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JUDICIAL FINE-TUNING OF ELECTRONIC SURVEILLANCE

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INTRODUCTION

In 1968, Congress enacted Title III of the Omnibus Crime Control Act, a comprehensive statute regulating the use of and procedure for electronic surveillance.[1] Challenges to the Act, alleging it to be unconstitutional both on its face and as applied, have not disturbed either the legislation itself or the cases decided in the mid-1960's which served to establish the structure within which the Act was drawn. Federal courts, however, in construing the Act, have mandated a strict compliance with it—from initial authorization through notice to the individual who has been the subject of the surveillance. With the passage of Title III, Congress provided law enforcement with a valuable investigative tool. The courts have shown that this means of investigation can be used without necessarily violating the Constitution. Aside from "national security" surveillance[2]—now curtailed by court decision[3]—or the never-

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[1] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, § 802, 82 Stat. 212, *as amended,* 18 U.S.C. § 2510 *et seq.* (1970).

[2] 18 U.S.C. § 2511(3) (1970) provides:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. 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.

For the judicial construction of this section see note 3 *infra.*

utilized "emergency" authorization procedure[4]—it is clear that

[3] United States v. United States Dist. Court, 407 U.S. 297 (1972), *aff'g* 444 F.2d 651 (6th Cir. 1971). This case involved the wiretapping of Lawrence Plamondon, one of the three defendants alleged to have conspired to destroy Government property in violation of 18 U.S.C. § 371 (1970), and who was specifically charged with bombing a Central Intelligence Agency office. 407 U.S. at 299. Prior to trial, the defendants moved for disclosure and a suppression hearing concerning any tapes of telephone conversations recorded by the Government. United States v. Sinclair, 321 F. Supp. 1074, 1075-76 (E.D. Mich. 1971). It developed that such recordings existed and that they had been authorized by Attorney General Mitchell—as agent for the President—without any judicial approval. This procedure was claimed justified by the Presidential authority to protect "national security." *Id.* at 1076. Holding that fourth amendment requirements had been bypassed, the district court granted the motion and entered an interlocutory order. *Id.* at 1079-80.

Since such an interlocutory order is not appealable, the Government applied for a writ of mandamus in the Court of Appeals for the Sixth Circuit in an effort to vacate the trial judge's order. 444 F.2d at 654-56. After a careful consideration of the constitutional issues involved, the Sixth Circuit agreed with the lower court's decision and denied the writ. *Id.* at 669. A dissent, however, after considering the grave issues involved, took the position that the Government's actions were "reasonable" and thus would have granted the mandamus. *Id.* at 677 (Weick, J., dissenting). Certiorari was granted by the Supreme Court. 403 U.S. 930 (1971).

The Government argued that the exception of "national security" surveillance from the Title III warrant requirement implied congressional recognition of the exclusivity of the Executive's powers in this area. 407 U.S. at 303. For the applicable provision of the Act see note 2 *supra.* Speaking for the Court, Justice Powell disagreed with the Government's interpretation:

> Section 2511(3) certainly confers no power, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them.

407 U.S. at 303. Justice Powell reasoned further that it would be "incongruous" for the whole of national security surveillance to be contained within that one section when Congress had so meticulously drafted other sections of the Act. *Id.* at 306. The Court observed that this power was derived from the President's duty to " 'preserve, protect and defend the Constitution of the United States.' " *Id.* at 310 (quoting from U.S. CONST. art. II, § 1). This power must, however, be balanced by "the potential danger posed by unreasonable surveillance to individual privacy and free expression." 407 U.S. at 314-15. Such a balance was seen as best being achieved by adherence to warrant requirements so as to assure that "a neutral and detached magistrate" can pass upon the necessity of such surveillance before its inception. *Id.* at 317-21 & n.18. Justice Powell further suggested that although "prior judicial approval is required for the type of domestic security surveillance involved in this case," the standards and procedures for obtaining a warrant may not have to match those of Title III. *Id.* at 322-24. The Court specifically avoided establishing standards for an electronic surveillance involving "the domestic aspects of national security." *Id.* at 321. The Court explained that it did "not attempt to detail the precise standards for domestic security warrants." *Id.* at 323. Thus, the Court affirmed the court of appeals, but restricted itself only to requiring prior judicial approval for the surveillance at issue in this case, and did not rule upon the standards proper to such a requirement. *Id.* at 321-24.

For other cases involving this section see United States v. Butenko, 494 F.2d 593, 602-05, 607-08 (3d Cir. 1974); United States v. Lemonakis, 485 F.2d 941, 961-63 (D.C. Cir. 1973); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973); United States v. Dellinger, 472 F.2d 340, 391 (7th Cir. 1972); Zweibon v. Mitchell, 363 F. Supp. 936, 942-44 (D.D.C. 1973); United States v. Ahmad, 347 F. Supp. 912, 931-36 (M.D. Pa. 1972) (illegal domestic surveillance found not to have tainted evidence introduced at trial).

[4] 18 U.S.C. § 2518(7) (1970) provides that if grounds for an interception of communi-

Title III, despite some criticism,[5] is serving its basic purpose. The Act strikes a critical balance between society's rights to be free from crime and the individual's inherent right to constitutional protections.

The unauthorized use of electronic surveillance techniques has presented a serious threat to the privacy of communications and has also created new tools for commercial espionage and labor-management eavesdropping. With continued court supervision, electronic surveillance, as well as other forms of sophisticated criminal detection made possible through modern science and technology, may be used without fear of trespassing on individual rights.

The Senate Report on Title III described the need for a comprehensive law governing such electronic surveillance:

> No longer is it possible . . . for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.[6]

Not surprisingly, the scientific advancements which have caused an increasing use of electronic surveillance equipment have evoked corresponding developments in the law. As Samuel Warren and Louis Brandeis pointed out, the "law, in its eternal youth, grows to meet the demands of society."[7]

HISTORY

Pre-Title III Considerations

The United States Supreme Court first examined the problems surrounding electronic surveillance less than fifty years ago. In 1928, the Court considered the propriety and status of wiretap-

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cation exist but sufficient time for obtaining proper authorization does not, such an interception may take place but, to be used, must be validated through statutory procedures within 48 hours.

