order properly did not warrant suppression, absent intentional misconduct or prejudice); *United States v. Angelini*, 565 F.2d 469, 472 (7th Cir. 1977) (government's failure to comply adequately with statutory sealing requirement did not require suppression, absent intentional misconduct or prejudice), *cert. denied*, 435 U.S. 923 (1978); *United States v. Johnson*, 539 F.2d 181, 193-95 (D.C. Cir. 1976) (absent deliberate noncompliance or prejudice, government's failure to provide formal notice to the defendant, pursuant to § 2518(8)(d), did not warrant suppression), *cert. denied*, 429 U.S. 1061 (1977); *United States v. Lawson*, 545 F.2d 557, 564-65 (7th Cir. 1975) (absent prejudice, suppression was not required for failure to comply with inventory notice provision; likewise, although some of the seals were broken, suppression was not required as integrity of tapes was unchallenged); *United States v. Civella*, 533 F.2d 1395, 1406 (8th Cir. 1976), *cert. denied*, 430 U.S. 905 (1977) (absent deliberate misconduct, minor delays in compliance with inventory notice provision did not require suppression); *United States v. Vento*, 533 F.2d at 864 (government failed to deliver notice of the wiretaps to the defendants within the ninety day period prescribed by § 2518(8)(d); suppression denied, absent prejudice or deliberate violation); *United States v. Chun*, 503 F.2d 533, 542-43 (9th Cir. 1974) (case remanded for consideration of whether government's failure to comply with inventory notice provision constituted deliberate attempt to gain tactical advantage). Note that this approach is consistent with the suggestion made in *Donovan* that prejudice and intent should be factors in the suppression analysis. See *supra* note 574 & 594 and accompanying text.

<sup>716</sup> Indeed, *Scott* suggested that the intentional nature of a violation may affect the scope of suppression. 436 U.S. at 139 n.13.

poses a serious threat to privacy. Thus far, however, its impact may have been slight, as relatively few defendants have since raised minimization issues.<sup>717</sup> Alternatively, *Scott* may have been responsible for this dearth by having made minimization an impossible defense to mount.

In most respects, however, the Supreme Court's most direct impact upon Title III litigation is plainly reflected by a lack of *consistently* careful judicial analysis in the lower courts. Although the judiciary has correctly enforced the statute in many respects, several important provisions have often been misapplied. Errors have most frequently been occasioned in six important areas: (1) standing; (2) exhaustion of investigative alternatives; (3) probable cause; (4) particularity of conversation; (5) plain view seizures; and (6) post-interception sealing of tapes. The failure to analyze carefully the various provisions governing these areas has precluded strict statutory enforcement and, on occasion, has disregarded constitutional rights.

#### A. STANDING

Although statutorily defined, Title III standing principles were effectively determined, albeit prematurely and improperly, by *Alderman v. United States*.<sup>718</sup> A few courts have resisted *Alderman* either by inferentially acknowledging standing when the movant was named in the ap-

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<sup>717</sup> The following are the post-*Scott* minimization cases: *United States v. Feldman*, 606 F.2d 673, 677-79 (6th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Cruz*, 587 F.2d 277, 278 (5th Cir. 1978); *United States v. Dorfman*, 542 F. Supp. 345, 389-98 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (7th Cir. 1982); *United States v. Napolitano*, No. 81-803, slip op. (S.D.N.Y. Nov. 16, 1982); *United States v. Ljubas*, No. 81-0402, slip op. (S.D.N.Y. June 30, 1982); *United States v. Lilla*, 534 F. Supp. 1247, 1264-68 (N.D.N.Y. 1982); *United States v. Cale*, 508 F. Supp. 1038, 1041 (S.D.N.Y. 1981); *United States v. Lyons*, 507 F. Supp. 551, 556-59 (D. Md. 1981); *United States v. Webster*, 473 F. Supp. 586, 597-98 (D. Md. 1979), *rev'd on other grounds*, 639 F.2d 174 (4th Cir.), *cert. denied*, 102 S. Ct. 1991 (1981); *United States v. Clemente*, 482 F. Supp. 102, 108-10 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 207 (2d Cir. 1981); *United States v. DePalma*, 461 F. Supp. 800, 817-23 (S.D.N.Y. 1978); *United States v. Licavoli*, 456 F. Supp. 960, 966 (N.D. Ohio 1978); *Higgins v. Fuessenich*, 452 F. Supp. 1331, 1334-35 (D. Conn. 1978).

One jurisdiction has rejected *Scott*. *State v. Catania*, 85 N.J. 418, 436, 427 A.2d 537, 546 (1981). See also *People v. Calgero*, 75 A.D.2d 455, 459, 429 N.Y.S.2d 970, 973 (N.Y. App. Div. 1980) (applying good faith test). Since *Scott*, there has been only one major decision which blatantly disregarded minimization principles. See *Morrow v. State*, 147 Ga. App. 395, 405, 249 S.E.2d 110, 119 (Ga. Ct. App. 1978), *cert. denied*, 440 U.S. 917 (1979) (four detectives refrained from recording, but listened to every call); see also *United States v. Clerkley*, 556 F.2d 709, 713 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978) (sanctioning interception of all conversations). Other decisions may also be wrongly decided, but their conclusory adoption of the *Scott* standards effectively precludes effective critique.

<sup>718</sup> See *supra* notes 344-91 and accompanying text. Ironically, in *Scott v. United States*, 436 U.S. 128, 135-36 n.10 (1978), the Supreme Court said that the question of standing under the fourth amendment is still open for someone neither overheard nor identified in the order and for whom any proprietary interest in the premises is lacking.

plication,<sup>719</sup> ignoring the issue,<sup>720</sup> or finding a creative alternative for recognizing the defendant as "aggrieved."<sup>721</sup> Ironically, on occasion, explicit recognition of target standing might have served to narrow the

<sup>719</sup> See *United States v. Civella*, 648 F.2d 1167, 1172 (8th Cir. 1981), *cert. denied*, 454 U.S. 867 (1981) (by implication); *United States v. Abramson*, 553 F.2d 1164, 1170 (8th Cir.), *cert. denied*, 433 U.S. 911 (1977) (no standing to defendants who were neither overheard nor named in wiretap order); *United States v. Picone*, 408 F. Supp. 255, 261-62 (D. Kan. 1975), *rev'd on other grounds*, 560 F.2d 998 (10th Cir. 1977) ("no question" about standing of defendant named in wiretap orders); *State v. Catania*, 85 N.J. 418, 424-27, 427 A.2d 537, 540-41 (1981). These decisions are clearly correct in terms of statutory language and Title III policy considerations. One named in an application has had electronic surveillance "directed against" him. 18 U.S.C. § 2510(11) (1976). In this respect, the statutory identification requirement, 18 U.S.C. § 2518(4)(a) (1976), serves as a predicate for target standing. See *supra* note 379; see also NAT'L LAWYERS GUILD, *supra* note 438, at 279. But see *United States v. Giacalone*, 455 F. Supp. 26, 42 (E.D. Mich. 1977), *aff'd sub nom.* *United States v. Feldman*, 606 F.2d 673 (6th Cir. 1979) (no standing to defendants named in applications and orders who were not overheard).

<sup>720</sup> *United States v. Gibson*, 500 F.2d 854, 855 (4th Cir. 1974), *cert. denied*, 419 U.S. 1106 (1975); *United States v. Marcello*, 508 F. Supp. 586, 601 (E.D. La. 1981); *People v. Amsden*, 82 Misc. 2d 91, 93, 368 N.Y.S.2d 433, 437 (Sup. Ct. 1975); *People v. Brown*, 80 Misc. 2d 777, 786-87, 364 N.Y.S.2d 364, 373-74 (Sup. Ct. 1975). These cases permitted defendants to contest evidence derived from earlier wiretaps even though defendants were neither overheard nor claiming any property interest in the premises under surveillance. Most courts, however, have denied standing under such circumstances, because to do otherwise would permit the defendant to accomplish indirectly what he could not do directly. See, e.g., *United States v. Civella*, 648 F.2d at 1172; *United States v. Williams*, 580 F.2d 578, 583 n. 21 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 832 (1979); *United States v. Fury*, 554 F.2d 522, 526 (2d Cir.), *cert. denied*, 433 U.S. 910 (1977); *United States v. Lanese*, 385 F. Supp. 525, 527-28 (N.D. Ohio 1974).

<sup>721</sup> See *United States v. King*, 478 F.2d 494, 506 (9th Cir. 1973), *cert. denied sub nom.* *Light v. United States*, 414 U.S. 846 (1973), *cert. denied*, 417 U.S. 920 (1974) (message and reply thereto intercepted; defendant at whose behest message sent granted standing). See generally NAT'L LAWYERS GUILD, *supra* note 438, at 379 (citing other eavesdropping cases implicitly recognizing target standing). On occasion, defendants have also shown creativity. In *United States v. Dorfman*, 690 F.2d 1217 (7th Cir. 1982), intercepted parties who had not been indicted moved to suppress evidence derived from electronic surveillance. Though never explicitly discussed, these motions may have been filed at the behest of some of the defendants who did not have standing under *Alderman* because they had not been parties and could not assert a proprietary interest. The court of appeals inferentially recognized that conferring standing upon unindicted parties would have been inconsistent with congressional intention that Title III was not "generally to press the scope of the suppression role beyond present [as of 1968] search and seizure law." *Id.* at 1220-21, 1227; see *supra* note 232. Therefore, standing was not automatically to be granted to unindicted parties who otherwise fit within the literal language of § 2510(11)'s definition of "aggrieved person." *United States v. Dorfman*, 690 F.2d at 1226-27. Nevertheless, while the court denied standing in this instance, it indicated that the statutory suppression remedy should be made available to unindicted parties in those cases in which none of the indicted defendants had standing to contest the propriety of the surveillance. Under such circumstances, the court reasoned, an unindicted party should be given the opportunity to contest the courtroom disclosure of potentially illegal electronic surveillance. However, since one of the defendants, Dorfman, had standing to contest the surveillance as a whole by virtue of his proprietary interest in the premises surveilled, there was no reason to confer standing in this case upon unindicted parties. *Id.* at 1228-29. This analysis is questionable in light of Congress' desire not to expand the scope of suppression, but is correct from the policy standpoint of discouraging unlawful surveillance. See *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 2959 (1982). A more

scope of the standing that was conferred.<sup>722</sup> Most judges, however, citing *Alderman*, have uniformly denied standing to anyone neither overheard nor claiming a possessory interest in the surveillance site.<sup>723</sup> Thus, by rejecting target standing, *Alderman* sharply reduced potential Title III litigation before it had a chance to develop.<sup>724</sup>

Unfortunately, some courts effected even further restrictions by ignoring Title III's explicit conferral of standing to overheard parties.<sup>725</sup> Although *Alderman* recognized that overheard parties have standing, at least one case has suggested in dicta<sup>726</sup>—and others have squarely held—that such persons are not entitled to receive consideration of their claims. For example, in *Khaalis v. United States*,<sup>727</sup> standing was denied two terrorist kidnappers whose telephone conversations with accomplices were overheard. The *Khaalis* court read *Alderman* as establishing that Title III standing limitations were designed to reflect “existent standing rules,”<sup>728</sup> and that such rules, at the time of enactment, did not confer standing upon trespassers.<sup>729</sup> While it is true that under *Jones v. United States*<sup>730</sup> one basis for effecting standing was not available to persons not “legitimately on the premises,”<sup>731</sup> *Khaalis* failed to acknowledge that this preclusion did not extend to all other bases potentially bestowing standing. For example, although the Supreme Court has recently

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legitimate way to achieve the purpose contemplated by the court would simply be to apply the statute's target standing provisions. See also *infra* note 740.

<sup>722</sup> For example, in the cases that conferred standing, see *supra* note 720, a different result would have been mandated had the courts found that these defendants, none of whom had been intercepted or claimed to have had property interests at stake, were not targets of the investigation.

<sup>723</sup> See, e.g., *United States v. Williams*, 580 F.2d 579, 583 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 832 (1979); *United States v. Houlton*, 525 F.2d 943, 946 (5th Cir. 1976), *vacated sub nom. Croucher v. United States*, 429 U.S. 1034 (1977); *United States v. Bynum*, 513 F.2d 533, 534-35 (2d Cir.), *cert. denied*, 423 U.S. 952 (1975); *United States v. Dorfman*, 542 F. Supp. 345, 359 n. 6 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (7th Cir. 1982); *United States v. Ahmad*, 347 F. Supp. 912, 932 (M.D. Pa. 1972), *aff'd in part and rev'd in part sub nom. United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973); see also *United States v. Jabara*, 618 F.2d 1319, 1326 (9th Cir. 1980), *cert. denied sub nom. Hood v. United States*, 446 U.S. 987 (1980), *cert. denied sub nom. Rideout v. United States*, 449 U.S. 856 (1980).

<sup>724</sup> See generally NWC HEARINGS, *supra* note 166, at 62 (chart from which inference may be drawn about number of people without standing).

<sup>725</sup> 18 U.S.C. § 2510(11) (1976).

<sup>726</sup> *United States v. Whittaker*, 474 F.2d 1246, 1247 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973).

<sup>727</sup> *Khaalis v. United States*, 408 A.2d 313, 340-41 (D.C. 1979), *cert. denied*, 444 U.S. 1092 (1980).

<sup>728</sup> *Id.* at 340.

<sup>729</sup> *Id.*

<sup>730</sup> *Jones v. United States*, 362 U.S. 257 (1960).

<sup>731</sup> *Id.* at 267. For a discussion of *Jones* and *Alderman*, see *supra* notes 361-73 and accompanying text.

held that an "expectation of privacy" is a prerequisite to standing,<sup>732</sup> "existent standing rules" in 1968 would have conferred standing upon a trespassing felon arrested on private property in possession of an illegal handgun;<sup>733</sup> alternatively, his standing claim could have been recognized under "automatic standing" for crimes of possession<sup>734</sup> or through the search incident to arrest of his person.<sup>735</sup> The *Khaalis* court may have been influenced both by the particularly gruesome facts before it—the taking of 130 hostages, murder of one man, repeated threats of execution by beheading—and by the distinct possibility that defendants were actually asserting a valid Title III claim.<sup>736</sup> Nevertheless, the legislative history's reference to *Jones v. United States* was painfully misapplied and the statute's plain language blatantly ignored.

Although *Khaalis* admittedly may be an example of a "hard case making bad law," the decision is not an isolated aberration. In the context of minimization, statutory standing principles have frequently been frustrated. This has been accomplished in two different respects: (1) by denying standing altogether to overheard parties lacking a sufficient, court imposed, nexus to the subject telephone; or (2) by restricting the scope of one's standing only to suppression of those conversations improperly minimized. The most remarkable statutory violation has been occasioned in those jurisdictions holding that a minimization claim may not be asserted unless the overheard party is the telephone subscriber, a member of his family, or otherwise has a privacy interest in the premises where the phone is located.<sup>737</sup> Typically, these rulings have been made either without explanation or by a conclusory statement that no privacy interest is impinged unless one of these preconditions has been met.<sup>738</sup>

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<sup>732</sup> *United States v. Salvucci*, 448 U.S. 83, 91-92 (1980); *Rakas v. Illinois*, 439 U.S. 128, 140-43 (1978).

<sup>733</sup> Federal law makes it illegal for convicted felons to possess firearms. 18 U.S.C. app. § 1202(a)(1) (1976).

<sup>734</sup> *Jones v. United States*, 362 U.S. at 264. *Jones* was overturned by *United States v. Salvucci*, 448 U.S. at 89-90, but nevertheless reflects the standing rules codified by Title III. See *supra* notes 362-88 and accompanying text.

<sup>735</sup> See *Russo v. United States*, 391 F.2d 1004, 1006 (9th Cir.), *cert. denied*, 393 U.S. 885 (1968); *Baily v. United States*, 389 F.2d 305, 308 (D.C. Cir. 1967); *Clemas v. United States*, 382 F.2d 403, 406-07 (8th Cir. 1967), *cert. denied*, 390 U.S. 962 (1968).

<sup>736</sup> See *Khaalis v. United States*, 408 A.2d at 319. Defendants claimed, *inter alia*, that the use of Title III's emergency provision was improper. Since the kidnapping apparently involved neither national security interests nor organized crime elements, their argument may have been valid. See *supra* note 300 and accompanying text.

<sup>737</sup> See *United States v. Fury*, 554 F.2d 522, 526-27 (2d Cir. 1977); *United States v. Hinton*, 543 F.2d 1002, 101 n.13 (2d Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977); *United States v. Ramsey*, 503 F.2d 524, 530 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); *United States v. Poeta*, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); *United States v. Aloï*, 449 F. Supp. 698, 744 (E.D.N.Y. 1977). See generally *Fishman*, *supra* note 596, at 350-51.

<sup>738</sup> See *supra* note 737.



This result baldly disregards Title III's definition of aggrieved person, and may ultimately remove law enforcement's incentive to minimize.<sup>739</sup> For example, if police obtain a wiretap for Citizen Small Fry's telephone to intercept conversations of "Citizen Small Fry and others as yet unknown," knowledge that virtually all who speak with Citizen Small Fry may not raise minimization claims could prompt a decision to sacrifice the case against Citizen Small Fry and gain the benefit of indiscriminate listening to all of his calls involving "higher ups."<sup>740</sup>

While not all courts have defined standing so restrictively,<sup>741</sup> many have severely limited its scope by holding that only those conversations improperly minimized are subject to suppression.<sup>742</sup> Law enforcement

<sup>739</sup> Prior to *Dalia*, this was also a problem in cases involving covert entry. Some jurisdictions limited standing to raise that claim to persons with a proprietary interest in the premises. See generally C. FISHMAN, *supra* note 438, § 296, at 396.

<sup>740</sup> But see generally *supra* note 718. Of course, even in these jurisdictions conversations between "Small Fry" and other household members would be amenable to Title III minimization claims. Nevertheless, *B* and *C*, using "Small Fry's" telephone, would not qualify for minimization protection if they were not household members, or otherwise had a cognizable privacy interest. This analysis might also preclude the availability of criminal or civil penalties to serve as deterrents because courts taking this stance may be saying that there is no need to minimize when the parties lack sufficient nexus to the target telephone. See *supra* note 737; see also *Anthony v. United States*, 667 F.2d 870, 877-88 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 2959 (1982). Even so, the admissibility of Title III evidence should not turn on a litigant's ability to convince, or, indeed, to pressure, a non-defendant to file a suppression motion.

<sup>741</sup> See *United States v. Scott*, 504 F.2d 194, 196-97 (D.C. Cir. 1974), *cert. denied*, 425 U.S. 947 (1975); *State v. Catania*, 85 N.J. 418, 426, 427 A.2d 537, 541 (1981).

<sup>742</sup> See *United States v. Scott*, 516 F.2d 751, 760 n. 19 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976); *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974); *United States v. DePalma*, 461 F. Supp. 800, 832 (S.D.N.Y. 1978); *United States v. Sisca*, 361 F. Supp. 735, 746-47 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 1337 (2d Cir. 1974); *United States v. Mainello*, 345 F. Supp. 863, 874-77 (E.D.N.Y. 1972); *United States v. King*, 335 F. Supp. 523, 543-45 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974). "Cases adopting this view generally remit the defendant to civil remedies for the interception of innocent conversations." *United States v. Principe*, 531 F.2d 1132, 1140 (2d Cir. 1976), *cert. denied*, 430 U.S. 905 (1977).

In *United States v. Dorfman*, 542 F. Supp. 345 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (7th Cir. 1982), the court ruled that any intercepted person could achieve suppression of conversations which fell within "a pattern of unlawful interception." *Id.* at 395. The court acknowledged that "[t]he evidence demonstrates that the monitoring agents intercepted a substantial number of conversations involving individuals who were not subjects of the surveillance order concerning matters that even on a liberal reading of the authorized objective . . . , had nothing to do with [the stated investigative purpose]." *Id.* at 393. Nevertheless, suppression was not mandated because the conversations in question were said not to have fallen within the overall pattern of unlawfulness. *Id.* at 395-97. In this respect, however, the court's analysis was in fundamental error. Focusing on whether a particular conversation falls within "a pattern of unlawful interception" is an appropriate analytic mode only if the pattern concept is not construed in unduly narrow terms. While, in the context of a long-term investigation, it would ordinarily make no sense to mandate total suppression by virtue of a few isolated patterns of unintentional unlawful interception, from a deterrence standpoint it likewise makes no sense to hold that only improperly minimized conversations fall within the pattern of illegality. See *infra* notes 743-44 and accompanying text. Rather, once a pattern of illegal-

thereby loses only that to which it had never been entitled.<sup>743</sup> Moreover, in most instances, this approach leads to suppression only of nonpertinent *innocent* conversations which the prosecution had never intended to use.<sup>744</sup> Although these decisions are derived by analogy to the scope of suppression that is applied when conventional search warrants have been exceeded,<sup>745</sup> the result is hardly one which promotes deterrence.<sup>746</sup> Accordingly, some courts have insisted on total suppression, at least when the minimization violation was intentional.<sup>747</sup> This approach conforms more with the underlying purpose of Title III,<sup>748</sup> as yet, however, it is a minority view.<sup>749</sup> Thus, in the context of standing, Title III litigation has been hampered both by *Alderman* and the courts' frequent failure to enforce the statute in light of its literal language or foundational policy considerations.

#### B. EXHAUSTION OF INVESTIGATIVE ALTERNATIVES

Section 2518(1)(c) requires that each surveillance application contain "a *full and complete* statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to

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ity has developed, all conversations occurring within the relevant timespan (i.e. all calls handled that day by that particular monitor) should be viewed as falling within the unlawful pattern.

<sup>743</sup> NWC REPORT, *supra* note 1, at 94; *see* Note, *supra* note 258, at 123-24; Note, *supra* note 535, at 1432.

<sup>744</sup> *See* United States v. Focarile, 340 F. Supp. 1033, 1046-47 (D. Md. 1972), *aff'd*, 469 F.2d 522 (4th Cir.), *aff'd sub nom.* United States v. Giordano, 416 U.S. 505 (1974) ("Knowing that only 'innocent' calls would be suppressed, the government could intercept every conversation during the entire period of a wiretap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway . . ."); United States v. Bynum, 360 F. Supp. 400, 403 n.2 (S.D.N.Y.), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974). This will not always be true. Occasionally, an apparently innocent conversation becomes relevant in other respects. *See* COMMISSION STUDIES, *supra* note 32, at 122, 185.

<sup>745</sup> *See, e.g.,* United States v. Sisca, 361 F. Supp. at 746-47; United States v. King, 335 F. Supp. at 544; Note, *supra* note 258, at 123-24.

<sup>746</sup> One commentator, however, has suggested that, under a total suppression approach, courts would be reluctant to find minimization violations. Note, *supra* note 535, at 1435 n.116.