[5] *See, e.g.*, Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969); Note, *Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968,* 23 RUTGERS L. REV. 319 (1969); Note, *Eavesdropping Provisions of the Omnibus Crime Control and Safe Streets Act of 1968: How Do They Stand in Light of Recent Supreme Court Decisions?,* 3 VALPARAISO U.L. REV. 89 (1968); Note, 26 VAND. L. REV. 177 (1973). *See generally* Wilkinson, *The Era of Libertarian Repression—1948 to 1973: From Congressman to President, With Substantial Support from the Liberal Establishment,* 7 AKRON L. REV. 280 (1974).

[6] S. REP. No. 1097, 90th Cong., 2d Sess. 67 (1968).

[7] Warren & Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 193 (1890). This seminal article introduced the argument for a "right to privacy," and discussed its extent and limitations, albeit within the framework of civil liability for its invasion.

ping in *Olmstead v. United States.*[8] At the time *Olmstead* was decided, there existed numerous state statutes[9] and, arguably, federal legislation[10] treating the use of wiretapping. In resolving the issues raised in *Olmstead,* Chief Justice Taft, writing for a closely divided Court, held that the practice of federal wiretapping infringed upon neither fourth nor fifth amendment rights.[11] The Court reasoned that the fourth amendment was inapplicable since there was no physical search or seizure and no trespass upon the property of the defendants.[12] Similarly, the fifth amendment could not be invoked since the defendants were not induced to use the telephones; their actions were totally voluntary and in disregard of any possible interceptions.[13]

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[8] 277 U.S. 438 (1928), *aff'g* 19 F.2d 842 (9th Cir. 1927). Roy Olmstead and others were convicted of conspiracy to violate the National Prohibition Act. 19 F.2d at 843. They claimed that the trial court had erred in that testimony had been admitted concerning telephone calls tapped without a search warrant. This, they argued, violated their fourth and fifth amendment rights. The circuit court, over a strong dissent, held:

> The purpose of the amendments is to prevent the invasion of homes and offices and the seizure of incriminating evidence found therein. Whatever may be said of the tapping of telephone wires as an unethical intrusion upon the privacy of persons who are suspected of crime, it is not an act which comes within the letter of the prohibition of constitutional provisions.

Id. at 847. The dissent, however, analogized the telephone messages to letters in the mail. The contents of such letters had been held to come within constitutional protections in *Ex parte* Jackson, 96 U.S. 727, 733 (1877). Telephone calls, it was urged, should be no different. 19 F.2d at 849-50 (Rudkin, J., dissenting).

The Supreme Court granted certiorari only to consider the applicability of the fourth and fifth amendments to wiretaps. 276 U.S. 609, 609-10 (1928).

[9] *See* 277 U.S. at 479-81 n.13 (Brandeis, J., dissenting).

[10] For a discussion of the federal legislation which may have touched the issues of wiretapping see note 21 *infra.*

[11] 277 U.S. at 462, 466. The Court held that, without a violation of the fourth amendment, there could be no violation of the fifth, and therefore limited its discussion to the fourth amendment issue. *Id.* at 462. *Cf.* Boyd v. United States, 116 U.S. 616, 638-41 (1886) (Miller, J., concurring) (seizure violated fifth amendment only). *See also* note 13 *infra.*

[12] 277 U.S. at 466. The Court gave considerable weight to the precise wording of the fourth amendment:

> The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.

Id. at 464 (emphasis in original). Since telephonic conversations are intangible, they could not have been contemplated by the framers of the Constitution as "things" needing protection from unreasonable searches and seizures. *Id.* at 465. The Court distinguished *Ex parte Jackson,* relied on by the dissent in the lower court, as involving "an effect" within the fourth amendment. *Id.* at 464. *See* note 8 *supra.* Chief Justice Taft, writing for the majority, noted that *Jackson* involved the U.S. Mail, a mode of communication expressly entrusted to governmental supervision by the Constitution. *See* U.S. CONST. art. I, § 8, cl. 7. The fourth amendment should clearly cover such items "in the custody of [the] Government." 277 U.S. at 464. The telephone wires involved in *Olmstead,* on the other hand, are not owned and run by the Government; moreover, they "are not part of [the defendant's] house or office any more than are the highways along which they are stretched." *Id.* at 464-65.

[13] 277 U.S. at 462. In lieu of analysis on this point, the majority offered only conclusory statements:

The position of the majority contrasted greatly with the dissenting opinions of Justices Brandeis,[14] Holmes,[15] and Butler,[16] each joined by Justice Stone.[17] Justice Brandeis viewed the scope of the fourth and fifth amendments to be broader than that conceded by the majority, recognizing in both a "right to be let alone."[18] As a consequence of this right, he expressed the view that

> every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[19]

Aside from this basic constitutional rationale for rejecting the position of the majority, Justice Brandeis urged that the case should be reversed because wiretapping itself was a crime. The laws of the

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> There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception.

Id.

[14] *Id.* at 471 (Brandeis, J., dissenting).

[15] *Id.* at 469 (Holmes, J., dissenting).

[16] *Id.* at 485 (Butler, J., dissenting). Eschewing consideration of statutory issues as outside the grant of certiorari, Justice Butler demanded a liberal interpretation of the Bill of Rights. He thought that to construe "the Constitution in the light of the principles upon which it was founded" would require reversal in *Olmstead*. *Id.* at 486-88.

[17] *Id.* at 488 (Stone, J., dissenting). Justice Stone briefly concurred in each of the opinions of the other dissenters, but reserved his agreement with some of Justice Butler's jurisdictional position. The question of the effect of the state statute, discussed at length in Justice Brandeis' opinion, but not considered in the majority opinion, was not foreclosed from the Court's consideration by the limited grant of certiorari, in Justice Stone's estimation. *Id.* at 488. See note 22 *infra* for a discussion of Justice Brandeis' opinion regarding this issue.