<sup>747</sup> *See* Rodriguez v. State, 297 So. 2d 15, 21 (Fla. 1974); People v. Brenes, 42 N.Y.2d 41, 49-50, 364 N.E.2d 1322, 1328, 396 N.Y.S.2d 629, 635 (1977). In *Scott*, the Court left open the question of what remedy is required for excessive monitoring. 436 U.S. at 135 n. 10. New Jersey has provided, by statute, for total suppression without regard to whether the violation was intentional. State v. Catania, 85 N.J. at 426, 427 A.2d at 541.

<sup>748</sup> Since most surveillances involve the seizure of numerous conversations, absent intentional misconduct, blanket suppression should not be mandated for an isolated violation. Instead, such suppression should be required only when the minimization violations are such that a pattern of illegality has been established. Arguably, this is what the statute already requires. *See supra* note 742. If not, it should be explicitly amended accordingly.

<sup>749</sup> Partial suppression, however, has created similar problems in other Title III contexts. *See* J. CARR, *supra* note 18, at 357-59.

be unlikely to succeed if tried or to be too dangerous.”<sup>750</sup> Based upon this statement, section 2518(3)(c) requires the authorizing judge to find that alternative means for achieving the investigation’s objectives are inadequate.<sup>751</sup> This determination is a prerequisite to the issuance of any eavesdropping order. Thus, basic to Title III is the concept of necessity; electronic surveillance is not to be routinely employed.<sup>752</sup>

This requirement stems from two distinct constitutional principles underlying Title III: (1) prior notice of fourth amendment intrusions, and (2) utilization of the least drastic means. The Constitution, of course, does not expressly require that governmental searches be accompanied by notice. In conventional searches, this has not become an issue because execution of the warrant normally serves notice that a search is about to occur.<sup>753</sup> The Supreme Court, however, has suggested that, absent exigent circumstances, the fourth amendment requires an announcement of purpose prior to entry pursuant to warrant.<sup>754</sup> This constitutional ingredient, however, clearly would pose insuperable barriers to effective electronic surveillance, where success necessarily depends upon secrecy; hence, prior notice obviously cannot be given. *Berger* and *Katz*, however, strongly intimated that this omission cannot be constitutionally justified unless there has been some “showing of special facts” or “exigent circumstances.”<sup>755</sup> In effect, a showing of necessity thereby became a constitutional substitute for prior notice.<sup>756</sup> The necessity requirement, however, also relates to a more direct constitutional source, since both *Berger* and *Katz* seemed to suggest that fourth amendment jurisprudence independently requires governmental intrusions to be minimized by a least drastic means approach.<sup>757</sup>

While a necessity requirement is therefore constitutionally based, Title III sponsors also considered it desirable from a policy standpoint.

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<sup>750</sup> 18 U.S.C. § 2518(1)(c) (1976) (emphasis added).

<sup>751</sup> 18 U.S.C. § 2518(3)(c) (1976).

<sup>752</sup> See *United States v. Giordano*, 416 U.S. 505, 515 (1974); *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974).

<sup>753</sup> *Katz v. United States*, 389 U.S. 347, 355 n.16 (1967). Of course, if no one is on the premises at the time of the search, prior notice is not given.

<sup>754</sup> See *Ker v. California*, 374 U.S. 23, 37-42 (1963).

<sup>755</sup> *Katz v. United States*, 389 U.S. at 355 n.16; *Berger v. New York*, 388 U.S. 41, 60 (1967); accord NWC REPORT, *supra* note 1, at 56-57.

<sup>756</sup> See *Berger v. New York*, 388 U.S. at 60.

<sup>757</sup> See *Katz v. United States*, 389 U.S. at 355-56; *Berger v. New York*, 388 U.S. at 57 (citing with approval a warrant of limited duration so that “no greater invasion of privacy was permitted than was necessary under the circumstances”). Title III’s durational limitation, 18 U.S.C. §§ 2518(1)(d), (5) (1976), similarly reflects this concept. See LEGISLATIVE HISTORY, *supra* note 111, at 2190. The use of least drastic means has also been implicit in conventional fourth amendment situations. See *Chimel v. California*, 395 U.S. 752, 755-57 (1969) (search of entire house may not be constitutionally necessary to a normal search incident to arrest).

They clearly perceived that the severe intrusion occasioned by electronic surveillance should be avoided if effective law enforcement can be achieved through less drastic means.<sup>758</sup> Electronic surveillance was not to be used if it would merely be helpful; rather, it was to be a "tool of last resort."<sup>759</sup> This posture, however, did not appease Title III critics who reasoned that whenever law enforcement invoked the name of organized crime, the necessity requirement would be expeditiously deemed satisfied.<sup>760</sup> Unfortunately, this prediction soon became reality.

Since Title III was enacted, suppression for failure to comply with the necessity requirement has been extremely rare.<sup>761</sup> Although Congress did not intend boilerplate assertions of exhaustion to constitute statutory compliance,<sup>762</sup> that, in fact, has too often become the norm.<sup>763</sup>

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<sup>758</sup> For example, during the legislative debate, one Senator made the following observations:

[Title III] further requires a showing that "normal investigative proceedings have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." We agree with the thought underlying this requirement that wiretapping and eavesdropping should not be used unless absolutely necessary. [Title III] should not, however, leave open the possibility of satisfying this requirement by a boilerplate recital of the statutory language. It should provide for a description with particulars of the efforts that have been made to obtain evidence without wiretapping or eavesdropping methods.

114 CONG. REC. 14, 474 (1968) (statement of Sen. Long), *quoted in* Note, *Electronic Surveillance, Title III and the Requirement of Necessity*, 2 HASTING CONST. L.Q. 571, 604 (1975).

<sup>759</sup> Senator McClellan viewed the necessity requirement as: "a requirement designed to make the use of [electronic surveillance] a tool of last resort." 115 CONG. REC. 23, 240 (1969). In a somewhat different context, the ABA study intimated that the concept of need could be viewed from four different perspectives:

(1) "helpful," that is, it will make the investigation easier; (2) "necessary," that is, some investigations will be successful without it, but not enough; (3) "indispensable," that is, few, if any investigations will be successful without it; and (4) "certain," that is, other techniques of investigation will only sometimes work while electronic surveillance techniques will always work.

ABA STANDARDS, *supra* note 81, at 49. Given the need to limit electronic surveillance, alternative three, indispensability, represents the most appropriate perspective for applying this concept. Nevertheless, the statutory exhaustion mandate at times may be self-defeating. For example, it is certainly conceivable that long term undercover infiltration or visual surveillance may be more intrusive than short term audio surveillance, but the statute does not even consider this possibility.

<sup>760</sup> Schwartz, *supra* note 15, at 486. For example, one skeptic observed:

Mr. Justice Clark said only that overcoming the requirement of notice would require "some showing of special facts" to justify the secrecy and the "unconsented entry"—a nice euphemism for an otherwise tortious and possibly criminal trespass. In practice, this will mean no more than that the police will say that no other means of obtaining the evidence is known to them.

T. TAYLOR, *supra* note 25, at 110 (citations omitted).

<sup>761</sup> NWC REPORT, *supra* note 1, at 66; J. CARR, *supra* note 18, at § 4.05(4) (Supp. 1982). For examples of cases that have suppressed evidence for failure to comply with the necessity requirement, see *United States v. Curreri*, 388 F. Supp. 607, (D. Md. 1974); *State v. DiMauro*, 205 Neb. 275, 279, 287 N.W.2d 74, 77-78 (1980); *cf. United States v. Spagnuolo*, 549 F.2d 705, 710 (9th Cir. 1977).

<sup>762</sup> See, e.g., *supra* note 758.

Rather than provide a "full and complete statement" detailing the failure, or likely failure, of investigative alternatives, law enforcement has often simply stated in conclusory terms that success cannot otherwise be achieved. Typically, these representations have relied upon the affiant's experience in dealing with other cases involving the same type of criminal activity;<sup>764</sup> in fact, the statement is often simply a "cut and paste" job from prior applications.<sup>765</sup> The use of boilerplate terminology suggests that alternative investigative modes actually are not being considered.<sup>766</sup> Moreover, such applications do not give the judge an independent means for evaluating whether electronic surveillance is necessary in the particular cases under consideration. While it is certainly true that previous experience with certain types of crimes—narcotics and gambling, for example—may have amply demonstrated that alternatives are unavailing, law enforcement should still be required to supplement this boilerplate assertion with a "full and complete statement" tied to the facts of each case.<sup>767</sup> At the very least, the statement should detail all efforts made in determining whether other means were reasonably available in the instant investigation.<sup>768</sup>

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<sup>763</sup> See NWC REPORT, *supra* note 1, at 66-67. Testimony before the National Wiretapping Commission repeatedly emphasized this problem. For example:

[I]t would appear that issuing judges rarely require more than a sworn allegation in conclusory form that "other investigative procedures have been tried and failed and appear unlikely to succeed" based upon a ritualistic assertion by the investigative agency that the intended subject acts in a "covert manner."

Of course, there are no statistics available on the number of applications rejected by a judge who finds that other investigative means were available, but not one reported Federal District or Circuit Court case has ever held that Title III's "normal investigative procedure" requirement was violated. Such a record strongly indicates need for legislative direction as to the circumstances upon which a judge scrutinizing an eavesdropping application may rely in making the determination required by 18 U.S.C. Sec. 2518(3)(c). NWC HEARINGS, *supra* note 166, at 607-08 (statement of Stanley S. Arkin, Esq.). But see *supra* note 761. Another example:

A graphic illustration of the illusory compliance with the statute occurred in one case I defended where the affidavit contained the names of suspects from a prior case and not those of the suspect in the case in question. The Government's explanation was that in putting the affidavit together, a secretary had cut out too much of the prior affidavit for use in the instant one. The Court allowed that this was not a fatal mistake.

*Id.* at 618 (statement of James K. O'Malley, Esq.). See *infra* note 771 and accompanying text.

<sup>764</sup> See NWC REPORT, *supra* note 1, at 66-67. For examples of cases approving conclusory affidavits, see *infra* note 770.

<sup>765</sup> See *supra* note 763.

<sup>766</sup> See Note, *supra* note 758, at 604.

<sup>767</sup> See 18 U.S.C. § 2518(2)(c) (1976).

<sup>768</sup> While it may be true that "information about the thirtieth bookmaking operation for which a wiretap is sought, except for names, dates, and addresses, is likely to be the same as the information about the 29 bookmaking operations which preceded it," NWC REPORT, *supra* note 1, at 14, failure to include all relevant facts in the affidavit, even with classic patterns of crime, ignores the possibility that other investigative techniques may still be effective in the case at hand. See *infra* note 775 and accompanying text; see also NWC REPORT, *supra* note 1, at 66-67.

Although a few courts have subjected the necessity statement and concomitant judicial determination to meticulous review,<sup>769</sup> most have been inclined to give the matter cursory approval; consequently, deficient applications have frequently been sustained.<sup>770</sup> Indeed, on occasion, preprinted forms using stereotyped phrases have been sanctioned,<sup>771</sup> and some courts have even expressly suggested that, for certain crimes, regular resort to electronic surveillance is not unreasonable.<sup>772</sup> Perhaps not, but the statute still requires that necessity be justified in each case with a "full and complete statement."<sup>773</sup> While many of these decisions involved patterns of criminality not historically vulnerable to traditional investigative techniques,<sup>774</sup> electronic surveillance was sometimes authorized in situations where less drastic means appeared to have been working.<sup>775</sup> Moreover, in numerous other instances the courts' conclusory disposition of the issue effectively precluded subsequent critique of investigative alternatives.<sup>776</sup>

<sup>769</sup> See *United States v. Hyde*, 574 F.2d 856, 867-68 (5th Cir. 1978); *United States v. Daly*, 535 F.2d 434, 438-39 (8th Cir. 1976); *United States v. DePalma*, 461 F. Supp. at 814; see also *supra* note 761.

<sup>770</sup> See *United States v. Scafidi*, 564 F.2d 633, 641 (2d Cir.), *cert. denied*, 436 U.S. 903 (1977); *United States v. Diadone*, 558 F.2d 775, 778 (5th Cir.), *cert. denied*, 434 U.S. 1064 (1977); *United States v. McCoy*, 539 F.2d 1050, 1055-56 (5th Cir. 1976), *cert. denied*, 431 U.S. 919 (1978); *United States v. Steinberg*, 525 F.2d 1126, 1130 (2d Cir.), *cert. denied*, 425 U.S. 971 (1975); *United States v. Caruso*, 415 F. Supp. 847, 851-52 (S.D.N.Y.), *aff'd*, 553 F.2d 94 (2d Cir. 1977).

<sup>771</sup> See *Morrow v. State*, 147 Ga. App. 393, 401-03, 249 S.E.2d 110, 118 (Ga. Ct. App.), *cert. denied*, 440 U.S. 917 (1978).

<sup>772</sup> See *United States v. Landmesser*, 553 F.2d 17, 20 (6th Cir.), *cert. denied*, 434 U.S. 855 (1977); *United States v. Steinberg*, 525 F.2d at 1130 ("wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise under investigation"); *United States v. Clemente*, 482 F. Supp. 102, 106-07 (S.D.N.Y.), *aff'd*, 663 F.2d 207 (2d Cir. 1980).

<sup>773</sup> 18 U.S.C. § 2518(1)(c) (1976).

<sup>774</sup> This is normally true with regard to narcotics and gambling. NWC REPORT, *supra* note 1, at 66-67.

<sup>775</sup> See *United States v. Sandoval*, 550 F.2d 427, 429-31 (9th Cir. 1976), *cert. denied*, 434 U.S. 879 (1977); *United States v. Woods*, 544 F.2d 242, 257 (6th Cir.), *cert. denied*, 429 U.S. 1062 (1976) (inside informant refused chance to gain more information, but court reasoned he would have had difficulty learning all details of conspiracy and that his criminal record would have detracted from credibility of his testimony); *United States v. Steinberg*, 525 F.2d at 1130-32; *United States v. Bynum*, 485 F.2d 490, 494-95 (2d Cir. 1973); NWC REPORT, *supra* note 1, at 51; COMMISSION STUDIES, *supra* note 322, at 61, 419. Admittedly, informants rarely penetrate high echelons of criminal enterprises, but it can be done. See Alpern, *I Was a Mobster For the F.B.I.*, NEWSWEEK, Aug. 19, 1982, at 26. While it is true that informant testimony is not always credible, once an informant is inside the organization, better sources of evidence may develop. Finally, on occasion, the government may have misrepresented that informants were not willing to testify. NWC REPORT, *supra* note 1, at 51, 66; C. FISHMAN, *supra* note 438, at 122-23; cf. *United States v. Schwartz*, 535 F.2d 160, 163-64 (2d Cir. 1976), *cert. denied*, 430 U.S. 906 (1977); *United States v. Caruso*, 415 F. Supp. at 851-52.

<sup>776</sup> See e.g., *United States v. Martin*, 599 F.2d 880, 886-87 (9th Cir. 1979); *United States v. Abramson*, 553 F.2d 1164, 1171 (8th Cir.), *cert. denied*, 433 U.S. 911 (1977); *United States v.*

Several factors explain this phenomenon. First, despite *Berger* and *Katz*, some courts have not realized that a constitutional principle is at issue.<sup>777</sup> Accordingly, they have failed to accord it much attention. Second, many jurists, observing the Senate Report's commentary that this requirement is to "be tested in a practical and common sense fashion,"<sup>778</sup> have responded with undue flexibility to government claims of necessity. Thus, cases have held that electronic surveillance need not be considered a last resort,<sup>779</sup> and that the burden to effect compliance is "not great."<sup>780</sup> Finally, many judges, lacking investigative expertise, are inclined to defer to the judgment of law enforcement personnel.<sup>781</sup>

Underlying each of these factors, however, is a deficiency in judicial analysis. The failure to comprehend that the necessity doctrine was derived from a constitutional premise is but a blatant example. Likewise, the tendency to rationalize approval on the basis of "common sense" fundamentally misunderstands Title III's legislative history. By suggesting that this issue was to be handled in a "common sense fashion," Congress did not intend to intimate that the standard for compliance was "not great," or that electronic surveillance was not a last resort. On the contrary, careful analysis of citations provided in the legislative report indicates that electronic surveillance was viewed as "an exceptional method" that was "inherently objectionable" and which, therefore, had

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Scully, 546 F.2d 255, 261 (9th Cir.), *cert. denied*, 430 U.S. 970 (1976); *United States v. Lawson*, 545 F.2d 557, 563 (7th Cir. 1975); *United States v. Hinton*, 543 F.2d 1002, 1011 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976).

<sup>777</sup> Most courts, however, appear to have ignored this issue. *See, e.g.*, *United States v. Perillo*, 333 F. Supp. 914, 921 (D. Del. 1971); Note, *supra* note 758, at 586.

<sup>778</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2190; *see* Note, *supra* note 758, at 589.

<sup>779</sup> *See United States v. Smith*, 519 F.2d 516, 518 (9th Cir. 1975); *United States v. Karri-gan*, 514 F.2d 35, 38 (9th Cir.), *cert. denied*, 423 U.S. 924 (1975); *United States v. Falcone*, 364 F. Supp. 877, 889 (D.N.J. 1973), *aff'd*, 505 F.2d 478 (3d Cir. 1974). On occasion, the Department of Justice has had difficulty articulating the appropriate standard in this respect. *See* NWC HEARINGS, *supra* note 166, at 35 (statement of Henry E. Peterson, Assistant Attorney General). The UNITED STATES ATTORNEYS' MANUAL now states that "[w]ire and oral interceptions have been and should remain almost the last resort of law enforcement." UNITED STATES ATTORNEYS' MANUAL title 9, *supra* note 603, at 14 (1979) (emphasis added). The MANUAL, however, does stress the importance of exhaustion and cautions against the use of boilerplate. *Id.* at 12-14.

<sup>780</sup> *United States v. Landmesser*, 553 F.2d at 20; *United States v. Anderson*, 542 F.2d 428, 431 (7th Cir. 1976); *United States v. Bobo*, 477 F.2d 974, 982-83 (4th Cir. 1973), *cert. denied*, 421 U.S. 909 (1975); *United States v. Dorfman*, 542 F. Supp. 342, 399 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (7th Cir. 1982); *United States v. Webster*, 473 F. Supp. 586, 595 (D. Md. 1979), *rev'd in part and aff'd in part*, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1991 (1982). Other courts have taken a similar position: "[t]o support a finding, that normal investigative procedures are unlikely to be successful, we interpret the congressional directive as only requiring that there exist a factual predicate in the affidavit." *United States v. Armocida*, 515 F.2d 29, 38 (3d Cir. 1975). While not all of these cases were wrongly decided, they have served to set a standard which is too easy for law enforcement to meet.

<sup>781</sup> NWC REPORT, *supra* note 1, at 77.

to "be used with great caution."<sup>782</sup> In context, the reference to common sense only meant that "[m]erely because a normal investigative technique is theoretically possible, it does not necessarily follow that it is likely."<sup>783</sup> Thus, comparative effectiveness and common sense were to be factors in the last resort analysis. Moreover, merely because the question of investigative alternatives is to be resolved using common sense does not excuse the need for a "full and complete statement" addressing, in nonconclusory form, all options in the context of each case;<sup>784</sup> indeed, without such compliance, intelligent judicial review cannot take place. Similarly, a judge's tendency to accord great weight to investigative decisions of law enforcement officials should not preclude him from ensuring that the "full and complete statement" required by statute has, in fact, been filed. Such a statement should contain, in effect, an investigative checklist of every alternative potentially available and an explanation of its inutility.<sup>785</sup> Moreover, ranking the list in terms of severity of

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<sup>782</sup> PRIVY COUNCILLORS COMMITTEE, INQUIRY INTO THE INTERCEPTION OF COMMUNICATION, CMD. 283, at § 64 (1957). This report was cited in Title III's legislative history regarding the exhaustion issue:

This requirement is patterned after traditional search warrant practice and present English procedure in the issuance of warrants to wire tap. . . . Compare *Report of the Committee of Councillors Appointed to Inquire into the Interception of Communication*, par. 64 (1957) [(which closely parallels the language in 18 U.S.C. § 2518(1)(c))]. . . . Normal investigative procedure would include, for example, standard visual or aural surveillance . . . , general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants.

LEGISLATIVE HISTORY, *supra* note 111, at 2190; *see also* Blakey & Hancock, *supra* note 378, at 672. Although some authors have criticized the Senate Report for "diminish[ing] the importance of § 2518(1)(c)," *see* J. CARR, *supra* note 18, at 179, the legislative history is actually clear. It is the court's misapplication which has occasioned this problem.

<sup>783</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2190.

<sup>784</sup> In each application, the specific reasons underlying the need for electronic surveillance should be included so that the judge may make his decision with regard to the facts of the case. *United States v. Curreri*, 388 F. Supp. 607, 620-21 (D. Md. 1974). For good examples of appropriate exhaustion language, *see* C. FISHMAN, *supra* note 438, at 120-28. *See also* NWC REPORT, *supra* note 1, at 56-58. It should also be noted that the affidavit must establish probable cause as to both the "targeted person(s)" and the potential effectiveness of surveillance. *State v. Hinchion*, 207 Neb. 478, 485-86, 299 N.W.2d 748, 753 (1980) (failure to establish probable cause that "higher-ups" in a gambling operation were connected to those using the targeted premises, as well as failure to establish probable cause as to the targeted telephone, required suppression of evidence).

<sup>785</sup> A brief list of investigative alternatives was set forth in the legislative history. *See supra* note 782. Other means which should be considered include the following: pen registers, contempt proceedings, perjury prosecutions, use of accomplice testimony, and grand jury subpoenas for documents. Of course, merely because alternatives are available theoretically does not mean they necessarily will be effective. No technique is perfect. For example, there may be considerable concern that a "target" will become aware of the investigation—with physical surveillance, a lack of "fresh faces" may cause a target to notice surveilling officers and consequently become "leery." NWC HEARINGS, *supra* note 166, at 417 (statement of Detective Robert Nicholson, N.Y.P.D.). Informant testimony has traditionally posed difficulties. Informants are often reluctant to testify out of fear of physical harm, their criminal records gener-



intrusion would ensure that a least drastic means analysis has been employed by both law enforcement and the issuing court. Thus, for example, before wiretapping could be authorized, prior utilization of pen registers and short term consensual monitoring would have to be considered. Similarly, no bug could be sanctioned if use of a less intrusive wiretap might effectively achieve the same result.<sup>786</sup> As yet, however, no court has imposed such a comprehensive requirement upon law enforcement; on the contrary, this type of categorical approach has been uniformly rejected.<sup>787</sup> Consequently, it is hardly surprising that a 1976 study prepared for the National Wiretapping Commission concluded

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ally subject them to damaging impeachment, and they frequently fail to recognize valuable evidence. *See, e.g., id.* at 697 (statement of Steven Bertucelli, Office of Public Safety, Dade County, Florida). Undercover officers, while valuable, risk physical injury if discovered. Providing effective cover, background identification, lodging, references, clothing to fit the investigation, backup officers, etc., is usually a very expensive proposition. The officer is also subject to later allegations of misconduct and personal involvement in criminal activity; he may, indeed, be forced to commit crimes in order to win the group's acceptance. *Id.* at 697-98. Thus, every case should be considered on its own merits. While the standard of necessity must be appropriately high, critics should not naively assume that alternatives will automatically be as effective in achieving investigative goals.