[18] 277 U.S. at 478 (Brandeis, J., dissenting). This "right to be let alone" was what Justice Brandeis had urged—as a formal theory—upon the legal world almost forty years previously. *See* Warren & Brandeis, *supra* note 7, at 195. Even then he had warned:

> [N]umerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."

Id. His *Olmstead* dissent mirrored this thought:

> Discovery and invention have made it possible for the Government . . . to obtain disclosure in court of what is whispered in the closet.

277 U.S. at 473.

[19] 277 U.S. at 478-79. Justice Brandeis further stated:

> "It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security . . . ."

Id. at 474-75 (quoting from Boyd v. United States, 116 U.S. 616, 630 (1886)). Applying the spirit of the fourth amendment to the invasion of personal security here involved, he observed:

> As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.

277 U.S. at 476. The fourth amendment was therefore seen as prohibiting such an unwarranted intrusion. *Id.* at 479.

State of Washington,[20] where the surveillance was conducted, were seen by Justice Brandeis as making the act of wiretapping illegal.[21] Thus, the Court should not have allowed the Government to prosecute the defendants when its own agents had broken the law.[22]

Justice Holmes agreed with significant parts of Justice Brandeis' position. He saw the problems presented by *Olmstead* as involving a choice between two objectives—while it is generally desirable that criminals be apprehended, it is also important that the Government should not itself commit bad acts in bringing people to justice. In resolution of this problem, Justice Holmes indicated it was his view that it is "a less evil that some criminals should escape than that the Government should play an ignoble part."[23]

Nine years after the *Olmstead* decision, the law relating to electronic surveillance was reexamined by the Court in *Nardone v. United States.*[24] In this, the first of two *Nardone* cases,[25] the Court indicated that evidence gathered by wiretapping was in violation of section 605 of the Federal Communications Act of 1934.[26] In

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[20] WASH. REV. CODE ANN. § 9.61.010(18) (Supp. 1973) (originally enacted as Law of March 22, 1909, ch. 249, § 404(18), [1909] Wash. Laws 1016) makes intercepting a telephone message a misdemeanor.

[21] 277 U.S. at 479-80 (Brandeis, J., dissenting). Justice Brandeis also intimated that the Radio Act of 1927, ch. 169, § 27, 44 Stat. 1172, which prohibits the divulging of the contents of an intercepted "message," could apply to make the wiretapping a criminal offense. 277 U.S. at 481 n.13. From the context of the language he quotes, however, it would seem that only a radio "message" was intended. The Washington law, however, is clearly applicable to telephone "messages."

[22] 277 U.S. at 480. While the individual agents alone would be the actual lawbreakers, the Government, by attempting to utilize the fruits of this criminality, "itself would become a lawbreaker." *Id.* at 483. Invoking the equitable doctrine of "unclean hands," Justice Brandeis would have barred the Government's prosecution to protect the Court's integrity. *Id.* at 483-85. *See generally* 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 397-99, 402, 404 (5th ed. 1941).

[23] 277 U.S. at 470 (Holmes, J., dissenting). While Justice Holmes, following the approach of Justice Brandeis, grounded the major part of his reasoning on the resolution of this balance, he went further and indicated that the exclusionary rule should apply to this case. Justice Holmes' was the only opinion to refer to Weeks v. United States, 232 U.S. 383 (1914). He concluded that the *Weeks* doctrine should not be ignored in Olmstead's situation:

> [I]f we are to confine ourselves to precedent and logic the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

277 U.S. at 471.

[24] 302 U.S. 379 (1937).

[25] After Nardone's conviction had been reversed in the first case, a new trial was held on remand. This second trial also resulted in a conviction, which again was appealed. Nardone v. United States, 308 U.S. 338, 339 (1939).

[26] 302 U.S. at 380-83. The Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103, *as amended,* 47 U.S.C. § 605 (1970) provides in pertinent part:

> [N]o person receiving . . . any interstate or foreign communication by wire or radio shall divulge . . . the . . . contents . . . thereof [unless he comes within certain

Olmstead, Justice Brandeis had made a similar suggestion regarding the Radio Act of 1927.[27] As a result of this statutory violation, evidence gathered by electronic surveillance should have been inadmissible at Nardone's trial.[28] By mandating that the Government must obey its own laws, the Court was able to avoid a direct analysis of the fourth and fifth amendment issues in the use of electronic surveilance.[29]

The language of the Communications Act on which the Court relied in *Nardone*—" 'no person not being authorized by the sender shall intercept any communication' "[30]—had been available to the Court at the time of the *Olmstead* decision as part of the Radio Act of 1927.[31] Although it was argued in *Nardone* that the Communications Act provision was but a reenactment of the Radio Act requirements,[32] the Court concluded "that the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message."[33]

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exceptions]; 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 . . . .

[27] *See* 277 U.S. at 481 n.13. The Radio Act of 1927, ch. 169, § 27, 44 Stat. 1172, was repealed and substantially replaced by the Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103. For a discussion of Justice Brandeis' earlier reference to the potential application of the prior statute see note 21 *supra.*

[28] 302 U.S. at 381-83. The Court held that the testimony of wiretapping Government agents would fall within the purview of the federal statute:

> Taken at face value the phrase "no person" comprehends federal agents, and the ban on communication to "any person" bars testimony to [*sic*] the content of an intercepted message.

Id. at 381.

[29] Thus, by the Court's focus on statutory interpretation, there was no need to refer to the constitutional law doctrine which had grown around the exclusionary rule. *But see* note 23 *supra.* Under the exclusionary rule evidence obtained by constitutionally proscribed means is not admissible in any court. *See generally* Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). For in-depth analysis of the exclusionary rule both on the theoretical and the empirical levels see Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970); Wright, *Must the Criminal Go Free If the Constable Blunders?,* 50 TEXAS L. REV. 736 (1972).

[30] 302 U.S. at 381 (quoting Communications Act of 1934, ch. 652, § 605, 48 Stat. 1104).