<sup>786</sup> "[T]he 'least intrusive means' test compels courts to consider as *prima facie* unreasonable a government request to break and enter private premises in order to install a bug—a presumption that should be rebuttable only by a government proffer of evidence demonstrating that a conventional wiretap would be ineffective." Comment, *The Permissibility of Forcible Entries by Police in Electronic Surveillance*, 57 B.U.L. REV. 587, 605 (1977). Presumably, the use of an external bug or wiretap, if reasonably effective, should precede an internal bug. As is, investigating officers, aware of the dangers inherent in planting an internal bug, favor external bugs when tactically feasible. *See* S. REP. NO. 319, 97th Cong., 1st Sess. 14 (1982). However, the concept of legally requiring wiretaps as prerequisites to bugs has not been widely accepted. *See generally* *United States v. Scafidi*, 564 F.2d at 641; *United States v. Clerkly*, 556 F.2d 709, 711 (4th Cir.), *cert. denied*, 436 U.S. 930 (1978).

<sup>787</sup> *See, e.g., United States v. Landmesser*, 553 F.2d at 19-20. One court attempted to impose a strict standard under which the government must inform the reviewing judge of "(1) every technique which is customarily used in police work in investigating the type of crime involved, and (2) explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of the particular circumstances of that case." *United States v. Kalustian*, 529 F.2d 585 (9th Cir. 1976). The language quoted above, however, appeared in a service reporter, 17 CRIM. L. REP. (BNA) 2428, 2429 (1975), *modified*, 18 CRIM. L. REP. (BNA) 2411 (1975), but was deleted in the opinion as it appears in the official reporter. *See also* *United States v. Fina*, 405 F. Supp. 267, 272-73 (E.D. Pa. 1975) (explicitly rejecting *Kalustian* as it appeared in the Criminal Law Reporter); *United States v. Caruso*, 415 F. Supp. 847, 856 (S.D.N.Y. 1976). Hence, similar language should be made a statutory requirement. In this respect, the National Wiretapping Commission's recommendation that § 2518 "be amended to require that the exhaustion of alternative investigative techniques include consideration of the particular facts of the case under investigation, insofar as practicable," NWC REPORTS, *supra* note 1, at 18, plainly does not deal with the problem adequately. Moreover, the statute should be amended both to require an explicit statement in the application of the investigative objective and to provide that this objective must be supported by probable cause. Although already implicitly required by § 2518(5), *see supra* note 320, an explicit provision would eliminate any possibility of exhaustion being achieved by virtue of an artificial statement of investigative objective (alleging, for example, an objective not supported by probable cause).

that "the 'last resort' requirement has gradually [been] eroded."<sup>788</sup>

### C. PROBABLE CAUSE

Title III, of course, requires probable cause as to person, crime, conversation, and communication facility.<sup>789</sup> Nevertheless, although the probable cause requirement is constitutionally mandated,<sup>790</sup> it has not always been strictly enforced.<sup>791</sup> Eavesdropping orders have been granted based upon stale probable cause; moreover, even when properly issued, lengthy surveillances routinely have been allowed without regard to the possibility that intervening factors may have vitiated the original probable cause.

Staleness is more often a problem in the federal courts, due primarily to the stratified authorization process employed by the Department of Justice.<sup>792</sup> While thorough evaluation is certainly desirable, an obvious consequence of tiered review is delay. Although special cases may be expedited,<sup>793</sup> two weeks are typically required to process an application for the Attorney General's authorization. By way of contrast, authorization for state applications can often be accomplished in two days.<sup>794</sup> Moreover, once the application has been authorized, another day or two may be required before judicial sanction is received. Finally, although Title III requires the orders to "be executed as soon as practicable,"<sup>795</sup> a wiretap may take a few days to effect,<sup>796</sup> and surreptitious installation of

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<sup>788</sup> NWC REPORT, *supra* note 1, at 66. The Commission, while not expressly adopting this finding, did recommend that Title III be amended to require, "insofar as practicable," more detail in exhaustion statements. *Id.* at 18.

<sup>789</sup> 18 U.S.C. § 2518(1)(b)(4) (1976); see *supra* note 246 and accompanying text.

<sup>790</sup> U.S. CONST. amend. IV.

<sup>791</sup> This discussion focuses primarily on the problem of staleness. For an analysis of other probable cause related problems in the context of electronic surveillance, see J. CARR, *supra* note 18, at §§ 4.05, 4.06(2), 5.05(2)(b), 6.04(2)(b) (1977).

<sup>792</sup> See NWC REPORT, *supra* note 1, at 7-8, 55-59 (describing six stages of review).

<sup>793</sup> NWC HEARINGS, *supra* note 166, at 184-85 (statement of Atlee W. Wampler, III, Department of Justice).

<sup>794</sup> S. REP. NO. 319, 97th Cong., 1st Sess. 9 (1982); NWC REPORT, *supra* note 1, at 58. For state procedure, see NWC HEARINGS, *supra* note 166, at 381, 419; COMMISSION STUDIES, *supra* note 322, at 123. Justice Department field personnel may try to expedite matters by working with state law enforcement agencies to obtain state warrants, but the Department presently restricts this practice because it circumvents review by the Attorney General. NWC REPORT, *supra* note 1, at 47.

<sup>795</sup> 18 U.S.C. § 2518(5) (1976). Prompt execution is required to ensure fresh probable cause. LEGISLATIVE HISTORY, *supra* note 111, at 2192; see ABA STANDARDS, *supra* note 81, at 148-49.

<sup>796</sup> See NWC REPORT, *supra* note 1, at 87; COMMISSION STUDIES, *supra* note 322, at 77; NWC HEARINGS, *supra* note 166, at 421 (statement of Detective Robert Nicholson). In several states, investigators have received little cooperation from telephone companies, thereby increasing the amount of time necessary to execute a wiretap order. NWC REPORT, *supra* note 1, at 8-9.

a bug considerably longer.<sup>797</sup> Consequently, when surveillance finally commences, the probable cause affidavit may often be dated by at least three weeks.<sup>798</sup>

Although far shorter periods have often not been tolerated with respect to conventional search warrants,<sup>799</sup> courts have not been troubled by staleness problems in electronic surveillance cases. To some extent, this may reflect a lack of imaginative lawyering since defense attorneys have not often raised the issue. Counsel may not be asserting this claim, however, simply because the courts are perceived as unreceptive. Typically, staleness arguments have been rejected because of the continuing nature of the criminal activity under consideration.<sup>800</sup> If the affidavit's probable cause statement established that a continuing criminal activity is involved, courts are willing to presume that probable cause is not rendered stale by the passage of three weeks.

This proposition has some validity. Certainly, the duration of probable cause should reflect its predicate facts.<sup>801</sup> This concept has been abused, however. Courts on occasion have sustained surveillances based upon probable cause predicates from one to three months old.<sup>802</sup>

<sup>797</sup> See, e.g., COMMISSION STUDIES, *supra* note 322, at 278, 396; see also *infra* note 941.

<sup>798</sup> In Title III's early years, the Department of Justice had a three week "freshness" rule: "Under this provision, no more than three weeks may transpire between the date of the last information relating to probable cause in the affidavit and the time the affidavit itself reaches the Attorney General's desk for approval." NWC REPORT, *supra* note 1, at 63.

<sup>799</sup> See *People v. Montgomery*, 27 Ill. 2d 404, 404-05, 189 N.E.2d 327, 328 (1963) (eight days); *People v. Siemienic*, 368 Mich. 405, 406-07, 118 N.W.2d 430, 431-32 (1962) (four days); *Commonwealth v. Suppa*, 223 Pa. Super. 513, 514, 302 A.2d 357, 358 (Pa. Super. Ct. 1973); see also *House v. United States*, 411 F.2d 725, 728 (D.C. Cir.), *cert. denied*, 399 U.S. 915 (1969); *United States v. Harper*, 450 F.2d 1032, 1043-44 (5th Cir. 1971) (execution of warrant within the ten day limit prescribed by F.R. Crim. P. 41(d) not necessarily compliance with F.R. Crim. P. 41(c) "forthwith" requirement); *United States v. Dunning*, 425 F.2d 836, 841 (2d Cir. 1969) (Smith, J., concurring), *cert. denied*, 397 U.S. 1002 (1970) (nine day delay in execution of warrant not "forthwith" within the meaning of F.R. Crim. P. 41(c)). The courts, however, at times have been willing to accept substantial delays when the offense involved is continuing in nature. 1 W. LAFAYE, *supra* note 60, § 3.7(a); Comment, *A Fresh Look at Stale Probable Cause: Examining the Timeliness Requirement of the Fourth Amendment*, 59 IOWA L. REV. 1308, 1314 (1974).

<sup>800</sup> See *United States v. Martino*, 664 F.2d 860, 866-67 (2d Cir. 1981); *United States v. Webster*, 639 F.2d 174, 178-79 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1991 (1982); *United States v. Dorfman*, 542 F. Supp. 345, 363 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (7th Cir. 1982); *United States v. DePalma*, 461 F. Supp. 800, 809 (S.D.N.Y. 1978); *Rodriguez v. State*, 297 So. 2d 15 (Fla. 1974). This is the mode of analysis usually relied upon in conventional searches as well. See *supra* note 799.

<sup>801</sup> This may explain why staleness occurs more quickly in conventional searches. Many items, narcotics and stolen property, for example, are retained only temporarily until they can be redistributed. See, e.g., *People v. Erthel*, 194 Colo. 147, 570 P.2d 534 (1977). See generally Blakey & Goldsmith, *supra* note 111, at 1549-50.

<sup>802</sup> See *People v. Montoya*, 44 Colo. App. 234, \_\_\_, 616 P.2d 156, 160-61 (1980) (probable cause more than three months old); *State v. Manning*, 379 So. 2d 1307 (Fla. Dist. Ct. App. 1980) (59 days); *Hudson v. State*, 368 So. 2d 899, 901-02 (Fla. Dist. Ct. App. 1979) (81 days

Under such circumstances a finding of enduring probable cause of the complexity required by Title III is extremely unlikely, notwithstanding the continuing nature of the crime involved.<sup>803</sup> Further, as a matter of policy, it is questionable whether passage of more than ten to fourteen days should be permitted.<sup>804</sup> Even given the need for extensive internal Justice Department review, ten to fourteen days should be sufficient for this task; if anything, the courts' present flexibility encourages bureaucratic delay. Moreover, regardless of delays inherent to the bureaucratic process, there is no reason why the government should not be required to update the information upon which probable cause was based.<sup>805</sup> The provision of such information would not necessarily entail further delays because the affidavit could be supplemented at any time before submission for judicial authorization. Since a constitutional concept is potentially at stake, requiring probable cause to be no more than two weeks old does not seem unreasonable.<sup>806</sup> Analytically, such a requirement would also be consistent with the necessity principle,<sup>807</sup> since if probable cause is based exclusively upon information that is three weeks stale, it is doubtful law enforcement pursued less drastic alternatives during the interim period.<sup>808</sup>

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old); *Washburn v. State*, 10 Md. App. 187, 193-95, 310 A.2d 176, 180-81 (Md. Ct. Spec. App. 1973) (three to six months old); *State v. Murphy*, 137 N.J. Super. 404, 422, 349 A.2d 122, 143 (N.J. Super. Ct. Law Div. 1975) (43 days old). *But see* *State v. Ramirez*, 351 A.2d 566, 569 (Del. Super. Ct. 1976) (two months rejected as stale); *Rodriguez v. State*, 297 So. 2d 15, 17-18 (Fla. 1974) (38 days rejected as stale). Some federal cases have involved probable cause approximately three weeks old. *See* *United States v. Martino*, 664 F.2d 860, 866-67 (2d Cir. 1982); *United States v. Hyde*, 574 F.2d 856, 864-65 (5th Cir. 1978) (34-46 days); *United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977); *United States v. Fina*, 405 F. Supp. 267, 274 (E.D. Pa. 1975) (21 days).

<sup>803</sup> *See supra* notes 246-47 & 318-40 and accompanying text (discussing statutory probable cause requirement).

<sup>804</sup> Although Connecticut has a 15 day staleness rule, CONN. GEN. STAT. § 54-41(c)(7) (1979), the provision is unduly rigid since supporting affidavits may contain *no* information more than 15 days old. *See* NWC REPORT, *supra* note 1, at 63; NWC HEARINGS, *supra* note 166, at 321 (statement of Pierce N. Lexal, Esq.).

<sup>805</sup> The Department of Justice has, at times, taken this measure. NWC HEARINGS, *supra* note 166, at 174 (statement of Atlee W. Wampler, III, Department of Justice). Professor Fishman provides a number of examples for how this might be done:

A variety of methods can be used to freshen stale information. Toll call records or surveillance may reveal that the target still calls or meets with others who are demonstrably involved in the type of crime under investigation. Informants may be able to provide enough information to update the probable cause. Alternatively, it may be possible to affirmatively create the probability that the crime under investigation will be discussed.

C. FISHMAN, *supra* note 438, § 78, at 110.

<sup>806</sup> This suggestion, however, does not mean that the application may contain no information more than 14 days old. *See supra* note 804.

<sup>807</sup> *See supra* notes 750-59 and accompanying text.

<sup>808</sup> This is especially true in situations involving 30 to 90 day staleness problems. *See supra* note 802 and accompanying text.

Although rarely considered, the existence of probable cause is also basic to the continuation of electronic surveillance. Title III does not explicitly address this point, but it seems apparent that once probable cause has dissipated by virtue of an unproductive or exculpatory investigation, surveillance cannot constitutionally continue.<sup>809</sup> The statute, however, provides only limited means for enforcing this principle. Under section 2518(6), the issuing judge may direct that periodic reports be submitted "showing what progress has been made toward achievement of the authorized objective and the need for continued interception."<sup>810</sup> Presumably, should these reports reveal the loss of probable cause, termination of surveillance would be required. In addition, the existence of probable cause must be reviewed whenever applications for extensions are filed.<sup>811</sup> Neither of these safeguards, however, has proven adequate.

Remarkably, the staleness issue has almost never been raised in the context of progress reports.<sup>812</sup> This may be attributable, however, to both legislative design and prevailing judicial analysis. Perhaps the chief difficulty with the progress report provision is its discretionary nature; reports are not required unless judicially mandated.<sup>813</sup> This has impacted upon the probable cause issue in two respects: (1) should a judge decide not to require progress reports, he normally would not know whether probable cause has dissipated;<sup>814</sup> and (2) courts have regarded violations of this directive as generally insignificant and, therefore, as not worthy of careful analysis. Since most judges require progress reports,<sup>815</sup> the question of judicial analysis is of greater concern.

Although early decisions suggested that progress reports serve a critical constitutional role by potentially limiting the duration of electronic surveillance,<sup>816</sup> violations of orders directing compliance have

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<sup>809</sup> For example, assume that police have obtained a valid warrant to search Suspect A's house. Before execution, however, Citizen X confesses to the crime in question. Assuming adequate corroboration, the police no longer have probable cause to search Suspect A's house.

<sup>810</sup> 18 U.S.C. § 2518(6) (1976).

<sup>811</sup> See *id.* §§ 2518(1)(f), (5); see also *United States v. Giordano*, 416 U.S. 505, 532 (1974); *Berger v. New York*, 388 U.S. 41, 59 (1967); LEGISLATIVE HISTORY, *supra* note 111, at 2162; ABA STANDARDS, *supra* note 81, § 5.9, at 150.

<sup>812</sup> Only a few cases have touched upon this topic. See *United States v. Dorfman*, 542 F. Supp. at 358 n.5. *United States v. Dalia*, 426 F. Supp. 862, 867-69 (D.N.J. 1977) (by implication), *aff'd on other grounds*, 575 F.2d 1344 (3d Cir. 1978), *aff'd*, 441 U.S. 238 (1979); *Howard v. State*, 51 Md. App. 46, \_\_\_, 442 A.2d 176, 187 (Md. Ct. Spec. App. 1982).

<sup>813</sup> 18 U.S.C. § 2518(6) (1976).

<sup>814</sup> At any time, however, the issuing judge may require oral progress reports.

<sup>815</sup> See NWC REPORT, *supra* note 1, at 96-97.

<sup>816</sup> See, e.g., *United States v. Sklaroff*, 323 F. Supp. 296, 306 (S.D. Fla. 1971); *United States v. Escandor*, 319 F. Supp. 295, 299 (S.D. Fla. 1970); see LEGISLATIVE HISTORY, *supra* note 111, at 2193.

generally been ignored. Typically, the cases have held that, since these reports statutorily could be dispensed with entirely,<sup>817</sup> both their adequacy and possible sanctions for noncompliance are matters best left to the supervising judge's discretion.<sup>818</sup> A few decisions have gone somewhat further by suggesting that noncompliance would warrant suppression if prejudice could be demonstrated.<sup>819</sup> The concept of prejudice, however, has been left undefined. Consequently, failure to provide the reports, tardy submission, and possibly inadequate compliance have gone unpunished.

Almost all of these cases, however, have been primarily concerned with the progress reports' sufficiency from a procedural standpoint—whether, for example, they accurately reported the number of interceptions—rather than with their adequacy in terms of probable cause.<sup>820</sup> Nevertheless, by emphasizing that these claims were generally matters of judicial discretion, the courts seemed to ignore the possibility that, under certain circumstances, the constitutionality of continued surveillance also could be at stake. Ultimately, the negative tone of these decisions may have discouraged defense attorneys from raising the probable cause issue. Recently, however, a few decisions have suggested that progress reports indicating a loss of probable cause would mandate termination of surveillance.<sup>821</sup> Whether this concept will become a constitutional reality depends upon the courts' willingness to view progress reports with greater scrutiny.<sup>822</sup>

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<sup>817</sup> See, e.g., *United States v. Ianelli*, 477 F.2d 999, 1002 (3d Cir. 1973), *aff'd on other grounds*, 420 U.S. 770 (1975).

<sup>818</sup> See *United States v. Vento*, 533 F.2d 838, 853, 854 (3d Cir. 1976); *United States v. Ianelli*, 477 F.2d at 1002; *United States v. Dorfman*, 542 F. Supp. at 358 n.5 (doubtful that court has authority to review adequacy of reports; matter of supervising judge's discretion). *United States v. Ianelli*, 430 F. Supp. 151, 156 (W.D. Pa. 1977); *Morrow v. State*, 147 Ga. App. 395, 398, 249 S.E.2d 110, 115 (1978), *cert. denied*, 440 U.S. 917 (1979); *State v. Kohout*, 198 Neb. 90, 94, 251 N.W.2d 723, 725 (1977). *Dorfman* illustrates the deficiency of prevailing analysis. While the court declined to review the adequacy of the progress reports, it subsequently acknowledged in dicta that "once surveillance commenced, the best indicator of whether probable cause continued was the fruits of the actual surveillance conducted, rather than the informants' prediction of what future surveillance might uncover." 542 F. Supp. at 363. For a case going to the other extreme unnecessarily, see *State v. Baldwin*, 289 Md. 635, 638-45, 426 A.2d 916, 919-22, *cert. denied*, 454 U.S. 852 (1981) (progress reports provided, but suppression for failure to include directive in order). *Baldwin*, however, was an extremely rigid construction of a mandatory state statute.

<sup>819</sup> *United States v. Canon*, 404 F. Supp. 841, 847 (N.D. Ala. 1975); *State v. Aurilio*, 366 So. 2d 71, 75 (Fla. Dist. Ct. App. 1978); *People v. Marino*, 49 N.Y. 2d 774, 775, 403 N.E.2d 179, 181, 426 N.Y.S.2d 474, 475 (1980); cf. *United States v. Dorfman*, 542 F. Supp. at 358 n.5 (recognizing that egregious misrepresentations in reports may justify suppression).

<sup>820</sup> *United States v. Dorfman*, 542 F. Supp. at 358 n.5, however, explicitly raised the substantive probable cause issue.

<sup>821</sup> See *Howard v. State*, 51 Md. App. 46, —, 442 A.2d 176, 187 (Md. Ct. Spec. App. 1982). See generally *People v. Marino*, 49 N.Y.2d at 775, 403 N.E.2d at 181, 426 N.Y.S.2d at 475.

<sup>822</sup> Greater scrutiny could be achieved by amending Title III to require mandatory pro-

Strict enforcement of probable cause principles also has been a problem in the context of extension orders. Although, by statutory design, extensions were to be premised upon both enduring probable cause and continued need for surveillance,<sup>823</sup> in actuality they have been granted without careful consideration of these factors. Thus, the National Wiretap Commission found that the quality of judicial review varied considerably with regard to extensions, and suggested that closer scrutiny was in order.<sup>824</sup> Significantly, there are no reported cases holding an extension order invalid.<sup>825</sup> Once again, this may reflect a lack of creative lawyering, since very few cases have raised the issue. On at least two occasions, however, courts have extended previously unproductive wiretaps without any additional showing of probable cause.<sup>826</sup> Other times, extensions have been sustained by conclusory analysis that failed to examine explicitly the probable cause issue.<sup>827</sup> Thus, there is some basis for concluding that the concerns of early Title III critics, who feared unduly prolonged electronic surveillance, have been realized.<sup>828</sup>

#### D. PARTICULARITY OF CONVERSATION

Particularity of conversation is critical to Title III because it serves to limit the scope of surveillance. There is a direct relationship between particularity and the minimization requirements; as anything not pertinent to the particularized conversation must be minimized, broader descriptions afford law enforcement greater leeway. Nevertheless, courts have not always been circumspect in evaluating the adequacy of these descriptions. Since conversations usually cannot be precisely predicted in advance,<sup>829</sup> the courts have accepted generic descriptions particular-

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gress reports. The reports should be required to address minimization concerns, the question of continued probable cause, as well as continued necessity in light of the investigative objective. Since the filing of such reports may occasionally be unduly onerous, suppression should not automatically follow for noncompliance, provided that an adequate oral report has been given to the supervising judge.

<sup>823</sup> See *supra* notes 333-34 and accompanying text.

<sup>824</sup> NWC REPORT, *supra* note 1, at 12; see also *id.* at 98.

<sup>825</sup> J. CARR, *supra* note 18, § 5.10, at 278.

<sup>826</sup> *United States v. Poeta*, 455 F.2d 117, 120-21 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); *United States v. King*, 335 F. Supp. 523, 537 (S.D. Cal. 1971), *aff'd*, 478 F.2d 494 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973). Both cases noted that anticipated incriminating conversations had not yet taken place, but did not find that nonoccurrence detracted from the original probable cause predicate. It is difficult to justify long term surveillance on this basis.

<sup>827</sup> See *United States v. Martin*, 599 F.2d 880, 887 (9th Cir. 1979); *People v. Marino*, 49 N.Y.2d at 775, 403 N.E.2d at 181, 426 N.Y.S.2d at 475.

<sup>828</sup> See *supra* note 313 and accompanying text.

<sup>829</sup> See *supra* notes 305-06 & 323-26 and accompanying text. To some extent, conversations can be predicted in advance. This is accomplished relatively easily in one party consensual surveillance. See *supra* notes 305-06 and accompanying text. On other occasions, success may sometimes be achieved by taking certain investigative measures that are likely to stimulate conversation. See NWC REPORT, *supra* note 1, at 151; COMMISSION STUDIES, *supra* note 322,

ized only in terms of the type of criminal activity under investigation.<sup>830</sup> While designation by categories may be constitutionally acceptable,<sup>831</sup> courts occasionally have applied this principle too broadly.

As discussed in connection with the early critical response to Title III, a valid description must particularize the crime in a manner directly related to the predicate facts establishing probable cause for the person(s) named in the order.<sup>832</sup> Since the purpose of particularity is to limit surveillance to the extent possible, the description should be no broader than permitted by the underlying probable cause predicate.<sup>833</sup> Accordingly, if probable cause has been established that Drug Dealers *A* and *B* will be discussing cocaine transaction *X* on a certain phone, the description should reflect this specificity. Thus, for example, of the following sample descriptions, only the fourth would suffice: (1) conversations involving narcotics; (2) conversations between Drug Dealers *A* and *B* involving narcotics; (3) conversations between Drug Dealers *A* and *B* involving cocaine; (4) conversations between Drug Dealers *A* and *B* involving cocaine transaction *X*.

Description (1) is obviously inadequate, since it is not limited to the specific persons or specific crime for which probable cause has been established. Description (2) is not sufficiently specific as to crime; the probable cause was for cocaine transaction *X*, not narcotics generally.<sup>834</sup> Similarly, description (3) is deficient as to crime; the probable cause was for cocaine transaction *X*, not cocaine generally.<sup>835</sup> Admittedly, had the probable cause been more general in nature so that, for example, conversations related to narcotics transaction *X*, rather than cocaine transaction *X*, were anticipated, the description could have been broadened accordingly. Similarly, if there was probable cause for a continuing series of cocaine transactions, there would have been no need to limit the

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at 101; NAT'L COMM'N, ELECTRONIC SURVEILLANCE, LAW ENFORCEMENT EFFECTIVENESS CONFERENCE 35 (1976).

<sup>830</sup> See *United States v. Steinberg*, 525 F.2d 1126, 1131 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Tortorello*, 480 F.2d 764, 780-81 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); *United States v. Poeta*, 455 F.2d at 121-22; see also NWC REPORT, *supra* note 1, at 65. For a sample of a well drafted application, see NWC HEARINGS, *supra* note 166, at 446.

<sup>831</sup> See *supra* notes 323-26 and accompanying text.

<sup>832</sup> See *id.*

<sup>833</sup> See *United States v. Tortorello*, 480 F.2d at 781.

<sup>834</sup> For example, in a conventional search, if police have probable cause to believe stolen televisions will be found on defendant's property, the warrant should specify "stolen television" rather than "stolen property generally." 2 W. LAFAVE, *supra* note 60, § 4.6(c). The admissibility of any other items would then turn upon plain view principles. See *infra* notes 868-70 and accompanying text.

<sup>835</sup> Cf. *United States v. Capra*, 501 F.2d 267, 273-77 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975) (surveillance order for criminal activity of Della Villa does not cover activity of one Della Cava).



authorization to transaction *X*.<sup>836</sup> But, this does not change the need for requiring particularity of conversation to correspond with specificity of probable cause. If probable cause exists only for cocaine transaction *X*, conversations concerning heroin, or, for that matter, cocaine transaction *Y*, transcend the scope of the probable cause predicate. Therefore, they must be viewed as distinct offenses not covered by the eavesdropping order. This is not to suggest that conversations pertaining to other crimes are not subject to interception. They very well may be, but their subsequent admissibility would then depend upon proper application of constitutional and statutory plain view principles.<sup>837</sup>

Thus far, courts have failed to address the particularity requirement in this manner. Rather, they have approved generalized descriptions, despite relatively specific probable cause predicates.<sup>838</sup> Thus, the

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<sup>836</sup> Concededly, it is usually not difficult to draft a valid description which is nevertheless quite broad.

<sup>837</sup> See *infra* notes 839-90 and accompanying text.

<sup>838</sup> See *United States v. Licavoli*, 604 F.2d 613, 620 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) (probable cause existed for stolen diamonds, but order referenced stolen property generally); *United States v. Daly*, 535 F.2d 434, 439-40 (8th Cir. 1976) (description of conversations regarding mail fraud held to cover conversations related to different mail fraud scheme). See generally *United States v. Principe*, 531 F.2d 1132, 1138-39 (2d Cir. 1976), *cert. denied*, 430 U.S. 905 (1977) (surveillance warrant liberally construed to cover seizure of conversations regarding future securities thefts). Note that surveillance orders for racketeering cases under the federal RICO statute, see *infra* notes 1011-13 and accompanying text, must be carefully scrutinized because the generic racketeering charge may be based upon any of numerous predicate crimes. 18 U.S.C. §§ 1961-1962 (1976); see *United States v. Dorfman*, 542 F. Supp. at 387 n.45 (recognizing that order must be specifically linked to particular RICO predicate offense). See generally *United States v. Loftin*, 518 F. Supp. 839, 844 (S.D.N.Y. 1981). Another occasional problem has been the tendency of some courts to save orders with deficient descriptions by referring to the affidavit and application. However, unless the order incorporates by reference the other papers, this approach is inappropriate since only the order defines the limits of what may properly be seized. See *Hudson v. State*, 368 So. 2d 899, 903 (Fla. Dist. Ct. App. 1979) (description merely referenced "voice communications"). See generally *United States v. Maninello*, 345 F. Supp. 863, 872 (E.D.N.Y. 1972); J. CARR, *supra* note 18, § 4.05(3)(c).

The problem described in the text is particularly well illustrated by the *Dorfman* case, albeit in a somewhat different context. There the district court found an extension application defective for failure to include an explanation required by § 2518(1)(f) "of results . . . to date, or an explanation of failure to obtain results." 542 F. Supp. at 374. The court properly recognized that this aspect of the application was consequently lacking probable cause, but it declined to suppress because there were other allegations in the supporting affidavits which established probable cause *as to other illegality*:

However, the failure of the government to justify continued interception on March 1 based on the Bingo Palace, Slots-A-Fun and Horseshore allegations does not vitiate the March 1 order entered by Chief Judge Parsons, because those were not the only allegations in the application. In his affidavit, Wacks also alleged that the FBI had intercepted conversations pursuant to the January 29 wiretap order which "concern the promotion and management of hidden and unlawful financial interests in the Aladdin hotel-casino and possibly other casinos located in Las Vegas, Nevada."

*Id.* at 375. Such analysis, however, fails to consider that, unless the resulting warrant was limited to authorizing the seizure of conversations for which probable cause existed, the ulti-

judiciary has often circumvented constitutional and statutory procedures for handling the interception of crimes not originally within the proper scope of the warrant.

#### E. PLAIN VIEW SEIZURES

Despite their concern for limiting the scope of electronic surveillance, Title III's drafters realized that conversations pertinent to crimes not specified in the warrant would inevitably be overheard; the minimization process was inherently imperfect,<sup>839</sup> and many criminals, especially those associated with organized crime, tended to diversify their activities.<sup>840</sup> Thus, section 2517(5) was designed to handle evidence of new crimes.

In effect, section 2517(5) establishes a statutory plain view procedure. At the time it was drafted, however, plain view was not yet a firmly established constitutional doctrine.<sup>841</sup> If anything, plain view seizures stemming from search warrant executions had been constitutionally suspect since *Marron v. United States*,<sup>842</sup> in which the Supreme Court interpreted the fourth amendment's particularity requirement as precluding plain view seizures. Accordingly, officers executing a search warrant could seize only those items particularized in the order. *Marron*, however, was a 1927 decision, and its continued validity had been cast into doubt by a series of decisions sustaining plain view seizures in the context of valid warrantless searches.<sup>843</sup> Nevertheless, in order to be certain of conforming to the Constitution, Congress imposed a retroactive amendment requirement upon plain view interceptions.<sup>844</sup> This requirement was derived by analogy to regular search warrant procedure.<sup>845</sup> Under prevailing 1968 practice, officers who came upon an

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mate seizure might be impermissibly broad. Hence, although the *Dorfman* facts are somewhat unclear, since the remainder of the court's opinion indicates that probable cause was limited to one or two casinos, the resulting description should have conformed in kind. *Id.* at 375-76. Seizure of evidence pertaining to undescribed illegality would then have been subjected to a plain view analysis. See *infra* notes 839-90 and accompanying text. Yet, the potential overbreadth of the description in the eavesdropping warrant was never addressed. See also *Dorfman*, 542 F. Supp. at 381-82 (same type of analysis repeated by court in another context).

<sup>839</sup> See *supra* notes 328-30 & 610 and accompanying text.

<sup>840</sup> *Callahan v. United States*, 364 U.S. 587, 593 (1960) (conspiracies usually involve diverse crimes); NWC REPORT, *supra* note 1, at 97; ABA STANDARDS, *supra* note 81 at 31-44. See generally 118 CONG. REC. 10, 468 (1972) (statement of Senator McClellan).

<sup>841</sup> ABA STANDARDS, *supra* note 81, at 142-44.

<sup>842</sup> *Marron v. United States*, 275 U.S. 192, 196-98 (1927).

<sup>843</sup> ABA STANDARDS, *supra* note 81, at 142-44; W. LAFAYE, *supra* note 60, at 163-67 (1978); see *Harris v. United States*, 390 U.S. 234, 235-36 (1968); *Abel v. United States*, 362 U.S. 217, 238-40 (1960); *Harris v. United States*, 331 U.S. 145, 153-54 (1947); *United States v. Eisner*, 297 F.2d 595, 597 (6th Cir.), *cert. denied*, 369 U.S. 859 (1962).

<sup>844</sup> *Blakey & Hancock*, *supra* note 378, at 670-71.

<sup>845</sup> *Id.*

item in plain view while executing a search warrant could place it under guard until another warrant had been obtained authorizing seizure.<sup>846</sup> Therefore, Congress reasoned, evidence of other crimes could be overheard so long as another warrant was subsequently issued approving the interception.<sup>847</sup> Of course, in contrast to regular searches, plain view evidence generated by electronic surveillance necessarily would be seized before the warrant could be obtained. This distinction was deemed *de minimis*, however, when admissibility was conditioned upon a judicial determination retroactively sanctioning the plain view seizure. Accordingly, section 2517(5) provides, in pertinent part:

When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom [may be admissible] when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.<sup>848</sup>

The legislative history indicates that judicial approval under section 2517(5) requires "a showing that the original order was lawfully obtained, that it was sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order."<sup>849</sup> While section 2517(5) has been criticized as providing undue incentive for broad surveillance,<sup>850</sup> the provision seems to be a reasonable accommodation of constitutional principles to the realities of electronic searches.<sup>851</sup> More-

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<sup>846</sup> *Id.*

<sup>847</sup> See LEGISLATIVE HISTORY, *supra* note 111, at 2189. Since there is no policy reason for restricting otherwise proper retroactive amendments to those crimes originally designated by statute, Title III does not purport to do so. LEGISLATIVE HISTORY, *supra* note 111, at 2189. Nevertheless, a few states have erroneously interpreted their statutes to restrict retroactive amendments to designated crimes. See J. CARR, *supra* note 18, § 5.09(3)(a), at 275.

<sup>848</sup> 18 U.S.C. § 2517(5) (1976).

<sup>849</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2189.

<sup>850</sup> J. CARR, *supra* note 18, §§ 5.09(1)-5.09(3), at 272-77; Schwartz, *supra* note 15, at 465-66; Note, *Subsequent Use of Electronic Surveillance Interceptions and the Plain View Doctrine*, 9 MICH. J.L. REFORM 529, 550 (1976). For this reason, some state statutes have imposed further limitations or outright prohibitions against the use of such evidence. See COLO. REV. STAT. § 16-15-102(16) (Supp. 1978) (conversations seized in plain view may only be used if pertinent to a felony); NEV. REV. STAT. § 179.465(4) (1979) (conversations seized in plain view may only be used derivatively); VA. CODE § 19.2-67(5) (1975) (plain view seizures may not be disclosed).

<sup>851</sup> The following remarks are worth noting:

The reason then for the seriousness of the problem here arises not from the fact that the particular conversations were not specifically described and given specific prior authorization, but rather from the unmanageability generally of electronic surveillance. The area is peculiarly sensitive due to its effort to probe the thoughts of the man who is the object of the search. Once the listening commences it becomes impossible to turn it off

over, when the Supreme Court later gave plain view seizures broad fourth amendment approval in *Coolidge v. New Hampshire*,<sup>852</sup> it became apparent that a formal retroactive amendment, as required by section 2517(5), was not constitutionally necessary.<sup>853</sup> Thus, the demands of section 2517(5) actually exceeded those of the fourth amendment. Perhaps for this reason, courts soon declined to enforce the provision strictly, as statutory language was often ignored and plain view principles disregarded.

Ironically, some jurisdictions have applied section 2517(5) too strictly—and *inappropriately*—by insisting upon retroactive amendments even when the words of a conversation were pertinent to both the crime specified by warrant and some other offense.<sup>854</sup> Obviously, under such circumstances section 2517(5) was intended to be inoperative, as the pertinency of those words to the specified crime is also dispositive of the subterfuge search issue.<sup>855</sup> Most courts, however, have ruled inappropri-

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when a subject other than one which is authorized is overheard. It would be the height of unreasonableness to distinguish between information specifically authorized and that which is unanticipated and which develops in the course of an authorized search such as that involved here. It would be irrational to hold that officers authorized to listen to conversations about drug traffic, upon learning that a bank robbery is to occur, must at once close down the project and not use the information to prevent the robbery since the information is tainted. It would be demoralizing to allow the bank to be robbed while the investigators stood by helpless to prevent the occurrence. Harder cases can be imagined. For example, in electronic surveillance of organized criminals involved in gambling, information might be intercepted disclosing a conspiracy to commit murder. Surely the officials must be empowered to use this information notwithstanding the lack of specific prior authorization.

As we view it, Congress was seeking to deal realistically with highly complex problems in accordance with the demands of the Constitution. . . . Congress has dealt with the problem about as well as could have been expected considering the nature and character of the subject matter . . . .

*United States v. Cox*, 449 F.2d 679, 686-87 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972). *See United States v. Johnson*, 539 F.2d 181, 188 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); *People v. DiStefano*, 38 N.Y.2d 640, 648, 345 N.E.2d 548, 552-53, 382 N.Y.S.2d 5, 9-10 (1976). Despite dicta in *Katz* to the contrary, 389 U.S. at 355-56, the Supreme Court has never held retroactive approval unconstitutional in the context of plain view. Nor is there anything per se unreasonable about such an approach, provided that a sufficiently high standard is applied in evaluating nonspecified interceptions.

<sup>852</sup> 403 U.S. 443, 465-67 (1971).

<sup>853</sup> Note, *supra* note 258, at 129 n.183.

<sup>854</sup> *United States v. Marion*, 535 F.2d 697, 703-07 (2d Cir. 1976); *United States v. Brodson*, 528 F.2d 214, 216 (7th Cir. 1975). The Second Circuit later expressed some reservations about such a rigid approach. *See United States v. Masciarelli*, 558 F.2d 1064, 1067-68 (2d Cir. 1977). Nevertheless, *Masciarelli* adhered to *Marion*, and some other jurisdictions have followed suit. *See State v. Kuchinsky*, 3 Kan. App. 2d 224, 228-29, 592 P.2d 144, 148 (Kan. Ct. App. 1979); *State v. Mayes*, 284 Md. 625, 635-37, 399 A.2d 597, 605-06. Regardless of whether the *Brodson-Marion* analysis is valid, the dismissal sanction imposed in *Brodson* for this purported violation was not authorized by statute. *See United States v. Alois*, 449 F. Supp. 698, 719 (E.D.N.Y. 1977). The only appropriate remedy is exclusion of the evidence. 18 U.S.C. § 2517(5) (1976).

<sup>855</sup> *See C. FISHMAN, supra* note 438, at 249. Obviously, no general fishing expedition is

ately in the other extreme. For example, although section 2517(5) requires applications for retroactive amendments to be filed "as soon as practicable,"<sup>856</sup> delays of several months have often been tolerated.<sup>857</sup> While practicability should be flexibly interpreted to provide for numerous valid reasons possibly occasioning delayed applications,<sup>858</sup> present practice is so loose that the statutory language is actually being disregarded.<sup>859</sup> Certainly, once there is probable cause to believe the words of a conversation relate to a new crime (and not to the crime specified in the order), timely amendment normally should follow.<sup>860</sup>

Moreover, some courts have held that, so long as a new crime was mentioned in either a progress report or a request for an extension of surveillance, formal application for retroactive amendment is unneces-

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involved when the same words pertain to more than one crime. This situation is analogous to police executing a search warrant for a stolen gun, discovering the gun, and immediately realizing that it was used in a recent homicide. Note also that since inadvertency is apparently a prerequisite to admissibility under § 2517(5), *see supra* note 849 and *infra* notes 876-77 and accompanying text, this condition often could not be met since the basic conversation pertinent to a crime specified in the warrant was, in fact, anticipated. *United States v. Marion*, 535 F.2d at 712 (Anderson, J., concurring in part and dissenting in part). Several jurisdictions have rejected the *Brodson-Marion* approach. *See United States v. Campagnuolo*, 556 F.2d 1209, 1213 (5th Cir. 1977); *United States v. Rabstein*, 554 F.2d 190, 194 (5th Cir. 1977); *United States v. Daly*, 535 F.2d 434, 439-40 (8th Cir. 1976); *United States v. Moore*, 513 F.2d 485, 501-02 (D.C. Cir. 1975), *vacated without opinion*, 556 F.2d 77 (1977). *See generally United States v. Sedovic*, 679 F.2d 1233, 1235-36 (8th Cir. 1982).

<sup>856</sup> 18 U.S.C. § 2517(5) (1976).

<sup>857</sup> *See United States v. Campagnuolo*, 556 F.2d 1209, 1211-13 (5th Cir. 1977) (eight month delay); *United States v. Vento*, 533 F.2d 838, 845-46 (3d Cir. 1976) (seven month delay); *United States v. Ratenni*, 480 F.2d 195, 198-99 (2d Cir. 1973) (five month delay); *United States v. Pine*, 473 F. Supp. 349, 352 (D. Md. 1978) (two month delay); *United States v. Aloï*, 449 F. Supp. 698, 716 (E.D.N.Y. 1977) (three month delay); *United States v. Denisio*, 360 F. Supp. 715, 720 (D. Md. 1973) (seven month delay). A few cases have suppressed for failure to file timely applications. *See State v. Mayes*, 284 Md. at 637, 399 A.2d at 604 (one year delay); *People v. O'Meara*, 70 A.D.2d 890, 891, 417 N.Y.S.2d 95, 97 (N.Y. App. Div. 1979), *aff'd*, 52 N.Y.2d 990, 420 N.E. 2d 85, 438 N.Y.S.2d 287 (1981) (18 day delay).

<sup>858</sup> Note, *supra* note 258, at 131-34. *See generally United States v. Campagnuolo*, 556 F.2d at 1214-15. For example, monitoring agents initially may not realize a conversation is relevant to another crime. This may be a particular problem when the discussion is ambiguous or relates to a cross-jurisdictional offense. Moreover, even when the other crime is obviously pertinent, prosecutors may initially decide that it is not worth pursuing. Strict application of § 2517(5) precludes subsequent reversal of prosecutorial discretion. Admittedly, prosecutors could preserve their options by filing an amendment, but often this will not be done because the thrust of an investigation is pointing in some other direction. Of these obstacles, the most difficult concerns ambiguous conversations. For this reason, there should be no need to file a retroactive amendment until probable cause exists to believe that the conversation was criminal in nature. *See United States v. Aloï*, 449 F. Supp. at 715-16; *see also infra* note 864.

<sup>859</sup> Perhaps as a consequence, the Justice Department's procedural manual treats retroactive amendments in a superficial and oblique manner. This manual merely notes that such amendments are required before presentation of the evidence to the grand jury, rather than as soon as practicable. UNITED STATES ATTORNEYS' MANUAL title 9, *supra* note 603, at 32, 39 (1979).

<sup>860</sup> *See supra* note 858.

sary.<sup>861</sup> These cases assume that, if electronic surveillance is allowed to continue under such circumstances, retroactive approval for the new crime has been granted implicitly.<sup>862</sup> This assumption, however, is often without foundation. Judges reviewing progress reports and applications—documents which are often both lengthy and complex—will not necessarily perceive new crimes that have been intercepted. Furthermore, a passing reference in a progress report or extension application does not provide an appropriate context for formal determination of whether the interception complied with all plain view requirements.<sup>863</sup> Finally, this concept of implicit adjudication squarely ignores statutory language requiring both a formal application and an explicit judicial ruling.<sup>864</sup>

On occasion, the judiciary has suggested that suppression is not an available remedy for section 2517(5) violations.<sup>865</sup> These decisions argue that, since exclusion is available under section 2518(10)(a) only for interception violations, suppression is inappropriate because late filing, or a failure to file altogether, is a post-interception violation.<sup>866</sup> This reading, however, ignores language in section 2517(5) which directly establishes an evidentiary prerequisite to admissibility which is independent of Title III's exclusionary rule; no evidence of other crimes may be disclosed in a judicial proceeding unless a timely retroactive amendment has been filed and approved.<sup>867</sup>

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<sup>861</sup> See *United States v. Masciarelli*, 558 F.2d at 1069; *United States v. Johnson*, 539 F.2d at 187; *United States v. Marion*, 535 F.2d at 703-08; *United States v. Tortorello*, 480 F.2d at 782-83; *State v. Murphy*, 148 N.J. Super. 542, 549 (1977). But see *State v. Kuchinsky*, 3 Kan. App. at 230, 592 P.2d at 149.

<sup>862</sup> See *supra* note 861.

<sup>863</sup> See J. CARR, *supra* note 18, § 509(2), at 274; Note, *supra* note 258, at 134-37.