[31] *Compare* 47 U.S.C. § 605 (1970) *with* Radio Act of 1927, ch. 169, § 27, 44 Stat. 1172. Justice Brandeis, dissenting in *Olmstead,* had listed this provision in his footnote describing applicable wiretapping provisions other than the Washington statute. *See* note 21 *supra.*

[32] 302 U.S. at 381-82. The Government pointed out the similarity of statutory language and argued that if the statute had not applied in *Olmstead,* its reenactment should not control in *Nardone. Id.* The Communications Act of 1934, in reenacting this section with some changes, had repealed the Radio Act of 1927. Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1102. However, the limited grant of certiorari in *Olmstead* led to a decision which did not rely on the statute. *See* note 8 *supra. Nardone,* therefore, could be said to be the first time this statutory language was directly before the Court.

[33] 302 U.S. at 382. The Court noted that, following the *Olmstead* decision, several moves

The extent to which the Court viewed section 605 as limiting the use of evidence obtained by means of electronic surveillance was dealt with in the latter of the two *Nardone* decisions.[34] Justice Frankfurter, writing for the Court, announced the "fruit of the poisonous tree" doctrine.[35] Under this approach, it was illegal to use any leads or evidence obtained by electronic surveillance unless the Government could "convince the trial court that its proof had an independent origin."[36]

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had been made in Congress to introduce bills which would end governmental wiretapping, "all of which failed to pass." *Id.* But none of this activity preceded the 1934 enactment, the major purpose of which had been to establish the jurisdiction of the newly created Federal Communications Commission. *Id.* Since no "contemporary legislative history relevant to the passage of the statute in question" had been brought to the Court's attention, the language was examined on its face. *Id.* at 382-83.

The Government had also advanced a policy argument: Congress would not have intended that law enforcement should be crippled by applying the statutory language to Government agents. The Court found this reasoning unpersuasive:

> Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt § 605 as evoked [*sic*] the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

Id. at 383. Yet constitutional considerations were not the basis of the decision in *Nardone.* Statutory considerations prevailed. The Government was held not to escape the plain words of its own statute. *Id.* at 381-82.

[34] Nardone v. United States, 308 U.S. 338, *rev'g* 106 F.2d 41 (2d Cir. 1939). The only question before the Court was

> "whether the [trial] judge improperly refused to allow the accused to examine the prosecution as to the uses to which it had put the information . . . ."

308 U.S. at 339 (quoting from 106 F.2d at 42). The Second Circuit had hesitantly concluded that, since neither *Olmstead* nor the first *Nardone* decision had held that wiretapping contravened the requirements of the fourth amendment, there would be no grounds for excluding "tainted" evidence, whose acquistion had depended on the wiretap information. 106 F.2d at 43-44. However, Justice Frankfurter, writing for the Court, recognized that the consideration of this issue would involve broad questions of policy. 308 U.S. at 339-40.

[35] 308 U.S. at 341. To limit the scope of the statute to exclude only "the exact words heard," held the Court, would only serve to "stultify the policy which compelled our decision" in the first *Nardone* case. Not to outlaw the "indirect use" of illegally obtained information would merely encourage the continuance of the repugnant practice. *Id.* at 340. Justice Frankfurter reasoned that if wiretapping—"the poisonous tree"—were to be uprooted, the evidence discovered by following up on leads obtained through illegal taps—the poisonous "fruit"—must likewise be disallowed by the Court. *See id.* at 340-41.

This logic stems from the Court's rationale in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920), which in turn had relied on and extended the holding in Weeks v. United States, 232 U.S. 383 (1914). The "fruits of the poisonous tree" doctrine was further refined in Wong Sun v. United States, 371 U.S. 471 (1963), and is now a well-established tenet in fourth amendment constitutional law. *See generally* C. MCCORMICK, LAW OF EVIDENCE § 177 (2d ed. 1972); 4 F. WHARTON, CRIMINAL EVIDENCE § 736 (13th ed. 1973).

[36] 308 U.S. at 341. That this exclusion of "fruits" was not to be construed as an absolute prohibition was emphasized in Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

Since the *Nardone* Court would allow evidence to be admitted if it were independently

In a case argued the same day as the second *Nardone* case, *Weiss v. United States*,[37] the Court ruled that section 605 prevented the use or interception of intrastate—as well as interstate—phone conversations.[38] At the same time, the Court concluded that the pretrial use of transcripts of wiretapped conversations to secure permission to use such evidence was not an "authorization" within the contemplation of the Act.[39] This position, however, was modified three years later in *Goldstein v. United States*.[40] The Court indicated that a defendant not a party to an intercepted conversation was without standing to object to the Government's pretrial use of information gained by wiretaps to influence the parties to the conversation to testify against that defendant.[41] Thus, it was

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discovered, it ordered that a separate hearing be held to determine the admissibility of such evidence. This hearing would be required only if the accused satisfied his burden of proof that illegal wiretapping had been employed, and then

> the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

308 U.S. at 341. Such a hearing should, if possible, take place before trial. *Id.* at 341-42.

[37] 308 U.S. 321 (1939). Not only were both cases argued on November 14, but both were decided on December 11, 1939.

[38] 308 U.S. at 329. On the basis of intercepted telephone calls, the defendants in *Weiss* were convicted for using the mails to defraud. While both interstate and intrastate calls of the defendants had been recorded, transcripts and recordings of only the latter had been used at trial. *Id.* at 324-26. The Government contended that section 605—held in the first *Nardone* case to bar the introduction of wiretap evidence—applied on its face only to interstate or foreign telephone calls. *Id.* at 326-27. *See* notes 26-33 *supra* and accompanying text.

The Court, however, pointed out that the clause in question—the second clause of the section—was not expressly limited so as to apply only to non-intrastate calls, as other clauses were. On the face of the statute, therefore, intrastate calls were not to be exempted from the law's protection. 308 U.S. at 327-29. The relevant language of the statute is reproduced at note 26 *supra*. Furthermore, the Court reasoned, the wiretapper is unable to distinguish between such various classes of calls, so "the only practicable way to protect interstate messages . . . is to prohibit the interception of all messages." 308 U.S. at 328.

This decision put to rest a myriad of conflicting determinations in the lower federal courts. *See, e.g.*, Sablowsky v. United States, 101 F.2d 183, 189-90 (3d Cir. 1938); Valli v. United States, 94 F.2d 687, 690 (1st Cir. 1938).