<sup>864</sup> See J. CARR, *supra* note 18, at 80 (Supp. 1982). It has been suggested that requiring an amendment as soon as practicable serves no important purpose so long as judicial approval is received some time before use at trial. See *A Bill to Amend Title III of the Omnibus Crime Control Act of 1968: Hearings on S. 1717 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 26 (1980) (statement of Clifford Fishman, Associate Professor of Law, Catholic University of America). Legislation to effect this change has been proposed. See *infra* note 931 and accompanying text. However, as part of the process of maintaining close judicial supervision, the present language is preferable, see J. CARR, *supra* note 18, § 5.09(3), at 276, provided that the requirement is not read to attach until there is probable cause to believe that the intercepted conversation pertained to criminal activity. See *supra* note 858. Moreover, the practicability standard should not be applied without giving due consideration to unusual investigative circumstances that may have precluded prompt amendment. These factors should all be considered during the course of any legislative reform.

<sup>865</sup> See *United States v. Vento*, 533 F.2d at 855; *Cox v. McNeal*, 577 S.W.2d 881, 889 (Mo. Ct. App. 1979).

<sup>866</sup> See *supra* note 865.

<sup>867</sup> See *supra* text accompanying note 848. While the legislative history indicates that § 2517 "must, of course, be read in light of section 2518," LEGISLATIVE HISTORY, *supra* note 111, at 2188, such a reading of § 2518 does not necessarily preclude some of the language

Even when retroactive amendments have been filed, they often have not been carefully analyzed. For example, in sustaining these interceptions, judges have rarely bothered to consider explicitly each constitutional and statutory component of a valid plain view seizure. In *Coolidge v. New Hampshire*,<sup>868</sup> the Supreme Court conditioned plain view seizures upon compliance with three conditions: (1) initial valid intrusion; (2) immediate recognition of the item's incriminating nature; and (3) inadvertent discovery.<sup>869</sup> Implicit was a fourth requirement—that of good faith.<sup>870</sup> Since each of these factors effects an important limitation against improper expansion of electronic eavesdropping, each should be explicitly evaluated under the following type of analysis:

(1) Was the initial intrusion valid? Law enforcement obviously should not be allowed to benefit from a plain view seizure unless the discovery was made during the course of a lawful search.<sup>871</sup> In the context of electronic surveillance, an initial valid intrusion would require a properly issued eavesdropping order and compliance with the minimization requirement. Thus, the legality of the seizure should not be sustained if the conversation occurred while monitors were not properly minimizing. Under such circumstances, the initial intrusion would not be valid because the officers were exceeding the authorized scope of surveillance. The effect of this limitation is exemplified below by the "immediately apparent" requirement.

(2) Was the conversation's incriminating character "immediately apparent"? *Coolidge* warned that a plain view seizure "is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."<sup>872</sup> Most courts have interpreted this

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contained in § 2517 from retaining independent significance. This does not mean, however, as one court has suggested, that compliance with § 2517(5) automatically shields the matter from further judicial review. *United States v. Dorfman*, 542 F. Supp. at 401. The lawfulness of any interception is still independently subject to judicial review to ensure compliance with statutory and constitutional requirements.

<sup>868</sup> 403 U.S. 443 (1971).

<sup>869</sup> *Id.* at 466-69. Note, however, that only a plurality of the Court recognized the inadvertency requirement. Its continued validity has been questioned. *See Texas v. Brown*, 33 CRIM. L. REP. (BNA) 3001, 3005 (1983).

<sup>870</sup> Justice Stewart's plurality opinion suggested that the plain view principle would not be used to sustain the seizure of items not specified in a warrant during a "planned warrantless seizure." *Id.* at 469-70 n.26. The government's pre-search knowledge of these items would suggest bad faith. *See also United States v. Pacelli*, 470 F.2d 67, 71 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *United States v. Tranquillo*, 330 F. Supp. 871, 875-76 (M.D. Fla. 1971); *W. LAFAVE, supra* note 60, § 4.11(e) (Supp. 1982); Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 100-24 (1982).

<sup>871</sup> *See Coolidge v. New Hampshire*, 403 U.S. at 466-67.

<sup>872</sup> *Id.* at 466. The Court has interpreted "immediately apparent" to mean probable cause

limitation as allowing an initial limited intrusion if an object appears suspicious. For example, cursory examination of suspected stolen property for brand name or serial number is routinely permitted.<sup>873</sup> In the context of electronic surveillance, this concept could be applied to conversations that clearly do not pertain to the specified crime, but are ambiguous in other respects.<sup>874</sup> Under such circumstances, officers should be allowed a limited intrusion—perhaps of two minutes—to assess the conversation's incriminating nature. If its criminality is not then apparent, the interception must terminate (subject, of course, to spot monitoring). Should the conversation's incriminating character become apparent only after the agents improperly exceeded their permissible limited intrusion, the seizure must nevertheless be suppressed.<sup>875</sup>

(3) Was the conversation's discovery inadvertent? This factor is required by a plurality of the Justices in *Coolidge* because where an item's discovery is advertent, there is no reason why a search warrant could not have been obtained.<sup>876</sup> Even in conventional searches, however, police often hope, or perhaps even expect, to discover evidence of other crimes.<sup>877</sup> This is especially true in electronic searches.<sup>878</sup> Since subjective considerations alone are not sufficient to attain a warrant, however,

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to believe that the pertinent item is criminal in nature. *Texas v. Brown*, 33 CRIM. L. REP. (BNA) 3001, 3004 (1983).

<sup>873</sup> See W. LAFAVE, *supra* note 60, § 4.11(c) (Supp. 1982).

<sup>874</sup> See generally *supra* notes 611-12 and accompanying text.

<sup>875</sup> C. FISHMAN, *supra* note 438, at 262-63. The question then becomes whether the entire conversation must be suppressed, or just that portion improperly seized after the first two minutes. This issue should turn on the question of good faith. Assuming good faith, the first two minutes should not be suppressed. Cf. *supra* notes 744-49 and accompanying text.

<sup>876</sup> The rationale of the exception to the warrant requirement . . . is that a plain-view seizure will not turn an initially valid (and therefore limited) seizure into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."

If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of "Warrants . . . particularly describing . . . [the] things to be seized . . . [T]o extend the scope of such intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

*Coolidge v. New Hampshire*, 403 U.S. at 469-71.

<sup>877</sup> See 2 W. LAFAVE, *supra* note 60, § 4.11, at 179, § 5.2, at 285-86 n.107 ("it would be an odd rule that there is a 'pretext' situation whenever the police anticipate or even contemplate the possibility of finding evidence of a crime unrelated to that for which the arrest is made").

<sup>878</sup> NWC REPORT, *supra* note 1, at 143; COMMISSION HEARINGS, *supra* note 166, at 395-96; see *United States v. Tortorello*, 480 F.2d at 784; *People v. DiStefano*, 38 N.Y.2d at 648, 345 N.E.2d at 552-53, 382 N.Y.S.2d at 9-10 (1976). Some have suggested that, for this reason, plain view seizures should not be allowed. J. CARR, *supra* note 18, § 5.09(1), at 272; C. FISHMAN, *supra* note 438, at 84, 262; Note, *supra* note 850, at 551. This view, however, overlooks



the policy expressed in *Coolidge* is of valid concern only where objective probable cause exists for the unspecified item. Therefore, inadvertency traditionally has been defined in objective terms as the absence of probable cause.<sup>879</sup>

The cases, however, have typically failed to consider this factor.<sup>880</sup> Consequently, on numerous occasions interceptions have been approved which clearly were objectively advertent in character.<sup>881</sup> For example, although a retroactive amendment may be appropriate for retrospectively legitimizing a "new crime" conversation (or even a brief series of such conversations) for which probable cause was originally lacking, eventually the continued interception of conversations pertaining to this new crime is no longer inadvertent. Rather, at some point there is probable cause to expect their occurrence. Since a retroactive amendment would no longer be available under such circumstances,<sup>882</sup> the government must seek a court authorization prospectively sanctioning the interception of conversations related to the new crime. In effect, a fresh application must be filed and an expanded court order issued.<sup>883</sup> Although the statute does not explicitly prescribe such prospective amendments, the concept is implied by section 2517(5)'s inadvertency requirement, and may be constitutionally necessary.<sup>884</sup> As yet, however,

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the fact that inadvertency is usually defined objectively rather than in terms of subjective expectations. See *infra* note 879 and accompanying text.

<sup>879</sup> 2 W. LAFAYE, *supra* note 60, § 4.11, at 179-80, 285. See *United States v. Hare*, 589 F.2d 1291, 1294 (6th Cir. 1979); *State v. Pepe*, 176 Conn. 75, 79-80, 405 A.2d 51, 53-54 (1978); *Commonwealth v. Cefalo*, 1980 Mass. Adv. Sh. 1877, \_\_\_\_\_, 409 N.E.2d 719, 727 (Mass. 1980). If there is no probable cause to believe something will be found, its occurrence is deemed inadvertent. Professor LaFave suggests that the inadvertency factor serves no purpose not already achieved by the good faith and initial valid intrusion components of plain view. W. LAFAYE, *supra*, at 181-84. This may explain why some courts have given the inadvertency rule relatively narrow scope. See *United States v. Delegado*, 615 F.2d 294, 296-97 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980) (requirement does not apply to contraband); W. LAFAYE, *supra*, at 182.

<sup>880</sup> See *infra* note 890. Thus far, only one case has addressed this issue with any degree of sophistication. See *People v. DiStefano*, 38 N.Y.2d at 647-50, 345 N.E.2d 548, 552-54, 382 N.Y.S.2d 5, 8-10 (1978).

<sup>881</sup> *United States v. Johnson*, 539 F.2d at 184; *United States v. Vento*, 533 F.2d at 853; *United States v. Armocida*, 515 F.2d 29, 43-46 (3d Cir. 1975); *United States v. Tortorello*, 480 F.2d at 781-83; *United States v. Ratteni*, 480 F.2d at 198-99; *United States v. Denisio*, 360 F. Supp. at 715-16; *People v. Ruffino*, 62 Misc. 2d 653, 660, 309 N.Y.S.2d 805, 812 (N.Y. Sup. Ct. 1970); see Note, *supra* note 258, at 129-30. In one case, *United States v. Pine*, 473 F. Supp. 349 (D. Md. 1978), the court addressed the issue, but erroneously concluded that inadvertency is to be gauged exclusively from the time the warrant was obtained. *Id.* at 357-58. In the context of long term surveillance, such an approach is unconstitutional. If there is time to obtain an amendment, the fourth amendment requires that this be done rather than allowing interception at the monitor's discretion.

<sup>882</sup> See C. FISHMAN, *supra* note 438, at 243, 260-63.

<sup>883</sup> *Id.*

<sup>884</sup> Note, *supra* note 258, at 127 n.124; see 2 W. LAFAYE, *supra* note 60, § 4.11, at 178-83. *Katz* implies that a prospective amendment would be necessary because interception of new

few courts have considered whether a prospective amendment should have been obtained,<sup>885</sup> and none have required one.<sup>886</sup> Since such amendments raise procedural and substantive issues of enormous complexity,<sup>887</sup> by failing to address the inadvertency requirement with great care, the courts have defined these issues out of existence.

(4) Was the interception made in good faith? By imposing a good faith requirement, Title III effectively established an important limitation which has survived *Scott*. While *Scott* indicated that subjective intent was not a factor in assessing possible minimization violations, good faith nevertheless remains a statutory prerequisite to expansive plain view seizures.<sup>888</sup> Thus far, courts have recognized that plain view interceptions must be grounded in good faith,<sup>889</sup> but they have never found any such seizure to have been made in bad faith.

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crimes is otherwise left to the officer's discretion. 389 U.S. at 358; *see also supra* note 869 and accompanying text.

<sup>885</sup> C. FISHMAN, *supra* note 438, at 244; *see* United States v. Johnson, 539 F.2d at 186-88; United States v. Armocida, 515 F.2d at 42; United States v. Tortorello, 480 F.2d at 782-84. Some courts have discussed amendments in terms that suggest confusion between retroactive and prospective principles. *See* J. CARR, *supra* note 18, § 5.09(2), at 273; *People v. Di Lorenzo*, 69 Misc. 2d 645, 651, 330 N.Y.S.2d 720, 727 (Rockland Co. Ct. 1971).

<sup>886</sup> C. FISHMAN, *supra* note 438, at 243-44. Professor Fishman refers to one recent case which he indicates was concerned with prospective amendments. *Id.* at 104 (Supp. 1981). Close analysis of that decision, however, suggests that it actually may have been concerned with retroactive amendments. *See* *People v. O'Meara*, 70 A.D. 2d at 891, 417 N.Y.S.2d at 97.

<sup>887</sup> For example, in a federal surveillance, must the Attorney General authorize the prospective amendment? If so, serious timing problems may be encountered. *See supra* notes 792-94 and accompanying text. To circumvent these problems, may prosecutors rely upon Title III's emergency provisions? Section 2518(7) seems to preclude this possibility in cases not involving national security or organized crime matters. *See supra* notes 298-99 and accompanying text. If there is time to obtain an amendment, may one be issued if the new crime is not an offense designated by statute? 18 U.S.C. § 2516(1) (1976). This could pose particular problems in federal investigations in non-Title III states when, for example, the new crime is a contemplated state homicide. Finally, prosecutors potentially face an intractable dilemma: if a prospective amendment is obtained, defense counsel will argue it was issued without probable cause, but if a retroactive amendment (or no amendment at all) is filed, defense counsel will assert that there was probable cause to anticipate the resulting seizure, and, therefore, the interception was not inadvertent. *See* Note, *supra* note 258, at 127 n.174; *cf.* 2 W. LAFAYE, *supra* note 60, at 181, 450-57. The only solution to this dilemma is to apply the probable cause concept flexibly in the context of prospective amendments. At least for purposes of judicial review, perhaps a reduced standard of probable cause should be applied. The Supreme Court has often indicated that such flexibility may be appropriate. *See* *Michigan v. Summers*, 452 U.S. 692, 697-700 (1981); *United States v. United States District Court*, 407 U.S. 297, 322-23 (1972) (reduced probable cause standard may be compatible with fourth amendment). *See generally* Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763; Greenberg, *Drug Carrier Profiles; Mendenhall and Reid: Analyzing Police Intrusions on Less Than Probable Cause*, 19 AM. CRIM. L. REV. 49 (1981). These factors should all be considered in the context of a statutory amendment explicitly requiring a prospective amendment once there is probable cause to believe a new offense will be overheard.

<sup>888</sup> *See supra* notes 849 & 870 and accompanying text.

<sup>889</sup> *See* *United States v. Brodson*, 528 F.2d 214, 216 (7th Cir. 1975).

As yet, no court has examined these four issues in an explicit and comprehensive fashion.<sup>890</sup> If the constitutional and statutory protections against improper expansions of surveillance are to regain their vitality, the judiciary must begin to enforce them in a more conscientious manner.

#### F. SEALING

Section 2518(8)(a) mandates that "[i]mmediately upon . . . expiration . . . of the order, or extensions thereof," all tapes must be delivered to the issuing judge and "sealed under his directions."<sup>891</sup> This provision is important because it ensures the integrity of all recordings.<sup>892</sup> Thus, section 2518(8)(a) provides that compliance with this requirement is a prerequisite to admissibility: "[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom [in any judicial proceeding]."<sup>893</sup>

Although the mechanics of compliance are quite simple, requiring only immediate delivery<sup>894</sup> and secure attachment of an appropriately identified piece of tape,<sup>895</sup> the government has often failed to fulfill this obligation. In almost all the reported cases, a seal was properly secured, but timely delivery had not been effected.<sup>896</sup> Nevertheless, despite the

<sup>890</sup> In fact, most cases do not even discuss the plain view concept. See *United States v. Rotundo*, 554 F.2d 712, 714 (5th Cir.), *cert. denied*, 434 U.S. 892 (1977); *United States v. Agrusa*, 541 F.2d 690, 695 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977); *United States v. Johnson*, 539 F.2d at 187-88; *United States v. Daly*, 535 F.2d 434, 440-42 (8th Cir. 1976); *United States v. Vento*, 533 F.2d at 860-62; *United States v. Tortorello*, 480 F.2d at 783; *United States v. Ratteni*, 480 F.2d at 198; *United States v. DePalma*, 461 F. Supp. 778, 817-23 (S.D.N.Y. 1978); *United States v. Aloï*, 449 F. Supp. 698, 715-19 (E.D.N.Y. 1977); *United States v. Denisio*, 360 F. Supp. 715, 719-20 (D.Md. 1973). Other cases have mentioned plain view but failed to undertake a refined analysis. See *United States v. Rizzo*, 492 F.2d 443, 446-47 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974); *United States v. Cox*, 462 F.2d 1293, 1302-03 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1973).

<sup>891</sup> 18 U.S.C. § 2518(8)(1) (1976).

<sup>892</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2193.

<sup>893</sup> 18 U.S.C. § 2518(8)(a) (1976). The full text of § 2518(8)(a) refers to 18 U.S.C. § 2517(3) (1976), which governs admissibility in any judicial proceeding.

<sup>894</sup> Section 2518(8)(a) applies to the timing of delivery, as well as to the presence of a seal. Otherwise, delivery could be delayed until trial, thereby providing maximum opportunity to falsify. See *United States v. Gigante*, 538 F.2d 502, 506 (2d Cir. 1976); Note, *Judicial Sealing of Tape Recordings Under Title III—A Need for Clarification*, 15 AM. CRIM. L. REV. 89, 94 (1977). Although courts could have easily avoided the impact of § 2518(8)(a) by holding that it does not apply to the timing of delivery, thus far they have declined to do so.

<sup>895</sup> See ELECTRONIC SURVEILLANCE: TWO VIEWS, *supra* note 218, at 35-36.

<sup>896</sup> In two cases, courts have confronted the question of whether a broken seal requires suppression of the tapes. *United States v. Lawson*, 545 F.2d 557, 564-65 (7th Cir. 1975); *Nye v. State*, 49 Md. App. 111, 122, 430 A.2d 867, 874 (Md. Ct. Spec. App. 1981). The *Lawson* court admitted the tapes absent an allegation of either tampering or intentional government-

clear command of section 2518(8)(a), most courts have declined to condition admissibility upon compliance with sealing requirements.<sup>897</sup> Typically, suppression has been avoided by three lines of analysis: (1) the delay has been satisfactorily explained; (2) absent evidence of alteration, no one has been prejudiced; and (3) since section 2518(10)(a) provides a procedural means for enforcing Title III's exclusionary sanction only in cases involving interception violations, suppression is not available for sealing errors which occur post-interception. The first of these grounds, however, has been misapplied, and the other two are fundamentally misconceived.

Although the courts have correctly noted that a satisfactory explanation will excuse delayed delivery, they have been far too forgiving in accepting explanations as satisfactory.<sup>898</sup> Delays of more than a week have routinely been tolerated by accepting a variety of excuses which may charitably be characterized as "administrative delay."<sup>899</sup> Typically, the government has maintained that delay was occasioned by the

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tal breaking of seals. After noting that the issue had not been raised at trial, the *Nye* court, in dicta, concluded that a broken seal would not be a barrier to admissibility. Both cases are wrongly decided because they ignore the statutory language of § 2518(8)(a). See *supra* text accompanying note 893.

<sup>897</sup> See *United States v. McGrath*, 622 F.2d 36, 42-43 (2d Cir. 1980) (accepting government's explanation that delays of three to eight days were necessary to facilitate duplication and processing of tapes prior to sealing); *United States v. Diana*, 605 F.2d 1307, 1314-15 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980) (accepting government's explanation that, even though duplicate tapes had been prepared, a 29 day delay was necessary because of possibility that duplicate tapes would be defective); *United States v. Angelini*, 565 F.2d 469, 472-73 (7th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978) (delays of 9, 26, and 38 days deemed necessary for preparation of transcripts); *United States v. Diadone*, 558 F.2d 775, 780 (5th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978) (absent showing of prejudice, two week delay does not require suppression); *United States v. Lawson*, 545 F.2d at 564-65 (absent attack on integrity of tape, suppression not required for 57 day delay); *United States v. Sklaroff*, 506 F.2d 837, 840 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975) (accepting excuse that tapes were in the FBI evidence room for seven days and that another seven days were necessary to prepare a warrant); *United States v. Falcone*, 505 F.2d 478, 481-84 (3d Cir.), *cert. denied*, 420 U.S. 955 (1975) (suppression not required for 45 day delay as trial court substantiated integrity of tapes); *United States v. Caruso*, 415 F. Supp. 847, 850-51 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 94 (2d Cir. 1977) (accepting explanation that 42 day delay resulted, inter alia, from hospitalization of prosecutor and subsequent reassignment of the case). But see *United States v. Gigante*, 538 F.2d 502, 507 (2d Cir. 1976) (delays of eight to twelve months warrant suppression).

Some state courts have strictly construed the immediate delivery requirement. *State v. Cerbo*, 78 N.J. 595, 397 A.2d 671 (1979) (33 day delay for purpose of preparing composites of relevant conversations warranted suppression); *People v. DeMartino*, 71 A.D.2d 477, 481 n.2, 422 N.Y.S.2d 949, 953 n.2 (N.Y. App. Div. 1979) (noting that "a minimal delay of one or two days in sealing might under appropriate circumstances be permissible . . ."). In light of the practical limitations on prosecutorial manpower, the New York approach is inordinately severe. A more reasonable standard would permit maximum delays of 72 hours. See generally *infra* note 916.

<sup>898</sup> Note, *supra* note 894, at 98.

<sup>899</sup> See *United States v. Falcone*, 505 F.2d at 474.

need to retain all original recordings so that duplicates could be made, transcripts typed, and pertinent legal documents processed.<sup>900</sup> However plausible these explanations may initially appear, in reality they are unconvincing. For example, duplicate tapes can be prepared in a matter of minutes using high speed technology.<sup>901</sup> These duplicates then can be used to prepare transcripts and other legal documents.<sup>902</sup> Should a portion of the duplicate be somewhat unclear, a court order could be obtained directing the original to be unsealed.<sup>903</sup> For some reason, however, courts have chosen to ignore this state of the art; indeed, on occasion, delay has been sanctioned even when a duplicate *original* was readily available.<sup>904</sup> Thus, while it is certainly possible to conceive of appropriate explanations for delayed delivery,<sup>905</sup> those sanctioned thus far too often have not been satisfactory.

Even when the courts have not endorsed the government's explanation, however, most have declined to suppress the recordings when there has been no evidence of tampering.<sup>906</sup> Their rationale stems from language in *Chavez* suggesting that even central violations do not require

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<sup>900</sup> See *United States v. Diana*, 605 F.2d at 1314-15 (despite the existence of duplicates, original tapes retained during preparation of warrants, indictment, and transcripts); *United States v. Angelini*, 565 F.2d at 472 (transcription of tapes); *United States v. Caruso*, 415 F. Supp. at 850 (delay resulting from duplication of tapes and illness of prosecutor); see also *United States v. Sklaroff*, 506 F.2d at 840 (14 day delay—seven days in FBI evidence room, seven days in preparation of warrant). See generally *United States v. McGrath*, 622 F.2d at 43 (delays of three to eight days necessary to transport tapes).

<sup>901</sup> Field interview with technical personnel from New York State Organized Crime Task Force (June 30, 1982); see *United States v. Falcone*, 505 F.2d at 486-87 (Rosenn, J., dissenting).

<sup>902</sup> See *United States v. Angelini*, 565 F.2d at 472.

<sup>903</sup> *United States v. Diana*, 605 F.2d at 1315; *People v. Washington*, 46 N.Y.2d 116, 125, 385 N.E.2d 593, 597, 412 N.Y.S.2d 854, 859 (1978).

<sup>904</sup> *United States v. Diana*, 605 F.2d at 1310; see *United States v. Falcone*, 505 F.2d at 486-87 (Rosenn, J., dissenting).

<sup>905</sup> See *United States v. Vazquez*, 605 F.2d 1269, 1279 (2d Cir.), *cert. denied*, 444 U.S. 981 (1979) (unforeseen manpower problems); *United States v. Caruso*, 415 F. Supp. at 950 (break-downs in equipment or sudden illness). However, even unusual circumstances normally should not excuse delays of more than three days. See *supra* note 897.

<sup>906</sup> Some courts have considered the absence of evidence of tampering to be a decisive factor. See *United States v. Diadone*, 558 F.2d at 780; *United States v. Lawson*, 545 F.2d at 564; *United States v. Falcone*, 505 F.2d at 484. Others have considered the absence of evidence of tampering as providing, to some extent, a satisfactory explanation for delayed delivery. See *United States v. McGrath*, 622 F.2d at 42; *United States v. Angelini*, 565 F.2d at 473; *United States v. Sklaroff*, 506 F.2d at 840. This approach, however, directly disregards the statutory language because the absence of evidence of tampering plainly does not constitute a satisfactory explanation for delay. Nevertheless, only a small minority has held that a lack of tampering does not *ipso facto* excuse a delay in sealing. See *United States v. Gigante*, 538 F.2d at 505-06. Some courts permitting delay, however, have suggested that intentional misconduct resulting in sealing delays would warrant exclusion of the tapes. See *United States v. McGrath*, 622 F.2d at 43; *United States v. Diana*, 605 F.2d at 1315.

suppression if the provision's underlying purpose has been met.<sup>907</sup> This analysis, however, reads an exception into section 2518(8)(a) which fundamentally misconstrues the objective sought to be achieved by the sealing rule. Prior to Title III, frequent allegations had been made that electronic surveillance tape recordings were susceptible to alteration.<sup>908</sup> The sealing requirement was adopted in response to this concern, but it served another purpose as well: since authentication is always a prerequisite to admissibility,<sup>909</sup> the sealing procedure, in effect, helped the prosecution establish *prima facie* that the recording was accurate. Without a seal, the government would otherwise face the difficult prospect of proving a negative—that the tape had not been altered.<sup>910</sup> Since the prosecution, therefore, derives an important advantage from this procedure, the defense should likewise benefit when the seal has not been properly obtained.<sup>911</sup> Given current technology, proof of alteration is extremely difficult.<sup>912</sup> Hence, the presence of a seal may be a better indicator of reliability than proof offered at a lengthy authenticity hearing.<sup>913</sup> Consequently, it makes little sense (and is basically unfair) to require the defense to provide evidence of tampering when the issue probably would never have arisen had a seal been timely secured.<sup>914</sup> While, in fact, there have been few, if any, serious allegations of alterations,<sup>915</sup> the courts' present approach engenders an unacceptable irony: delayed sealing will be tolerated so long as there is no evidence of tampering, but the greater the delay, the more opportunity a skillful forger

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<sup>907</sup> See *United States v. Caggiano*, 667 F.2d 1176, 1179 (5th Cir. 1982); *United States v. Diana*, 605 F.2d at 1314; *United States v. Lawson*, 545 F.2d at 564; *United States v. Falcone*, 505 F.2d at 483-84; cf. *People v. Nieves*, 92 Ill. 2d 452, 442 N.E.2d 228 (1982) (applying this analysis to state statute).

<sup>908</sup> See *supra* note 81 and accompanying text.

<sup>909</sup> See MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 534 (2d ed. 1972).

<sup>910</sup> NWC REPORT, *supra* note 1, at 131.

<sup>911</sup> See *United States v. Diana*, 605 F.2d at 1317-18 (Hall, J., dissenting).

<sup>912</sup> *Id.* at 1318; *United States v. Falcone*, 505 F.2d at 488 (Rosenn, J., dissenting); see NWC REPORT, *supra* note 1, at 131; COMMISSION STUDIES, *supra* note 322, at 216 (*The Authentication of Magnetic Tapes: Current Problems and Possible Solutions*). An interview with Professor Mark Weiss, coauthor of the Wiretapping Commission study, established that the state of the art for detecting tampering has not advanced beyond that set forth in his 1976 report. Telephone interview with Professor Mark Weiss (Nov. 29, 1982).

<sup>913</sup> The dissent in *United States v. Diana*, 605 F.2d at 1318 (Hall, J., dissenting), noted that compliance with the sealing requirement would avoid "a time-consuming, expensive, and entirely collateral 'battle of the experts' on the tampering issue." See *United States v. Falcone*, 505 F.2d at 488 (Rosenn, J., dissenting).

<sup>914</sup> Nevertheless, most courts place the burden of going forward on the defendant. Compare *United States v. Diadone*, 558 F.2d at 780 and *United States v. Sklaroff*, 506 F.2d at 840 with *United States v. Angelini*, 565 F.2d at 473. Indeed, *Diadone* and *Sklaroff* may also have placed the burden of persuasion on the defendant. *United States v. Angelini*, 565 F.2d at 473.

<sup>915</sup> See *infra* note 944 and accompanying text.

has to effect an undetectable alteration.<sup>916</sup>

Finally, the suggestion that sealing violations may not occasion suppression under section 2518(10)(a) because they occur after the interception<sup>917</sup> fundamentally misconceives Title III's overall design. True, section 2518(10)(a) is concerned only with interception violations but, as a few courts have recognized, the sealing rule in section 2518(8)(a) contains its own evidentiary preclusion;<sup>918</sup> compliance is a prerequisite to admissibility. Therefore, the limitations of section 2518(10)(a) are not pertinent to sealing violations.<sup>919</sup> Indeed, any other view would make the evidentiary sanction set forth in section 2518(8)(a) meaningless.<sup>920</sup>

Given the heavy monetary and manpower costs which are inherent to effective electronic surveillance,<sup>921</sup> there is considerable temptation to ignore sealing violations.<sup>922</sup> One commentator has decried that "[o]f all the ways for law enforcement officials to lose a significant case, this is perhaps the most ridiculous ever conceived."<sup>923</sup> Perhaps so, but since compliance requires minimal effort and serves an important policy interest, it is not for the courts to question congressional wisdom in enacting this provision.<sup>924</sup> In this respect, Chief Justice Burger's opinion in

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<sup>916</sup> See Note, *supra* note 894, at 94. To some extent, there is a statutory gap which independently permits this result since delivery is not required until the authorizing order, or extensions thereof, have expired. Thus, an opportunity to forge exists during the time between recording and expiration of the order or extension. See *United States v. Vazquez*, 605 F.2d at 1276 n.15. This is clearly a statutory interstice, but it does not excuse noncompliance. Moreover, Congress should consider amending Title III to require monitoring officers to attach a seal on each tape within 24 hours of completion. Since seals are rarely secured in the presence of a supervising judge, the current obligation to effect the seal pursuant to his direction should be abolished. This would eliminate a major cause of bureaucratic delay: delivery of the tapes to court. A statutory requirement of courthouse delivery within 72 hours should be sufficient protection against abuse since, indeed, many judges do not require courthouse delivery at all. Failure to comply with this requirement, however, should not automatically result in suppression. Rather, admissibility should then be conditioned upon clear and convincing proof by the prosecution that the tapes have not been altered.

<sup>917</sup> See *United States v. Falcone*, 505 F.2d at 483. See generally *Commonwealth v. Vitello*, 367 Mass. 224, 277-78, 327 N.E.2d 819, 848-50 (1975).

<sup>918</sup> See *United States v. Diana*, 605 F.2d at 1312; *United States v. Gigante*, 538 F.2d at 506; *United States v. Falcone*, 505 F.2d at 488 (Rosenn, J., dissenting).

<sup>919</sup> Note, for example, that the legislative history states that § 2517 is modified by § 2518(10)(a), but there is no similar statement that § 2518(8)(a) is modified by § 2518(10)(a). LEGISLATIVE HISTORY, *supra* note 111, at 2188, 2194; see Note, *supra* note 894, at 104; see also *supra* note 867. But see *United States v. Angelini*, 565 F.2d at 473 n.7.

<sup>920</sup> See *United States v. Falcone*, 505 F.2d at 485-86 (Rosenn, J., dissenting); Note, *supra* note 894, at 93.

<sup>921</sup> See *infra* notes 957-75 and accompanying text.

<sup>922</sup> This is particularly so because the evidence gathered by electronic surveillance is often pivotal to the prosecution's case. See *United States v. Diana*, 605 F.2d at 1318 (Hall, J., dissenting); *United States v. Falcone*, 505 F.2d at 488 (Rosenn, J., dissenting).

<sup>923</sup> C. FISHMAN, *supra* note 438, at 286 n.19.

<sup>924</sup> One court has reasoned that other Title III restrictions would be meaningless if the tapes were inaccurate. *United States v. Gigante*, 538 F.2d at 505. While this may overstate

the celebrated "Snail Darter" case should be dispositive:

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto . . . .

[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with "common sense and the public weal."<sup>925</sup>

In the context of sealing, however, as with other aspects of Title III,<sup>926</sup> this principle has essentially been ignored.

## VI. CONGRESSIONAL INACTION

While Title III has been amended in a few respects since its passage, none of these measures are related to the major issues discussed by this Article.<sup>927</sup> Recently, the statute has received attention, primarily during the course of the overall congressional effort to revamp the federal criminal code.<sup>928</sup> For the most part, however, the proposed revisions likewise are not responsive to post-Title III judicial developments. This is not to suggest that they would not effect any improvement, since clearly some of the changes would be for the better. For example, Senate Bill 1630, which was reported by the Senate Judiciary Committee on January 25, 1982, would have defined the term "intercept" broadly to

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the case, there is still cause for concern, especially since the sealing rule may embody a constitutional requirement. See *United States v. Donovan*, 429 U.S. 413, 429 n.19 (1977); see also *Blakey & Hancock, supra* note 378, at 677 n.46.

If suppression is mandated, a final question is whether monitors who intercepted the conversation may testify to what they heard. Since such evidence was obtained prior to the time that sealing should have been effected, it is not improper derivative evidence, and, therefore, is arguably not subject to suppression within the meaning of § 2518(8)(a). Cf. *People v. Weiss*, 48 N.Y.2d 988, 988, 401 N.E.2d 901, 901, 425 N.Y.S.2d 543, 543 (1980) (sealing violation does not mandate suppression of warrant obtained before sealing was required to have been effected); *People v. Versace*, 73 A.D.2d 304, 308, 426 N.Y.S.2d 61, 64 (N.Y. App. Div. 1980). Ironically, this analysis would allow less accurate evidence in the form of an agent's recollection to be introduced over the more reliable evidence which had been excluded. Nevertheless, this is a fact of life under traditional exclusionary rule principles.

<sup>925</sup> *TVA v. Hill*, 437 U.S. 153, 195 (1978), quoted in *United States v. Diana*, 605 F.2d at 1319 (Hall, J., dissenting).

<sup>926</sup> See *supra* notes 703-10 and accompanying text.

<sup>927</sup> See Act of Nov. 6, 1978, Pub. L. No. 95-598, § 314(h), 92 Stat. 2549, 2677; Act of Oct. 25, 1978, Pub. L. No. 95-511, § 201(a)-(h), 92 Stat. 1783, 1796-98; Act of Jan. 2, 1971, Pub. L. No. 91-644, § 16, 84 Stat. 1881, 1891; Act of Oct. 15, 1970, Pub. L. No. 91-452, §§ 810, 902(a)-(b), 1103, 84 Stat. 922, 940, 947, 959; Act of July 29, 1970, Pub. L. No. 91-358, § 211(a)-(c), 84 Stat. 473, 654.

<sup>928</sup> See S. 1630, 97th Cong., 2d Sess. §§ 3101-3109 (1982); REPORT ON CRIMINAL CODE REFORM, *supra* note 445, at 1075-91; S. REP. NO. 319, 97th Cong., 1st Sess. 2 (1982); S. REP. NO. 788, 96th Cong., 2d Sess. 2 (1980).



include either listening or recording,<sup>929</sup> would have expanded authorization for warrantless emergency surveillance to embrace situations involving risk of death,<sup>930</sup> would have eliminated explicitly any requirement of a retroactive amendment for conversations which relate both to a named and unnamed offense,<sup>931</sup> and would have required express court authorization for any covert entries necessary to install bugs.<sup>932</sup> Ultimately, however, Senate Bill 1630 simply, and uncritically, purported to continue existing law.<sup>933</sup>

Senate Bill 1630 is indicative of overall congressional satisfaction with Title III. In all likelihood, however, Congress has not recognized that, as applied, the legislation is not the same as the statute that was passed in 1968.<sup>934</sup> Consequently, no effort has been made to rectify the deviations generated by post-Title III judicial decisions<sup>935</sup>—much less to consider comprehensive reform.

In 1976, the National Wiretapping Commission, while expressing overall satisfaction with the operation of Title III, recommended that the statute be amended in several important respects.<sup>936</sup> Yet, although the Commission was established by Congress to evaluate Title III's effec-

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<sup>929</sup> S. 1630, 97th Cong., 2d Sess. § 3109(c), (f) (1982); see REPORT ON CRIMINAL CODE REFORM, *supra* note 445, at 1077 n.20. For a discussion of this problem, see *supra* notes 604-07 & 609 and accompanying text.

<sup>930</sup> S. 1630, 97th Cong., 2d Sess. § 3105(b)(2)(a) (1982); see REPORT ON CRIMINAL CODE REFORM, *supra* note 445, at 1085-86. The proposal, however, fails to require prior oral notification of an emergency judge before commencement of such surveillance. See *supra* note 300.

<sup>931</sup> S. 1630, 97th Cong., 2d Sess. § 3105(a) (1982). For a discussion of this problem, see *supra* notes 855-60 and accompanying text. The proposal would also postpone the amendment requirement until the surveillance information is offered into evidence. Compare with *supra* note 864.

<sup>932</sup> S. 1630, 97th Cong., 2d Sess. §§ 3102(b), 3103(5) (1982). For a discussion of this matter, see *supra* notes 672-710 and accompanying text. Congress did address the desirability of such a requirement at length. See REPORT ON CRIMINAL CODE REFORM, *supra* note 445, at 1081-83; S. REP. NO. 319, 97th Cong., 1st Sess. 4-6, 12-16 (1982); S. REP. NO. 788, 96th Cong., 2d Sess. 4-6, 11-13 (1980).

<sup>933</sup> See REPORT ON CRIMINAL CODE REFORM, *supra* note 445 at 1075, 1077.

<sup>934</sup> See *id.* The Scott decision was clearly brought to Congress' attention by Professor Fishman—but to no avail. See *Wiretapping Amendments: Hearings on S. 1717 before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 25 (1980) (statement of Professor Clifford S. Fishman).

<sup>935</sup> On the contrary, without any analysis, Congress has implicitly endorsed the Supreme Court's decision in *Kahn*, REPORT ON CRIMINAL CODE REFORM, *supra* note 445, at 1080, and explicitly endorsed the result in *Donovan*. *Id.* at 1080-81. For an analysis of these cases, see *supra* notes 513-94.

<sup>936</sup> NWC REPORT, *supra* note 1, at 9-10, 18, 26-29. In essence, recommendations were made in the following areas: (1) expansion of the number of designated crimes; (2) expansion of the number of officials authorized to approve surveillance applications; (3) refinement of the standards under which extension may be available; (4) refinement of the exhaustion requirement; (5) requirement of express authorization for covert entries; (6) requirement of oral notification as a prerequisite to emergency surveillance; (7) refinement of the notice requirement; and (8) clarification of the law concerning pen registers and bumper beepers. See *supra*

tiveness,<sup>937</sup> virtually no attention has been given to its proposals for legislative action. Some of these proposals related to considerations raised by this Article, while in other respects both the Commission and this Article addressed different concerns.<sup>938</sup> It should now be apparent that electronic surveillance is an area deserving further legislative review. Once such review has been initiated, the statute should be modified to conform to its original design, as well as refined to reflect the lessons learned from its application.<sup>939</sup>

## VII. EXECUTIVE ENFORCEMENT: THE IRONY OF ELECTRONIC SURVEILLANCE

This Article has demonstrated that, notwithstanding original legislative intentions, Title III has frequently not been strictly enforced. Nor has Congress initiated serious effort to correct this trend. Thus, it is appropriate to consider whether, as a consequence, *1984* has come upon us.<sup>940</sup> As yet, however, the historical record demonstrates that the Orwellian fears of electronic surveillance critics have not been realized. To a degree, technical limitations may have prevented this occurrence,<sup>941</sup> but Title III has also had an impact. While the court order system has worked imperfectly, resort to illegal, warrantless eavesdropping apparently has been sharply curtailed.<sup>942</sup> Indeed, law enforcement has often exhibited appropriate restraint in terminating surveillances

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notes 300, 335 & 787 and accompanying text. A detailed discussion of these proposals is beyond the scope of this Article.

<sup>937</sup> NWC REPORT, *supra* note 1, at xiii, 230-31.

<sup>938</sup> See *supra* note 936 and *infra* note 939.

<sup>939</sup> This Article has not attempted to address every aspect of electronic surveillance considered by the National Wiretapping Commission. Nevertheless, within the context of the issues raised by this Article proposals for reform, when appropriate, have been made. See *supra* notes 300 (emergency searches), 607 (definition of the term "intercept"), 748 (minimization), 786-87 (the exhaustion requirement; statement of objectives), 819 (progress reports), 864 (retroactive amendments), 887 (prospective amendments) & 916 (sealing).

<sup>940</sup> For a discussion of Orwellian concerns, see *supra* notes 1-2, 68, 72, 81, 144-46 & 190 and accompanying text.

<sup>941</sup> NWC REPORT, *supra* note 1, at 88-89; Van Dewerker, *supra* note 81, at 141; see *supra* note 81.

<sup>942</sup> The National Wiretapping Commission found that, notwithstanding early law enforcement difficulties in meeting Title III standards, electronic surveillance had not been used for any corrupt purpose, and that most investigative authorities have made diligent efforts to comply with Title III requirements. NWC Report, *supra* note 1, at 19. The Commission did, however, note occasional instances of illegal warrantless eavesdropping. *Id.* at 20. Evidence was presented to the Commission demonstrating that Title III still served an important purpose in such instances by providing criminal sanctions. See NWC STAFF STUDIES, *supra* note 598, at 268 (illegal taps by Robert Leuci, the notorious "Prince of the City," and a New York Police narcotics unit). In addition, the Commission found that Title III had effectively reduced illegal surveillance by private parties. NWC REPORT, *supra*, at 22.

which appeared to be unproductive.<sup>943</sup> Similarly, there has been no significant evidence of recordings being doctored.<sup>944</sup> On the contrary, electronic surveillance has occasionally exonerated persons suspected of wrongdoing.<sup>945</sup> Most remarkable, however, available statistics actually suggest that Title III has been underutilized. The statute, of course, was enacted as a compromise measure designed to provide an effective, and constitutional, investigative tool for organized crime control.<sup>946</sup> Nevertheless, Title III's extraordinary potential has not been realized: since its enactment, annual court authorized interceptions have ranged from a high of 864 in 1973 to a low of 553 in 1979.<sup>947</sup> The number has not exceeded 600 since 1977.<sup>948</sup> Moreover, most intercepts do not last more than twenty days.<sup>949</sup> Given the magnitude of organized crime in this

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<sup>943</sup> See, e.g., NWC HEARINGS, *supra* note 166, at 43 (statement of Henry Peterson, Assistant Attorney General). For example, the Commission noted that, on occasion, close prosecutorial supervision served to "trigger . . . prompt termination of nonproductive surveillance." NWC REPORT, *supra* note 1, at 91; see also LEGISLATIVE HISTORY, *supra* note 111, at 2267 (curtailment of unproductive operations would be the natural result of cost-benefit management).

<sup>944</sup> NWC REPORT, *supra* note 1, at 131 ("Responses to Commission questionnaires by judges and defense attorneys indicated no cases in which allegations of tampering had either been substantial or proven"). Tampering is unlikely because of both close prosecutorial supervision and the absence of any motive to risk suppression and other sanctions by attempting to falsify. See *id.* Admittedly, proof of alteration is difficult. See *supra* note 912. Nevertheless, a leading expert in this field has expressed awareness of a handful of cases in which examination of the tape indicated that it had been produced in a manner inconsistent with the version originally given by law enforcement personnel. Telephone interview with Professor Mark Weiss (Nov. 19, 1982). Significantly, in one of these cases, the expert was asked to examine the tape by the prosecuting attorney, who subsequently decided not to use it. *Id.* See generally *supra* note 912.

<sup>945</sup> See NWC STAFF STUDIES, *supra* note 598, at 57.

<sup>946</sup> See *supra* notes 179-219 and accompanying text.

<sup>947</sup> ADMIN. OFFICE OF THE UNITED STATES COURTS, 1981 REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS 16 (1982) [hereinafter cited as WIRETAP APPLICATIONS REPORT]. Figures for 1982 were comparable: 130 federal and 448 state surveillance orders were authorized. 1982 REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS 18 (1983). The 130 federal orders represent the most such surveillances since 1973. *Id.* See generally, Krajick, *Electronic Surveillance Makes a Comeback*, POLICE MAGAZINE, Mar. 1983, at 8 (reporting, erroneously however, that the issuance of federal electronic surveillance warrants increased more than 100% from 1981 to 1982). These numbers do not cover consensual taps, which are not governed by Title III. Consensual surveillance is a common investigative technique. Such monitorings, however, are often unavailable in major organized crime investigations because of the absence of any significant party willing to consent to interception. NWC REPORT, *supra* note 1, at 114. Nor do these numbers include wiretaps authorized under the Foreign Intelligence Surveillance Act of 1978. From 1979 to 1981, such orders rose from 207 to 433. Further information is classified. S. REP. NO. 280, 97th Cong., 1st Sess. 2 (1981); S. REP. NO. 1466, 96th Cong., 2d Sess. 4 (1980); Letter from Attorney General William F. Smith to Speaker Thomas O'Neill (Apr. 15, 1982) (reporting FISA wiretap applications and authorizations).

<sup>948</sup> See *supra* note 947 and accompanying text.