[39] 308 U.S. at 330-31. Confronted with the recordings the Government had made during the wiretap, several of the defendants, whose subsequently-introduced conversations had been recorded, had "turned state's evidence" and testified against their compatriots. *Id.* at 325, 330. The Government argued before the Court that this testimony rendered the evidence of the wiretaps " 'authorized by the sender' " and thus not banned by the statute. *Id.* at 329. The Court, however, reasoned that the consent to disclosure referred to in the Act contemplates voluntary consent and not subsequent agreement to disclose induced by a hope of leniency after the Government has confronted a party with the transcript of the message. *Id.* at 330-31.

[40] 316 U.S. 114 (1942).

[41] *Id.* at 117, 121-22. Goldstein and others had been indicted for mail fraud conspiracy.

established that only a party to a tapped conversation would have the necessary standing to object to its use.

In deciding cases involving electronic surveillance of a type other than telephone interceptions, the Court employed a "trespass" theory to determine violations of fourth amendment rights.[42] Thus, evidence obtained by means of electronic eavesdropping instruments would be admissible as long as no unauthorized invasions of a subject's property rights were involved. As a result, in *Goldman v. United States,*[43] evidence was permitted which had been obtained by attaching a listening device to the wall of a room adjoining the one occupied by the defendant.[44] This same theory

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Some of the alleged conspirators, when confronted by the Government with illegally made recordings of incriminating telephone calls, had turned state's evidence and confessed. Other conspirators—among them Goldstein—who were not parties to these recorded calls, were convicted on the testimony of the first group. No testimony made reference to the intercepted calls and there was no other tainted evidence. *Id.* at 115-16. The defendants claimed that section 605 should prohibit the use before trial of illegally recorded telephone calls. *Id.* at 117.

The Court reasoned that although wiretap evidence does not come under the protections of the fourth amendment, a similar policy has justified suppression of evidence in the case of statutory violations. *Id.* at 120. And, while the Supreme Court had never ruled on the point, lower federal courts had unanimously decided a similar issue in search-and-seizure cases—a defendant who was not himself the victim of a fourth amendment violation will not have standing to challenge the introduction of evidence unlawfully seized. *Id.* at 121 & n.12. Applying this principle, the defendants could not have standing to complain of the use of the telephone intercepts. *Id.* at 121.

[42] The lines of analysis used by the Supreme Court are reflected in the *Olmstead* opinion. There, where the majority considered no applicable statutory prohibition, it was concluded that no fourth amendment violation had taken place because there had been no physical trespass upon tangible property of the defendant. *See* notes 8 & 12 *supra* and text accompanying note 12. This theory was put into practice in Goldman v. United States, 316 U.S. 129, 134-35 (1942), and held sway until the Court decided Katz v. United States, 389 U.S. 347, 352-53 (1967).

[43] 316 U.S. 129 (1942).

[44] *Id.* at 133-36. The defendants had been convicted of conspiracy, largely on the basis of evidence transcribed from eavesdropping on the office of one of the defendants. This had been accomplished by means of a "detectaphone," a sensitive microphone attached to the partition wall of an adjoining office. A stenographer transcribed all conversations taking place in the bugged office, including both conferences and telephone calls. *Id.* at 131-32.

The Court held that these bugged telephone calls were not within the protection of 47 U.S.C. § 605 (1970), because interception had not taken place during transmission, but rather before transmission. An analogy was made to the protection of letters in the mail, inasmuch as no protection is afforded prior to placing the letters in the mail. 316 U.S. at 133-34.

There was an actual trespass when federal agents entered defendant's office to install a listening apparatus. *Id.* at 131. This apparatus was defective and another device, the detectaphone, was used instead. *Id.* The Court indicated that if any trespass had been connected with the use of the detectaphone, the fourth amendment would have been violated. However, it found no material connection. *Id.* at 134-35.

Finally, the Court ruled that this case was indistinguishable from *Olmstead.* Since there

later resulted in the inadmissibility of the fruits of a surveillance, where a "spike-mike" was inserted into a heating duct on the defendants' property by Government agents.[45]

Where the eavesdropping equipment has been concealed on a person who then engages in conversation with a subject, who subsequently becomes a defendant, yet another legal standard has been employed in order to determine the validity of the search. When this practice has been accomplished with the consent of one of the participants, the defendant is without grounds to complain that his conversation was monitored and used against him in the absence of a proper warrant. This has been characterized as "consensual participant monitoring," and it continues to be distinguished from "third-party" nonconsensual interceptions where none of the parties has consented to the monitoring practice.[46]

In 1952, the Supreme Court held in *On Lee v. United States*[47] that the fourth amendment did not prohibit testimony by a narcotics agent concerning a conversation overheard by him between the accused and an informant. Stationed outside the defendant's premises, the agent had heard the conversation by means of a transmitting device concealed on the informant.[48] In *Lopez v. United States,*[49] eleven years later, the Court held that no rights were

had been no trespass and no violation of statute, the speaker was presumed to assume the risk of being overheard by someone with a detectaphone in the next office. *Id.* at 135.

[45] Silverman v. United States, 365 U.S. 505, 511-12 (1961). In *Silverman,* police officers obtained evidence of a gambling operation by inserting a foot-long spike attached to a microphone into a party wall. *Id.* at 506-07. The Court noted that the spike penetrated by inches into defendant's property and this constituted a physical trespass. *Id.* at 509. While the Court intimated the defendant's constitutional rights were not a matter of inches, it still described its holding in terms of property concepts and physically defined constitutional areas. *Id.* at 510-12.

[46] *See generally* Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation,* 68 COLUM. L. REV. 189 (1968). For an overview of the Supreme Court's treatment of these issues see United States v. White, 405 F.2d 838 (7th Cir. 1969), *rev'd,* 401 U.S. 745 (1971).

[47] 343 U.S. 747, 753-54 (1952).