<sup>949</sup> NWC REPORT, *supra* note 1, at 12-13; see WIRETAP APPLICATIONS REPORT, *supra* note 947, at 16. But see NWC REPORT, *supra* note 1, at 181 (duration of state taps).

country,<sup>950</sup> these statistics are conspicuously low.<sup>951</sup>

<sup>950</sup> If anything, the organized crime problem has worsened in recent years. See, e.g., U.S. DEP'T OF JUSTICE, REPORT OF THE TASK FORCE ON ORGANIZED CRIME 7-15 (1976); *International Narcotics Trafficking: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 219-52 (1981) (statement of Robert Fiske, former U.S. Attorney); *Organized Crime and Use of Violence: Hearings before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. pts. 1, 2 (1980).

In 1968, the Department of Justice estimated that the La Cosa Nostra (LCN), otherwise known as the mafia, had 5,000 members. LEGISLATIVE HISTORY, *supra* note 111, at 2275. Recent estimates place present membership at approximately 2,000. Telephone Interview with Sean McWeeney, Chief in Charge of Organized Crime, Federal Bureau of Investigation (Dec. 2, 1982). This decline, however, cannot be fully attributed to successful prosecutions. For example, since 1970, the Department of Justice has convicted only 556 LCN members. Letter to author from Alfred N. King, Executive Assistant to the Chief, Organized Crime and Racketeering Section, Criminal Division, Department of Justice (Nov. 24, 1982); see also *infra* notes 951, 1008. But see generally Pieniak, *Cosa Nostra Feeling Heat on all Sides*, THE TENNESSEAN, Aug. 8, 1982, at 1, 14. Even recognizing that state authorities have effected convictions, the overall decline is more appropriately attributable to improved intelligence information. Moreover, these numbers do not include other organized crime groups. See, e.g., BATTEL HUMAN AFFAIRS RESEARCH CENTER, THE CONTAINMENT OF ORGANIZED CRIME, A REPORT TO THE ARIZONA LEGISLATIVE COUNCIL 12-16 (1982). See generally F. IANNI, BLACK MAFIA: ETHNIC SUCCESSION IN ORGANIZED CRIME (1974). Consider the following commentary:

In 1980, 132 traditional-organized crime members or associates were convicted or awaiting trial. In 1981, the number increased to 185. *Id.* Yet, the blunt fact is that even if these criminal convictions permanently disabled each defendant, and no new members joined, it would take more than a quarter of a century to incarcerate and thus end the criminal careers of each member of these organized crime groups.

Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME LAW. 237, 300 n.168 (1982).

<sup>951</sup> Some states with severe organized crime problems such as Ohio and Illinois, have no eavesdropping statute. See Press & Shannon, *How the Mob Really Works*, NEWSWEEK, Jan. 5, 1981, at 34. States that do have a statute have often underutilized it. Pennsylvania, for example, has a massive organized crime problem, PENNSYLVANIA CRIME COMM'N, 1980 REPORT: A DECADE OF ORGANIZED CRIME vi-vii, x (1981), but conducted only 13 taps in 1981. WIRE-TAP APPLICATIONS REPORT, *supra* note 947, at 7. Prior to 1981, Pennsylvania had never used its statute.

Recently, however, the Department of Justice has achieved notable success in the prosecution of organized crime cases. Specifically, FBI Director Webster has made the following observations before a congressional appropriations committee:

Turning to our Organized Crime Program, I am pleased to report to you, Mr. Chairman, that during calendar year 1981, 14 recognized leaders of the 25 traditional Organized Crime "Families" were indicted or convicted. Included in this unprecedented statistic are the "Bosses" of the New Orleans Organized Crime "Family"; the Colombo and Genovese "Families" of New York; and the Buffalino "Family" of Pennsylvania, who have all been convicted. Indicted were the "Bosses" of the Organized Crime "Families" in Boston, Cleveland, Tampa, and Chicago. With regard to the Bonanno "Family" in New York and the Organized Crime "Families" in Kansas City and Milwaukee, not only have the "Bosses" been indicted, but also the ruling hierarchies of these "families."

*Departments of Commerce, Justice & State, the Judiciary, and Related Agencies Appropriations for 1983: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 97th Cong., 1st Sess. 1050-51 (1982) (statement of FBI Director Webster). Significantly, five of these major prosecutions made extensive use of nonconsensual electronic surveillance. Letter from Alfred N. King, Executive Assistant to the Chief, Organized Crime and Racketeering Section, United States Dep't of Justice, to Michael Goldsmith (March 8, 1983).

Initially, underutilization simply reflected the Johnson Administration's reluctance to use electronic surveillance.<sup>952</sup> In some respects, this reluctance may have been tragic. For example, there is substantial evidence indicating that the death of Martin Luther King could have been effectively investigated—and a conspiracy uncovered—through the use of electronic surveillance.<sup>953</sup> This is especially ironic since King's murder may have influenced the passage of Title III.<sup>954</sup> However, the Department of Justice, which had subjected King to continuous eavesdropping from 1963 to 1966,<sup>955</sup> maintained in 1968 that electronic surveillance was neither morally acceptable nor investigatively necessary.<sup>956</sup> After the Johnson Administration, however, succeeding Attorneys General seemed to favor the use of electronic surveillance. Thus, other factors must explain the relatively infrequent resort to Title III.

To a great extent, underutilization should probably be attributed to various problems inherent to the eavesdropping process. In this respect, financial and manpower constraints are the most obvious factors.<sup>957</sup> Electronic surveillance is expensive; the average cost per

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<sup>952</sup> See *supra* notes 195-96 & 210 and accompanying text.

<sup>953</sup> SELECT COMM. ON ASSASSINATIONS, FINAL REPORT, H.R. REP. NO. 1828, 95th Cong., 2d Sess. pt. 2, at 453 (1979) [hereinafter cited as ASSASSINATIONS REPORT]. Although murder is a history crime involving a previous event, and therefore is traditionally difficult to investigate with electronic surveillance, NWC REPORT, *supra* note 1, at 150 (people rarely discuss completed crimes), King's assassination may have involved continuing criminal conspiracies of varying degrees. ASSASSINATIONS REPORT, *supra*, at 449-53. In 1979, Professor G. Robert Blakey, former chief counsel to the House Select Committee on Assassinations, decried the Department's failure to use electronic surveillance in this case:

It is my considered judgment after reviewing the 1968 investigation and reinvestigating the matter in 1978 that the imaginative use of surveillance in 1968 could have brought James Earl Ray's still free co-conspirators to book. If I'm right, the price we paid for not using surveillance in 1968 was surely too high, too high a price to ask any free society to suffer.

Blakey, *The Case for Wiretaps*, THE NATION, Dec. 22, 1979, at 642.

<sup>954</sup> See ASSASSINATIONS REPORT, *supra* note 953 at 436-37.

<sup>955</sup> See CHURCH COMMITTEE REPORT, *supra* note 185, at 81-183 (case study of Martin Luther King).

<sup>956</sup> See NWC HEARINGS, *supra* note 166, at 1008-30 (statement of former Attorney General Ramsey Clark); see also *supra* notes 195-201 & 210 and accompanying text.

<sup>957</sup> For example, the Wiretapping Commission observed:

An important factor in deciding whether to authorize a surveillance application is the impact of the planned surveillance on available resources. The Drug Enforcement Administration's manual specifies the impact on other investigations as one of the criteria to be considered, and several witnesses testified before the Commission that the cost of the surveillance is a primary consideration.

According to an FBI spokesman, the most important discovery made by the Bureau about electronic surveillance was that it was very expensive and required a great expenditure of manpower. The Bureau estimated that it had spent approximately \$6.4 million on manpower and resources carrying out court-authorized surveillance between 1968 and 1974. Although this figure represents less than one percent of the FBI's expenditures during this period, the Bureau spokesman said, with reference to Title III surveillance, "They are manpower killers, no question."

The cost of conducting a court-ordered surveillance has been frequently cited as the

intercept in 1981 was \$21,686.<sup>958</sup> Electronic surveillance is also labor intensive. Despite suggestions that eavesdropping is the "lazy man's" way to law enforcement,<sup>959</sup> the opposite is true. A heavy commitment of personnel is often necessary for each phase of the process: securing authorization for the application, preparation of court documents,<sup>960</sup> locating a surveillance plant,<sup>961</sup> installation of the intercept,<sup>962</sup> monitoring

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primary disadvantage of using eavesdropping. As summarized by former United States Attorney James R. Thompson of Chicago, electronic surveillance is "expensive; it is time-consuming. It is a lot of hassle to engage in electronic surveillance, even consensual overhears. We really only use it when we think it is likely to be productive of the truth in an unclear area." These costs, especially when the amount of money spent for each conviction is calculated, have been a primary cause for criticism by persons opposed to Title III.

In addition to the direct expense of the salaries of monitoring officers, which have been roughly calculated to amount to \$26,000 for a month-long, full-time surveillance, other costs should be considered. Among these are the costs of manpower required to check leads and conduct coordinated physical surveillance. Analysis of tapes can be a very time-consuming task, as can the preparation of transcripts. There are also non-monetary effects, such as the demands made on officers by the conditions in which many surveillances are conducted. The boredom of monitoring also takes its toll, as does the impact upon the officer's home life. This can be especially severe during a narcotics surveillance, which cannot be conducted during regular business hours, as can most gambling taps. In sum, execution of court-ordered electronic searches generally was not described by knowledgeable witnesses as lazy man's law enforcement.

The high costs of execution of a surveillance order serves as a strong deterrent to frequent and lengthy eavesdropping. As stated by the Chief Counsel to New York's Special Corruption Prosecutor, prior to Title III "the enormous manpower demands which are made by present day wiretaps did not exist, and therefore tapping was resorted to much more frequently." Defense counsel concur in the view, as expressed by a participant at the Law Enforcement Effectiveness Conference, that cost is a natural deterrent to a law enforcement agency's using electronic surveillance.

NWC REPORT, *supra* note 1, at 57-58 (footnotes omitted); *see also* NWC STAFF STUDIES, *supra* note 598, at 111 (New Jersey reports tap requests may be rejected at field level if target is not sufficiently important to justify expense). For example, in 1974 a Drug Enforcement Agency administrator estimated average electronic surveillance costs for his agency as follows: average length of wiretap—18 1/2 days; time involved in obtaining probable cause and operating tap—3,090 agent hours, six to ten agents to monitor tap at listening post; total average cost—\$12,384. This estimate did not consider the costs in followup investigations or suppression hearings. NWC HEARINGS, *supra* note 166, at 82.

<sup>958</sup> WIRETAP APPLICATIONS REPORT, *supra* note 947, at 12; *see supra* note 957. For a description of the particularly high costs associated with installing and maintaining a bug, *see* S. REP. NO. 319, 97th Cong., 1st Sess. 4 (1982).

<sup>959</sup> Observers have commented that the effect of wiretapping on law enforcement is to make the police lazy and inefficient. *See, e.g.*, 32 F.R.D. 114, 119 (1962) (Statement of Mr. S. Dash of the Pa. Bar); NWC STAFF STUDIES, *supra* note 598, at 328; *see also supra* note 194.

<sup>960</sup> *See, e.g.*, NWC STAFF STUDIES, *supra* note 598 at 127-69 (example of the voluminous paperwork involved in a wiretap); *see also supra* note 957.

<sup>961</sup> Telephone companies are often reluctant to provide leased lines to a centralized law enforcement location. *See* NWC REPORT, *supra* note 1, at 9, 86-88. Consequently, law enforcement authorities must locate a safe and unobtrusive surveillance plant in the target's neighborhood. This can often pose problems "in tightly cohesive ethnically homogenous neighborhoods." *Id.* at 86.

<sup>962</sup> This is an acute problem with bugs. Surreptitious entry is a difficult and dangerous process. NWC REPORT, *supra* note 1, at 86. Moreover, reentry is often required to adjust or

and recording conversations,<sup>963</sup> maintaining concurrent visual surveillance of the target,<sup>964</sup> identifying voices,<sup>965</sup> typing transcripts,<sup>966</sup> filing progress reports,<sup>967</sup> providing inventory notice,<sup>968</sup> litigating suppression issues,<sup>969</sup> and preparation for trial.<sup>970</sup> Not surprisingly, law enforcement officials often view electronic surveillance as impractical.<sup>971</sup> Moreover, when bugs are concerned, the danger factor must also be considered.<sup>972</sup> These concerns, combined with procedural complexities engendered by

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remove the device. *Wiretap Amendments: Hearings on S. 1717 before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 12-17 (1980) [hereinafter cited as *Hearings on S. 1717*]. Investigations have often failed because the premises were too well guarded. See, e.g., NWC STAFF STUDIES, *supra* note 598, at 396. A classic example of the difficulties occasioned in attempting to install a bug was given to the National Wiretapping Commission by a New York City detective who had tried to bug a room at the Delmonico Hotel. Caught in the act by the targets, the detective engaged in a tug-of-war with his would be captors in an attempt to keep the door to their room from opening. Eventually, the detective fled the scene, but 56 police cars responded to the hotel's burglary report. Ultimately, the surveillance detectives, pretending to be investigating the burglary, reentered the targets' room and installed the bug. NWC HEARINGS, *supra* note 166, at 431-32 (statement of Sgt. Robert Nicholson, N.Y.P.D.).

<sup>963</sup> For a detailed discussion of the procedures involved, see *United States v. Bynum*, 360 F. Supp. 400, 411-13 (S.D.N.Y.), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974). Extremely uncomfortable surroundings and long inconvenient hours are the standard fare of many operations. See, e.g., NWC HEARINGS, *supra* note 166, at 188-89 (statement of B. Modesitt, former Customs agent); *id.* at 420 (statement of Sgt. Robert Nicholson, N.Y.P.D.). Such observers do not speak simply of the pressures on the individual of the typical late-night, early-morning shifts alone, but also of the unfortunate concomitant effects on one's family. See also *supra* note 957.

<sup>964</sup> Electronic surveillance is most effective when it supplements, rather than replaces, other investigative methods. Moreover, concurrent visual surveillance is necessary to keep apprised of recent developments regarding the target. NWC REPORT, *supra* note 1, at 91-92; see *supra* note 957.

<sup>965</sup> See NWC REPORT, *supra* note 1, at 131-32; C. FISHMAN, *supra* note 438, §§ 149, 311. The state may have to incur substantial costs simply to identify unknown speakers. For instance, in the *Tantillo* case (proper appellate designation is *United States v. James*, 494 F.2d 1007 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974)), identification of unknown conversants would have taken an estimated two years. NWC REPORT, *supra* note 1, at 131.

<sup>966</sup> NWC REPORT, *supra* note 1, at 131; see *supra* note 957; cf. R. GREENE, *supra* note 613, at 253-54, 279 (describing logistical difficulties in Abscam).

<sup>967</sup> NWC REPORT, *supra* note 1, at 96-97.

<sup>968</sup> *Donovan* requires categories of intercepted parties to be furnished to the supervising judge. *United States v. Donovan*, 429 U.S. 413, 428-32 (1977). For a general outline of notice requirements, see NWC REPORT, *supra* note 1, at 100-02.

<sup>969</sup> Most cases obviously turn on the suppression question. See NWC REPORT, *supra* note 1, at 129. "Preparing for the suppression hearing requires an exhaustive analysis of the application and affidavits, court order, periodic reports, sealing order, inventory, and prior applications." *Id.*

<sup>970</sup> See C. FISHMAN, *supra* note 438, §§ 318, 319, 321; see also *supra* notes 965-66 and accompanying text.

<sup>971</sup> See NWC REPORT, *supra* note 1, at 146-47; see also *supra* note 957 and accompanying text. For this reason, surveillance is often rejected.

<sup>972</sup> *Hearings on S. 1717*, *supra* note 962, at 4; see *supra* note 962 and accompanying text (Delmonico Hotel example).

Title III, often discourage the use of electronic surveillance.<sup>973</sup>

Perhaps for these reasons, electronic surveillance has been only a qualified success. Although the National Wiretapping Commission found that "electronic surveillance under Title III has effectively assisted law enforcement in investigations of organized-crime type offenses,"<sup>974</sup> several of which resulted in conviction of major crime chieftains,<sup>975</sup> there was no suggestion that organized crime has been "eradicated" nationally.<sup>976</sup> To some extent, the qualified nature of this success may also be attributable to law enforcement targeting strategies.<sup>977</sup> Eradication of organized crime may not be possible,<sup>978</sup> but it is

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<sup>973</sup> See, e.g., NWC REPORT, *supra* note 1, at 137. Some law enforcement officials found Title III so complex and procedurally arduous that electronic surveillance was thereby discouraged. For instance, from 1972 to 1974 the DEA experienced a decline in electronic eavesdropping which, at least in part, could be blamed on the administrative delays and costs attendant to wiretap applications. To correct the decline, the DEA instituted a technical operations field program to expedite Title III compliance. NWC HEARINGS, *supra* note 166, at 82 (statement of John Bartels, DEA Administrator).

The various state statutes can further complicate the process. For an example of the complex and exhausting procedure and paperwork often required by these laws, see the application and affidavit for the tap in a New York rackets investigation, *reprinted in* NWC HEARINGS, *supra*, at 446-52. The question of whether the complexity of electronic surveillance requirements is effecting reduced eavesdropping elicited differing opinions within New York law enforcement ranks. One office asserted that the new statute had inhibited wiretapping by making it a more difficult tool to use. NWC STAFF STUDIES, *supra* note 598, at 207 (statement of the Office of the Special Prosecutor, Corruption, New York). Another agency had a different explanation: although taps had decreased, this was not necessarily due to the complexity of Title III. The real problem lay in the high turnover rate that had become commonplace in the prosecutor's office, leaving a shortage of attorneys with substantial Title III experience. NWC STAFF STUDIES, *supra*, at 304 (statement of the Office of the District Attorney of New York County). This may suggest that electronic surveillance is best operated by a career staff, specializing in wiretapping law.

Some critics maintain that wiretapping costs are an unnecessary drain on public resources because the crimes investigated are often trivial. While to some extent this is a fair criticism, *see infra* notes 979-87 and accompanying text, a cost-benefit analysis is considered by virtually any competent investigative unit before undertaking electronic eavesdropping. NWC REPORT, *supra* note 1, at 55-61. Some law enforcement agencies have literally exhausted all funds while conducting wiretaps and, thus, are acutely aware of their limited resources. See, e.g., NWC STAFF STUDIES, *supra*, at 445. Frequently, the substantial economic and manpower costs of electronic surveillance ultimately inhibit its use. *See supra* note 957.

<sup>974</sup> NWC Report, *supra* note 1, at 4; *see infra* note 976.

<sup>975</sup> NWC REPORT, *supra* note 1, at 139.

<sup>976</sup> J. CARR, *supra* note 18, § 2.01. In a concurring opinion, however, Commissioner Blakey gave several concrete examples demonstrating the successful use of electronic surveillance in organized crime cases. NWC REPORT, *supra* note 1, at 198-200; *see supra* note 974-75 and accompanying text.

<sup>977</sup> The Department of Justice has recently been criticized for its lack of overall planning in the organized crime area. *See* REPORT BY THE COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, STRONGER FEDERAL EFFORT NEEDED IN FIGHT AGAINST ORGANIZED CRIME 24-25 (1981); REPORT BY THE COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, WAR ON ORGANIZED CRIME FALTERING—FEDERAL STRIKE FORCES NOT GETTING THE JOB DONE 9-10 (1979). *See generally* RACKETS BUREAUS, *supra* note 205, at 2, 11-19.

<sup>978</sup> *See* NWC REPORT, *supra* note 1, at 134-39.



apparent that surveillance strategies previously employed will not achieve this goal. During Title III's early years, eavesdropping was heavily concentrated on gambling investigations: from 1968 to 1974, fifty-four percent of the surveillances concentrated upon this subject.<sup>979</sup> This emphasis was justified by the traditional argument that gambling constituted the "lifeblood of organized crime" because it generated income for other illicit activities.<sup>980</sup> The modern validity of this conventional wisdom is questionable;<sup>981</sup> at least federally, however, there may also have been a political side to this orientation, since the Nixon Administration apparently viewed gambling prosecutions as an easy way to demonstrate that progress was being made against organized crime.<sup>982</sup> The Wiretapping Commission observed, however, that while gambling surveillance had both achieved some dramatic accomplishments and effected considerable disruption upon gambling enterprises,<sup>983</sup> many of these investigations had been confined to low level gambling opera-

<sup>979</sup> *Id.* at 267 (table F-3).

<sup>980</sup> *Id.* at 142-45. For years, law enforcement officials have presumed, rightly or wrongly, that gambling was the principal source of revenue for organized crime. For example, during the wiretap hearings, at least three prominent witnesses testified to the primacy of gambling as a source of revenue for organized crime. NWC HEARINGS, *supra* note 166, at 7 (statement of Henry Peterson, Assistant Attorney General) (explaining that the high percentage of gambling intercepts reflects gambling as the largest single source of revenue for organized crime); *id.* at 867 (statement of John Barron, FBI supervisor) ("gambling and extortion . . . have been the backbone and mainstay of organized criminal activities"); *id.* at 902 (statement of Edward T. Joyce, Department of Justice) (organized crime "needs the bankroll from the gambling in order to buy the narcotics").

<sup>981</sup> *See, e.g.*, NWC HEARINGS, *supra* note 166, at 902 (statement of Prof. Blakey); Blakey, *supra* note 950, at 301 n.169. The main attack has been on the idea that the organized crime groups that engage in gambling use it to finance their operations in narcotics. In reality, gambling is conducted by a myriad of small and large organizations, many of whom are independent or not substantially involved in other illegal activities. Indeed, the Commission on the Review of the National Policy Towards Gambling specifically rejected the notion that "all illegal gambling provides revenues for other illegal activities." GAMBLING IN AMERICA, *supra* note 111, at 170-71. Likewise, in a study of illegal gambling in New York City, researchers found that gambling had a narrow "profit" margin; bookmakers often went broke, seldom financed anything but gambling operations, and most had only loose ties to major organized crime outfits. The researchers rejected the "lifeline theory" that gambling was organized crime's lifeblood. Ultimately, they characterized gambling as a "fragmented market." Reuter & Rubinstein, *Fact, Fancy & Organized Crime*, 53 THE PUBLIC INTEREST 45, 46-65 (1978); *see also* THE TASK FORCE ON LEGALIZED GAMBLING, FUND FOR THE CITY OF NEW YORK AND THE TWENTIETH CENTURY FUND, EASY MONEY 10-11 (1974). If anything, there is some basis for concluding that gambling investigations actually promote organized crime because the increased operational expenses occasioned as a result of law enforcement disruptions force the bookmaker to turn to organized crime loansharks. Goldstock, *Letting the Loan Shark Off the Hook*, NEWSDAY, Sept. 9, 1977, at 67; *see* Goldstock & Coenan, *Controlling the Contemporary Loanshark: The Law of Illicit Lending and the Problem of Witness Fear*, 65 CORNELL L. REV. 127, 134-37, 156 (1980).

<sup>982</sup> *See generally* GAMBLING IN AMERICA, *supra* note 111, at 12-14; Blakey & Kurland, *The Development of the Federal Law of Gambling*, 62 CORNELL L. REV. 923, 977 n.236 (1978).