[48] *Id.* at 749. The Court stated that the informant—who was a participant in the conversation—had consented to the monitoring of the conversation and had entered the accused's premises "with the consent, if not by the implied invitation, of the [accused]." *Id.* at 751-52. Therefore, no trespass was committed.

The Court also intimated that On Lee assumed the risk that his conversation with the informant would be repeated or overheard, and reasoned that the circumstances of the agent listening outside by means of the transmitting and recording device had the same effect on the defendant's privacy as if the agent had been eavesdropping outside an open window. *Id.* at 753-54. The effect was de minimis.

The Court distinguished the concept of an overheard conversation from the intercepted conversation issue presented in *Olmstead,* finding in *On Lee* only a "most attenuated analogy to wiretapping." *Id.* at 753.

[49] 373 U.S. 427 (1963).

violated when an agent, invited to defendant's office, surreptitiously recorded an attempted bribe and later offered the tape at trial.[50] Thus, in these two cases, no trespass was committed in the process of transmitting or recording and therefore no individual rights were violated.

The underlying rationale of the Court's refusal in *Lopez* to overrule the prior law established in *On Lee* was the non-compelled nature of the speech by the recorded pary.[51] The majority in *Lopez* relied on the fact that the recorded party was speaking freely and voluntarily taking the risk that the party to whom he spoke may have been recording his words.[52] The approach in *Lopez* remained strikingly similar to that originally intimated in *Olmstead*—parties involved in conversations assumed the risk that their words were being preserved without their knowledge and some unknown third party might be listening.

It should be emphasized, however, that consensual participant monitoring is not as potentially problematic as third-party eavesdropping where neither subject consents to having his conversation monitored.[53] Thus, in the case of *United States v. White*,[54] the Court

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[50] *Id.* at 437-38. Roger Davis, an IRS agent, suspected Lopez of income tax delinquency with respect to his business establishment, a cabaret. *Id.* at 428-29. At an early meeting between the two, Lopez offered Davis money to ignore any past tax liabilities. Davis, " 'pretend[ing] to play along with the scheme,' " returned a few days later and taped his conversation with the defendant on a pocket wire recorder. *Id.* at 430. The recorded conversation was introduced, over objection, at trial in which Lopez was convicted of attempting to bribe an Internal Revenue agent. *Id.* at 432, 434.

The Supreme Court first ruled that a jury charge on entrapment was not required "under any theory." *Id.* at 436. Lopez then argued that Davis had "gained access to [his] office by misrepresentation," and that thus the evidence—the content of the conversation, whether as recorded or as Davis remembered it—should have been inadmissible. *Id.* at 437. The Court refused to accept this theory:

> We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally protected communication.

Id. at 438. If the agent could testify from memory, there was no constitutional or other reason to prohibit the introduction of an unerring recording. *Id.* at 439-40.

[51] *See id.* at 438. This rationale was pointed up by Chief Justice Warren, who concurred in the result. He argued that *On Lee* should be distinguished and overruled. *Id.* at 441. In *Lopez*, the use of the recording was only to corroborate the testimony of the agent, while in *On Lee* the use of the recording was to obviate the necessity of placing the informer, a man of questionable criminal character, on the stand, thereby not exposing his testimony to certain impeachment. *Id.* at 442-43.

[52] *Id.* at 438-39. The Court considered that the agent could have testified from memory as to the conversation, and allowing an accurate recording could not be complained of:

> We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.

Id. at 439.

[53] Some commentators have strongly attacked third-party surveillance while reserving

placed consensual participant recording and transmitting squarely outside the purview of the fourth amendment.[55] This characterization has continued and this type of evidence has been specifically exempted from Title III.[56]

In his dissent in *Lopez,* Justice Brennan urged a reconsideration of the viability of the *Olmstead-Goldman* doctrine.[57] Although

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any absolute condemnation of consent monitoring. *See, e.g.,* Greenawalt, *supra* note 46 *passim;* Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View,* 44 MINN. L. REV. 855, 866-68 (1960). Some jurists likewise recognize the distinction. *See* United States v. White, 401 U.S. 745, 788 n.24 (1971) (Harlan, J., dissenting). *See also* United States v. Santillo, No. 74-1580, at 10-11 (3d Cir., filed Jan. 9, 1975), in which Circuit Judge Forman explained:

> Warrantless electronic eavesdropping without the knowledge of either party to the conversation produces an atmosphere of police omniscience analogous to that produced by the general warrant of a by-gone era. . . . It is this broad transgression . . . against which the Fourth Amendment is designed to protect. A more limited threat to the values of a free society arises from the risk that an invited participant may be electronically recording one's conversation for later replaying. We concede that, in the latter case, the conversation may eventually reach the same number and kind of people as if the electronic intrusion had been accomplished by an uninvited third party. The significant difference, however, is that private discussions are more likely to be inhibited by the continuous threat of an uninvited listener.

(Citations omitted).

[54] 401 U.S. 745 (1971).

[55] *Id.* at 752-53. In *White,* the Court was again faced with the issue presented in *On Lee* and *Lopez*—the admissibility of evidence obtained by monitoring a private conversation with the consent of one of the participants. The Court held that either party assumed the risk that the other party could record the conversation or consent to its being transmitted to third parties, and distinguished Katz v. United States, 389 U.S. 347 (1967), as applying to nonconsensual third-party eavesdropping only. 401 U.S. at 749. *Accord,* United States v. Santillo, No. 74-1580 (3d Cir., filed Jan. 9, 1975), where the court of appeals considered the constitutionality of consensual participant monitoring and held that appellants' expectation of privacy was not protected by the fourth amendment, and that a person unveiling incriminatory information must judge for himself whether the person to whom he is speaking is trustworthy or not.

[56] 18 U.S.C. §§ 2511(2)(c)-(d) (1970) provide:

> (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, *where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.*
>
> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication *where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception* unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(Emphasis added). Not only does this provision cover the *White* holding, but it also, with its limitation to "prior consent," speaks to *Weiss,* discussed in note 39 *supra.*

[57] Lopez v. United States, 373 U.S. 427, 457-63 (1963). In a long and thoughtful opinion, Justice Brennan reviewed prior decisions and explained:

> I think it is demonstrable that *Olmstead* was erroneously decided, that its authority has been steadily sapped by subsequent decisions of the Court, and that it and the cases following it are sports [*sic*] in our jurisprudence which ought to be eliminated.

this position might have been more properly reserved for a case involving third-party eavesdropping, his opinion better defined the issues and provided a possible basis for the repudiation of the *Olmstead* rationale. Justice Brennan viewed the position of the majority regarding assumption of the risk as an improper approach to consensual participant monitoring and saw this rationale extended to third-party eavesdropping situations.[58] This, the dissenting Justice felt, raised serious fourth and fifth amendment considerations—a position which had been specifically rejected in the past.[59] If a person were forced to assume the risk that whenever he spoke his words might be recorded, then the harm to an individual's right to privacy would be imminent. These rights would then "mean little if ... limited to a person's solitary thoughts, and so fostered secretiveness."[60] In an effort to elucidate the position of the majority, Justice Brennan viewed the inarticulated reason for the Court's failure to meet the fourth amendment issue, and thereby overrule *Olmstead,* as involving two problems somewhat unique to electronic surveillance. Although electronic surveillance was a major aid to law enforcement, it was Justice Brennan's position that the majority feared that it would be necessary to forbid its use if it were brought within the ambit of the fourth amendment because it was "so general, so 'inherently indiscriminate,' so obviously a quest for 'mere evidence.' "[61] Coupled

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Id. at 458-59. The "cases following" *Olmstead* which he felt were also in error included *Goldman* and *On Lee. Id.* at 463.

[58] *Id.* at 449-51. Justice Brennan reasoned:

> If a person commits his secret thoughts to paper, that is no license for the police to seize the paper; if a person communicates his secret thoughts verbally to another, that is no license for the police to record the words.

Id. at 449. It would make no difference which vehicle—the agent or his recording—eventually offers the "secret thoughts" as evidence in a criminal trial. *Id.* at 450.

[59] *Id.* at 453-57.

[60] *Id.* at 449. The disruptions that this limitation would foster in normal life, and the very real dangers of modern surveillance techniques, are meticulously examined. *Id.* at 466-71. *See also* Greenawalt, *Wiretapping and Bugging—Striking a Balance Between Privacy and Law Enforcement,* 50 JUDICATURE 303, 303-04 (1967).

[61] Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's* (pt. II), 66 COLUM. L. REV. 1205, 1245 (1966) (quoting Lopez v. United States, 373 U.S. 427, 463 (1963) (Brennan, J., dissenting)). Justice Brennan imputed to the majority a fear that if fourth amendment protections were imposed, law enforcement efficacy would deteriorate:

> 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.

373 U.S. at 463 (Brennan, J., dissenting).

with this problem was the issue of whether, without notice to the suspect, the fourth amendment standards for a search could be properly satisfied.[62]

From these points of departure, Justice Brennan went further and discussed the second premise he assigned to the majority—the "spill-over" effect such a decision might have upon the validity of other techniques employed in law enforcement. The dissenting Justice distinguished electronic surveillance techniques from other law enforcement practices, such as the utilization of informers, or actual eavesdropping, by explaining:

> The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy.[63]

In *Lopez*, Justice Brennan was urging that a constitutional constraint be placed upon the use of electronic surveillance; however, this limitation was not accepted generally by the Court until *Berger v. New York*[64] and *Katz v. United States*.[65] By relying upon legislative enactment and placing property concept limitations upon electronic surveillance, the Court had been able to avoid

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[62] 373 U.S. at 463-65. Justice Brennan questioned whether a strict fourth amendment warrant could be drawn so as to cover an electronic search. He suggested that some flexibility would be required, but that no affirmative actions to accommodate fourth amendment interests would be taken until the Court took a decisive stance:

> 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.

Id. at 465.

[63] *Id.* at 465-66. Justice Brennan quoted one of the Government's arguments: "[I]f the agent's relatively innocuous conduct here is found offensive, *a fortiori*, the whole gamut of investigatorial techniques involving more serious deception must also be condemned. Police officers could then no longer employ confidential informants, act as undercover agents, or even wear 'plain clothes.'"

Id. at 465. "But this argument," continued Justice Brennan, "misses the point." *Id.* Modern electronic surveillance, in contradistinction to undercover work, will lead to "police omniscience." *Id.* at 466. This, he argued, the Court should never permit, much less encourage. *Id.* at 470-71.

[64] 388 U.S. 41, 44 (1967).

[65] 389 U.S. 347, 353 (1967).

dealing with the impact of these law enforcement practices upon any constitutional rights from 1928 until 1967.

The effect of the Court's avoidance of fourth amendment considerations in its analysis of electronic surveillance had been that some states looked upon the section 605 limitation as applying only to federal practice. Thus, wiretap evidence was deemed admissible in certain state courts, notwithstanding the fact that it had been obtained in violation of the Federal Communications Act.[66] Both federal and state law changed dramatically in 1967 with the Court's consideration of *Berger* and *Katz*. These cases signalled a basic shift in the Court's approach to the problems presented by electronic surveillance.

In *Berger*, agents investigating state liquor authority violations placed a recording device in the office of an attorney by authority of a court order.[67] Evidence obtained by this technique resulted in the conviction of the defendant as a "go-between" in a conspiracy to bribe the Chairman of the New York State Liquor Authority.[68] After appeal through and ultimate affirmance by the New York state courts,[69] the Supreme Court granted certiorari to consider the application of the fourth amendment to this type of investigative practice.[70] The Court, through Justice Clark, determined the New York law allowing court ordered surveillance to be unconstitutional due in part to "the statute's blanket grant of permission to eavesdrop . . . without adequate judicial supervision or protective procedures."[71]

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[66] Schwartz v. Texas, 344 U.S. 199, 201 (1952); People v. Channell, 107 Cal. App. 2d 192, 198-99, 236 P.2d 654, 658 (Dist. Ct. App. 1951); Leon v. State, 180 Md. 279, 284, 23 A.2d 706, 709 (1942); People v. Dinan, 11 N.Y.2d 350, 354-56, 183 N.E.2d 689, 690-91, 229 N.Y.S.2d 406, 409-10 (1962); Harlem Check Cashing Corp. v. Bell, 296 N.Y. 15, 17, 68 N.E.2d 854, 855 (1946). *See* Benanti v. United States, 355 U.S. 96, 101-02 (1957).