<sup>983</sup> NWC REPORT, *supra* note 1, at 142-45.

tions.<sup>984</sup> The Commission did note a developing trend towards more selectivity in targeting gambling defendants,<sup>985</sup> but it was nevertheless apparent that gambling investigations would not quell organized crime; neither the public nor the courts responded enthusiastically to such prosecutions, and prison terms rarely resulted.<sup>986</sup> Since the Commission's report, the number of gambling surveillances has decreased considerably. Nevertheless, more than twenty-five percent of all intercepts are still authorized for this purpose.<sup>987</sup>

The other major area of eavesdropping concentration has been narcotics. From 1968 to 1974, 24.7% of all surveillance orders were for this category of crime.<sup>988</sup> In contrast to gambling, the results in this context were impressive. The Wiretapping Commission noted numerous instances in which entire narcotics operations had been eliminated through penetration by electronic surveillance.<sup>989</sup> Moreover, conviction in this context often led to lengthy incarceration.<sup>990</sup> Although the Commission noted that electronic surveillance of narcotics networks is significantly more difficult than eavesdropping upon gambling organizations,<sup>991</sup> the recommendation nevertheless was made that electronic surveillance be used more extensively in narcotics investigations

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<sup>984</sup> *Id.* at 145.

<sup>985</sup> *Id.* at 6-7, 143-44.

<sup>986</sup> *Id.* at 143-45; H. SCHWARTZ, *supra* note 216, at 19.

<sup>987</sup> WIRETAP APPLICATIONS REPORT, *supra* note 947, at 8 (table 3).

<sup>988</sup> NWC REPORT, *supra* note 1, at 267 (table F-3).

<sup>989</sup> *Id.* at 145-48.

<sup>990</sup> *Id.* at 146. Over one-half of the offenders were sentenced to more than one year and 29% received five years or more.

<sup>991</sup> See NWC REPORT, *supra* note 1, at 145-46. Gambling establishments typically operate through phones with gamblers calling in their bets during regular hours. Moreover, almost all of the calls are clearly gambling related. *Id.* at 151. Consequently, the Wiretapping Commission observed:

Bookmaking operations are also thought to be uniquely susceptible to electronic surveillance: "No bookmaker of any consequence can operate without his telephone network, and, by and large, Title III . . . effectively cuts into these networks." Dependence on the telephone as a business instrument was acknowledged by one major bookmaker, . . . who stated, "You can't work without a telephone . . . . Federal wiretaps are going to put us all out of business."

For these reasons, "gambling is the Federal offense most susceptible to Title III coverage and the one most devastated by it." These factors have caused electronic surveillance to be used most frequently in gambling investigations, where it has been described as "probably your most productive wire."

NWC REPORT, *supra*, at 142 (footnotes omitted). In contrast, major narcotics transactions are typically very secretive. While the telephone is often used to arrange sales, dealers tend to keep irregular hours, use the phone intermittently (or possibly use public phones), converse in codes, and try to insulate their involvement from the street level. Hence, probable cause is difficult to establish. Ultimately, narcotics operations often involve complex conspiracies and lengthy taps, requiring enormous economic and manpower expenditures. See NWC REPORT, *supra*, at 146, 151. The difficulties of wiretapping a suspected narcotics dealer are described in *United States v. Bynum*, 360 F. Supp. 400, 411-19 (S.D.N.Y.), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974).

and other crimes "of substantial significance to the public interest."<sup>992</sup> To some degree, this has been done. Narcotics surveillance now accounts for more than fifty percent of all intercept orders;<sup>993</sup> in 1981, for example, 318 warrants were issued for this purpose.<sup>994</sup> Given the overwhelming magnitude of America's narcotics distribution problem,<sup>995</sup> however, even this number is far from adequate. For example, in 1981 the state of Florida had only forty-six narcotics surveillances, and the federal government had just thirty-nine nationwide.<sup>996</sup> Concededly, comparisons based upon numbers are somewhat deficient, as they do not account for qualitative factors regarding each particular case.<sup>997</sup> Even so, the severity of the problem mandates greater use of Title III surveillance.

Futhermore, if electronic surveillance is to be more effective, law enforcement must utilize it more often against other crimes.<sup>998</sup> Despite the Wiretapping Commission's exhortation to expand into other areas, the overall distribution has remained remarkably similar since 1974; gambling and narcotics have switched places, but, together, they still account for seventy-five percent of all surveillances.<sup>999</sup> Consequently, other areas where organized crime is heavily involved, such as theft and fencing, have essentially been ignored.<sup>1000</sup> But more than diversification

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<sup>992</sup> NWC REPORT, *supra* note 1, at 5.

<sup>993</sup> WIRETAP APPLICATIONS REPORT, *supra* note 947, at 16. Narcotics investigations have accounted for over 50% of taps since 1980. *Id.*

<sup>994</sup> *Id.* No doubt, economic and manpower costs are somewhat responsible for the relatively infrequent use of electronic surveillance. See NWC REPORT, *supra* note 1, at 145-48; see also *supra* notes 957-58 and accompanying text. Many agents, however, still prefer more traditional investigative techniques. See NWC REPORT, *supra*, at 145.

<sup>995</sup> See THE NATIONAL INTELLIGENCE CONSUMERS COMM., THE SUPPLY OF DRUGS TO THE ILLICIT MARKET FROM FOREIGN AND DOMESTIC SOURCES IN 1979 (1979) (narcotics trafficking reportedly "generated \$64 billion in retail sales in 1979, compared to \$50 billion in 1978 and \$48 billion in 1977"); *Federal Drug Strategy, Prospects for the 1980's: Hearings Before the House Select Comm. on Narcotics Abuse and Control*, 96th Cong., 2d Sess. (1980); HOUSE SELECT COMM. ON NARCOTICS ABUSE AND CONTROL, ANNUAL REPORT FOR 1980, H.R. REP. NO. 1547, 96th Cong., 2d Sess. (1980); HOUSE SELECT COMM. ON NARCOTICS ABUSE AND CONTROL, ANNUAL REPORT FOR 1981, H.R. REP. NO. 418, 97th Cong., 1st Sess. pts. 1, 2 (1982); SENATE COMM. ON GOV'T AFFAIRS & SENATE PERMANENT COMM. ON INVESTIGATIONS, ILLLEGAL NARCOTICS PROFITS, S. REP. NO. 887, 96th Cong., 2d Sess. 11-12 (1980).

One commentator has noted that "[l]ittle evidence exists that current law enforcement resource commitment and strategy are having a significant impact on drug traffic. Federal expenditures in drug control programs amount to one billion dollars each year, yet only two or five percent of the heroin, for example, is diverted. . . . Overall, less than 15% of all drug traffic entering the country is intercepted." Blakey, *supra* note 950, at 302 n.170.

<sup>996</sup> WIRETAP APPLICATIONS REPORT, *supra* note 947, at 16.

<sup>997</sup> See, e.g., NWC REPORT, *supra* note 1, at 140-43 (Commission notes the disruptive effect of taps on criminal organizations, regardless of number of convictions).

<sup>998</sup> See *id.* at 5-6.

<sup>999</sup> WIRETAP APPLICATIONS REPORT, *supra* note 947, at 16.

<sup>1000</sup> Since 1978, less than 2% of the authorized wiretaps have been for theft and fencing. *Id.* at 16. For a detailed discussion of the largely unrecognized theft and fencing problem and

is needed. Law enforcement must also use eavesdropping more creatively. For example, far greater use must be made of bugs. From 1968 to 1974, fewer than seven percent of all surveillances involved microphone installations.<sup>1001</sup> By 1981, the proportion had increased to thirteen percent.<sup>1002</sup> Nevertheless, the raw numbers are unimpressive. In 1981, there were only seventy-three microphone surveillances nationwide.<sup>1003</sup> Since there is considerable evidence that criminals are especially cautious in their telephone conversations,<sup>1004</sup> bugging is the best way to pursue an investigation to the next level. Assuming continued probable cause, this should be done after efforts with a less intrusive wiretap have failed.<sup>1005</sup> Admittedly, developing probable cause for a bug may be more difficult than with a wiretap,<sup>1006</sup> and installation may be an arduous and dangerous task.<sup>1007</sup> Several recent cases demonstrate, however, that with proper planning, these problems can often be overcome.<sup>1008</sup>

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the limited law enforcement response, see Blakey & Goldsmith, *supra* note 111, at 1517-23, 1611-13.

<sup>1001</sup> NWC REPORT, *supra* note 1, at 269 (table F-5).

<sup>1002</sup> WIRETAP APPLICATIONS REPORT, *supra* note 947, at 14.

<sup>1003</sup> *Id.*

<sup>1004</sup> See, e.g., NWC REPORT, *supra* note 1, at 146. Not surprisingly, those who suspect their activities may be the subject of electronic surveillance have resorted to countermeasures. They may refrain from phone use altogether. A more typical tactic, employed primarily by bookies, however, is simply to change phone numbers frequently, thereby taking advantage of the time delay inherent in the wiretap application process. NWC REPORT, *supra* note 1, at 151-52. Defendants may stage exculpatory conversations, NWC STAFF STUDIES, *supra* note 598, at 208 (statement of the Office of the Special Prosecutor, Corruption, New York), or resort to the use of codes or foreign languages. See *supra* note 612 and accompanying text. In a case described in the wiretap hearings, one defendant used codes to indicate what outside phones he would use. The calling party would then hang up, and dial the designated public phone. NWC HEARINGS, *supra* note 166, at 375 (statement of Joseph Phillips, Assistant Special Prosecutor, Corruption, New York).

<sup>1005</sup> See *supra* note 735 and accompanying text.

<sup>1006</sup> NWC REPORT, *supra* note 1, at 43-44.

<sup>1007</sup> See *supra* notes 962 & 1005 and accompanying text.

<sup>1008</sup> See generally *United States v. Civella*, 648 F.2d 1167, 1170-73 (8th Cir.), *cert. denied*, 454 U.S. 818 (1981); *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Clemente*, 482 F. Supp. 102 (S.D.N.Y.), *aff'd*, 633 F.2d 207 (2d Cir. 1980). For an excellent description of how electronic surveillance involving wiretaps and bugs was used for seven months by federal authorities to penetrate massive organized crime corruption on the waterfronts of New York and Florida, see *Waterfront Corruption: Hearings before the Senate Permanent Subcomm. on Investigations of Governmental Affairs*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings on Waterfront Corruption*]. After years of organized crime domination, this investigation resulted in the successful prosecution of Anthony Scotto, a Vice President of the International Longshoremen's Association (I.L.A.), and a "capocicada" or "chief" in the Carlo Gambino organized Crime family." Note, *United States v. Scotto: Progression of a Waterfront Corruption Prosecution From Investigation Through Appeal*, 57 NOTRE DAME LAW. 364, 378 (1981). At the time of his conviction, Scotto was an extremely popular union figure who was also highly regarded as a civic leader. *Id.* at 367-69; see *id.* at 384 n.141. In fact, his trial was prominently marked by the testimony of then New York Governor Hugh Carey,

Creativity also involves using eavesdropping more often on a long term basis. Both the Constitution and Title III permit lengthy surveillances so long as the underlying probable cause predicate is satisfied, and the investigation's objectives have not yet been met.<sup>1009</sup> Here, it is important to emphasize that investigative objectives can often be redefined. For example, surveillance may commence based upon probable cause to believe that narcotics related conversations, involving a small criminal enterprise, will be intercepted. Accordingly, the investigative objective might appropriately be the elimination of that criminal enterprise. However, should probable cause later develop that conversations will be overheard regarding a much larger narcotics enterprise, the objective can be expanded accordingly to seek the elimination of that organization.<sup>1010</sup> Significantly, the federal racketeering statute (RICO),<sup>1011</sup> which has served as a model for comparable state legislation,<sup>1012</sup> is ideally suited for investigations against large scale criminal enterprises. Indeed, properly used, a Title III RICO investigation provides the potential for the elimination of entire organized crime families.<sup>1013</sup> Moreover, such investigations are capable of penetrating with

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former New York City Mayor John Lindsay, former New York City Mayor Robert F. Wagner, and AFL-CIO secretary-treasurer Lane Kirkland, all of whom served as character witnesses in his behalf. *Id.* at 378-79. For these reasons, as well as Scotto's sophisticated precautionary measures designed to insulate him from effective investigation, it is apparent that the case never could have been successfully prosecuted without the use of wiretaps and bugs. See *Hearings on Waterfront Corruption, supra*, at 232-33 (statement of Jack Barrett, Special Agent, FBI). In total, more than ten elected I.L.A. officials were convicted on racketeering charges stemming from this investigation. *Id.* at 221 (statement of Robert Fiske, former United States Attorney). Other examples of recent successful electronic surveillance investigations are provided in the internal semi-annual reports of the Justice Department's Organized Crime Section. See Organized Crime and Racketeering Section of the Dep't of Justice Semi-annual Report, Nov. 29, 1981. Presently, however, electronic surveillance is used in only 15% of the Organized Crime and Racketeering Section's investigations. Letter to author from Alfred H. King, Executive Assistant to the Chief of the Organized Crime and Racketeering Section, United States Department of Justice (Nov. 24, 1982).

<sup>1009</sup> LEGISLATIVE HISTORY, *supra* note 111, at 2189-90.

<sup>1010</sup> See generally NWC REPORT, *supra* note 1, at 98.

<sup>1011</sup> 18 U.S.C. §§ 1961-1968 (1976).

<sup>1012</sup> The states below have both "RICO" and electronic surveillance statutes. See *supra* note 14 for the electronic surveillance statutes. The state RICO statutes are: ARIZ. REV. STAT. ANN. § 13-2312 to -2315 (1978); COLO. REV. STAT. § 18-17-101 (Supp. 1981); FLA. STAT. ANN. § 895-01 to -06 (West Supp. 1980); GA. CODE ANN. § 26-3401 to -3414 (1975 & Supp. 1982); HAWAII REV. STAT. § 842-1-12 (1976); IND. CODE ANN. §§ 34-4-30.51 to 30.5.6 (Burns Supp. 1981); N.J. STAT. ANN. § 2C:41-1-6.2 (West Supp. 1982); N.M. STAT. ANN. § 29-9-1-17 (1978); OR. REV. STAT. § 166.715 to .735 (1981); PA. CONS. STAT. § 911 (1978); R.I. GEN. LAWS § 7-15-1-11 (Supp. 1982). Kentucky and Connecticut have just passed similar statutes, and Illinois, New York, Ohio, Tennessee, and Wisconsin are presently considering such a law.

<sup>1013</sup> See Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013-14, 1023-28 (1980). RICO makes it unlawful, inter alia, to operate an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c) (1976). The term "enterprise" has been held to apply to groups and organi-

great breadth as well as great depth.<sup>1014</sup> Not only does the investigation move upstream against individual leaders within the organization, it also can penetrate laterally against other enterprises involved in similar or other crimes. While Title III prohibits intelligence surveillance, conversations involving nonspecified crimes may, subject to Constitutional and statutory limitations, be intercepted and used for further investigative purposes.<sup>1015</sup> Thus, by utilizing in effect a "spin off" approach to electronic surveillance,<sup>1016</sup> headway could be made against organized crime. Although this approach seems to be a matter of common sense, it has rarely been employed.<sup>1017</sup> Thus, perhaps the ultimate irony of elec-

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zations engaged in exclusively criminal activities. *United States v. Turkette*, 452 U.S. 576, 580-81 (1981). Since group members have to communicate, their conversations are potentially vulnerable to electronic surveillance because RICO is a designated Title III offense. 18 U.S.C. § 2516(1)(c) (1976). Accordingly, assuming adequate probable cause, under a RICO eavesdropping operation, surveillance could be initiated for the purpose of prosecuting an organized crime family or any other large scale criminal enterprise engaged in RICO violations. Moreover, assuming continued probable cause to support an investigative objective of enterprise elimination, surveillance could be maintained until such elimination has been achieved. See Blakey, *Techniques in the Investigation of Organized Crime, Thoughts on Title III, Title IX and Title X, A Strategy for a Preemptive Strike Against Organized Crime* 10-19, 90-92 (1980) (unpublished manuscript available from author) [hereinafter cited as *Preemptive Strike*]. While some might question the legitimacy of this goal, since RICO clearly makes it unlawful to conduct any enterprise through a pattern of racketeering activity, elimination of such an enterprise is a proper investigative purpose under Title III.

<sup>1014</sup> See NWC REPORT, *supra* note 1, at 4-5.

<sup>1015</sup> See *id.* at 126-27, 143-44.

<sup>1016</sup> See *id.* at 92, 126-27, 143-44.

<sup>1017</sup> See NWC REPORT, *supra* note 1, at 3-5. For a description of several investigations successfully using this approach, see NWC STAFF STUDIES, *supra* note 598, at 109, 179. While it is difficult to document specific examples of failure, in at least one case which federal authorities regard as exemplary of their success, *United States v. James*, 494 F.2d 1007 (D.C. Cir. 1974); see NWC HEARINGS, *supra* note 166, at 56-58 (letter from Assistant Attorney General Peterson summarizing *James* case), there was an apparent failure to pursue an excellent opportunity to initiate electronic surveillance laterally against major organized crime leaders who were not part of the original enterprise under investigation. In this respect, consider the following commentary:

In early 1969, the Federal Bureau of Narcotics and Dangerous Drugs (BNDD) created a special task force in Washington, D.C. to focus on major drug traffickers in the city. Fifty major violators were targeted.

The initial thrust was with undercover agents put on the streets to try to move up the distribution network. Informants were used to supply intelligence and to make introductions.

The investigators' first major break came when one of their informants announced that he could make a purchase of heroin from Laurence "Slippery" Jackson, one of Washington, D.C.'s biggest drug dealers.

Following the purchases, subsequent surveillance of Jackson, his headquarters and the apartment of his girlfriend, Mary Davis, produced little additional knowledge. The BNDD then sought authorization for a wire interception on the Jackson headquarters. It became operational on July 11 and with one extension, ran until August 18. It was productive. Seventy percent of the calls related to narcotics and five percent to other crimes.

During the 35 days of interception, 40 agents, 3 police officers, 6 attorneys and 8 clerical personnel worked on the wiretaps and accompanying surveillance. The investi-

tronic surveillance has been law enforcement's failure to use this legally sanctioned technique effectively.

### VIII. CONCLUSION

Electronic surveillance had been a constitutional controversy since the Supreme Court's landmark decision in *Olmstead*. Years of debate were climaxed by the Court's opinions in *Berger* and *Katz*, which sought to provide an appropriate constitutional matrix for legislative reform. Given this matrix, Congress conceived Title III as a legislative design which would conform the law of electronic surveillance to the requisites of constitutional doctrine. As enacted, the statute actually contained many protections which exceeded constitutional demands. Indeed, given recent Supreme Court decisions, virtually every level of protection afforded by the statute transcends constitutional requirements.<sup>1018</sup>

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gators found that over 100 dealers, including most of the 50 targeted violators were buying drugs from the Jackson enterprise. In addition, Jackson was found to have had at least 2 police officers, one lawyer, and bondsmen keeping him abreast of informants, pending raids, and outstanding arrest warrants.

There was little more that the investigators could have done to obtain their objective—the successful investigation and prosecution of the Jackson organization. But because of their myopia, they failed to see and therefore to use the really significant information that they were able to obtain—information that if developed could have been the basis for the prosecution that would have had more lasting impact on organized crime, not in just D.C., but the United States.

On July 28, Mary Davis called Jackson at his headquarters and said that 'Carlos' was at her apartment. Agents followed two males from her apartment to the National Airport. Later identification and continuing surveillance showed that the men were Carmine Paladino and Bobby Verderosa, lieutenants for Harry Tantillo, a major narcotics wholesaler and member of the New York Genovese Family.

On August 18, Paladino, Verderosa, Tantillo and Jackson were arrested in Washington, D.C. while trying to make a drug connection. Concurrent searches seized various amounts of narcotics. Altogether, 55 were indicted and 48 were convicted including Verderosa, Tantillo, and Jackson (Paladino and Mary Davis had died by the time of trial). The prosecution of the Jackson organization was successful.

But look at what failed to be done. A connection had been established between the Jackson enterprise and the Mob. Verderosa and Paladino were the suppliers of heroin. They were getting it from somewhere and that implies other levels of organization. Tantillo was a member of the Genovese family, and probable cause had been established against him as the Jackson supplier. An interception had hooked into the organized crime structure: it was the communication structure that could have been turned against them [sic] orders should have been applied for on Tantillo and "others as yet unknown," to fill in the means, methods, and members involved in the narcotics enterprise at the importation level, and focused on the larger enterprise—the Genovese Family.

Preemptive Strike, *supra* note 1013, at 40-44 (footnotes omitted).

<sup>1018</sup> For example, although the statute provides otherwise, the Supreme Court has held that, at least from a constitutional standpoint, targets do not have to be identified, *see supra* notes 532-34 and accompanying text, the suppression sanction does not have to extend to all civil proceedings, *United States v. Janis*, 428 U.S. 433, 447-60 (1976), the suppression sanction does not apply to grand jury proceedings, *United States v. Calandra*, 414 U.S. 338, 347-52 (1974), and standing may be limited to persons possessing a reasonable expectation of privacy, *Salvucci v. United States*, 448 U.S. 83, 86-95 (1980); *Rakas v. Illinois*, 439 U.S. 128, 138-40 (1978). *See supra* note 362.

Ironically, although the constitutional controversy has since subsided, many Title III safeguards have been eviscerated by the Supreme Court's failure to enforce with care the statute which it had originally engendered. Consequently, constitutional and statutory rights often have been violated, and the law of electronic surveillance has suffered from a lack of doctrinal consistency. So far, widespread abuse has not prevailed, but this is somewhat attributable to the statute's underutilization by law enforcement. Should law enforcement start to effect Title III surveillance aggressively and imaginatively, there will be even greater need for proper judicial controls.<sup>1019</sup> If anything, given the intensely intrusive nature of electronic surveillance, judicial standards of review should be more rigorous than those applied in conventional fourth amendment cases. That the criminal element often invoking these protections may be deserving of our disdain should be of no consequence.<sup>1020</sup> For, as Justice Frankfurter wrote years ago, "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."<sup>1021</sup>

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<sup>1019</sup> Rigorous judicial enforcement, of course, should commence immediately. However, since law enforcement is relying upon the statute as it has been applied in the past, suppression should not automatically be imposed. Absent intentional misconduct, suppression should not be mandated for purely statutory violations until some initial notice has been given that past practices are no longer acceptable. *Cf.* *Michigan v. DeFillippo*, 443 U.S. 31, 39-40 (1979).

<sup>1020</sup> *But see generally* NWC STAFF STUDIES, *supra* note 598, at 258, 386 (judges more flexible in murder cases and high level narcotics investigations); 1 W. LAFAVE, *supra* note 60, at 455 (constitutional rulings tend to be influenced by seriousness of crimes).

<sup>1021</sup> *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).