[67] 388 U.S. at 44-45. The order was issued pursuant to section 813-a of the old N.Y. Code of Criminal Procedure. Law of May 23, 1942, ch. 924, § 1, [1942] N.Y. Laws 2031, *as amended*, Law of April 12, 1958, ch. 676, § 1, [1958] N.Y. Laws 786, 786-87 (repealed 1968). The present New York statute authorizing such orders is N.Y. CRIM. PRO. § 700.05 *et seq.* (McKinney 1971), *as amended*, (McKinney Supp. 1974-75).

[68] 388 U.S. at 44-45.

[69] People v. Berger, 25 App. Div. 2d 718, 269 N.Y.S.2d 368, *aff'd mem.*, 18 N.Y.2d 638, 219 N.E.2d 295, 272 N.Y.S.2d 782 (1966).

[70] 385 U.S. 967 (1966).

[71] 388 U.S. at 60, 64. The Court reviewed the legal history of eavesdropping and admitted that "[t]he law, though jealous of individual privacy, has not kept pace with . . . advances in scientific knowledge." *Id.* at 49. An analysis of the Court's prior decisions in the area noted that "verbal evidence may be the fruit of official illegality under the Fourth Amendment." *Id.* at 52. *See* Wong Sun v. United States, 371 U.S. 471, 485 (1963). Yet, it concluded, fourth amendment protections had been limited to a " 'physical invasion of a constitutionally protected area.' " 388 U.S. at 52 (quoting from Lopez v. United States, 373

Although the Court conceded that certain aspects of fourth amendment considerations were met by the New York statutes, it nevertheless failed in crucial areas to satisfy the required standards:

> While New York's statute satisfies the Fourth Amendment's requirement that a neutral and detached authority be interposed between the police and the public . . . the broad sweep of the statute is immediately observable.[72]

The statute was found deficient in the general lack of a judicial determination of probable cause;[73] lack of particularity in description of crime, place, and items seized;[74] the continuing nature of the "intrusions, searches, and seizures,"[75] and finally, a total lack of notice afforded to the subject of the surveillance.[76]

Interestingly, all three of the dissenting Justices suggested that greater weight be accorded the effectiveness of electronic surveillance when balanced against individual rights and the restrictive standards established by the majority.[77] The majority also acknowledged the effectiveness of this means of surveillance[78] but concluded that although the fourth amendment requirements " 'are not inflexible, or obtusely unyielding to the legitimate needs of law

U.S. 427, 438-39 (1963)). Even so, such an invasion must conform to fourth amendment requirements; New York's procedure failed because it lacked a provision for "particularization" of the places and objects of the surveillance in the warrant. 388 U.S. at 55-56.

[72] 388 U.S. at 54 (citation omitted).

[73] *Id.* at 54-55. The Court noted that the New York law required " 'reasonable ground to believe that evidence' " may be found, such ground to be substantiated by the oath of certain state law enforcement officers. *Id.* at 54 (quoting from Law of April 12, 1958, ch. 676, § 1, [1958] N.Y. Laws 786 (repealed 1968)). The constitution requires "probable cause," which only

> exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.

Id. at 55.

[74] *Id.* at 55-60. The Court likened this lack of particularity to the "general warrants" abhorred by the framers of the Constitution, and contrasted the New York procedures with those approved in Osborn v. United States, 385 U.S. 323, 330 (1966). 388 U.S. at 56-58.

[75] 388 U.S. at 59. This was termed a continual series of intrusions based on only "a single showing of probable cause." *Id.* Furthermore, there was no mandate to cease the intrusions once the desired evidence had been obtained. *Id.* at 59-60.

[76] *Id.* at 60. The New York procedure, noted the Court,

> permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized.

Id.

[77] *Id.* at 88-89 (Black, J., dissenting); *id.* at 94-95 (Harlan, J., dissenting); *id.* at 112-14 (White, J., dissenting).

[78] *Id.* at 46-47.

enforcement,' "[79] it would nevertheless be necessary that minimal standards be complied with. Additionally, Justice Clark reminded the dissenters that "this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices."[80]

The position established by the Court in *Berger* was reiterated in the following term when *Katz v. United States*[81] was decided. In *Katz,* agents of the Federal Bureau of Investigation, looking into an alleged gambling operation, had attached a listening device to the outside of a telephone booth from which a subject was known to make calls. Evidence obtained through this means was used at trial, resulting in defendants' conviction for interstate transmission of wagers by wire.[82]

Justice Stewart, in writing the majority opinion which reversed the conviction, indicated that the trespass doctrine established in *Olmstead* and reenforced by *Goldman* could no longer be considered controlling.[83] Unlike the *Berger* situation, in the *Katz* case no court order had been obtained prior to installation of the listening device.[84] The Supreme Court, in rejecting an approach premised upon a trespass theory, referred to the fourth amendment, noting that it provided protection for "people—and not simply 'areas'—against unreasonable searches and seizures."[85] Although the agents

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[79] *Id.* at 63 (quoting from Lopez v. United States, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting)).

[80] 388 U.S. at 63.

[81] 389 U.S. 347 (1967).

[82] *Id.* at 348.

[83] *Id.* at 353. The Ninth Circuit had affirmed the trial conviction because of a lack of "physical entrance" into a constitutionally protected area. 369 F.2d 130, 134 (9th Cir. 1966). The court of appeals specificially relied upon the *Olmstead-Goldman* line of cases. *Id.* The Supreme Court granted a limited writ of certiorari specifically to reconsider the fourth amendment issue. 386 U.S. 954, 955 (1967). Justice Stewart's opinion reformulated the issues presented, disregarding both the " 'constitutionally protected area' " concept and the "general constitutional 'right to privacy' " concept as had been founded on the fourth amendment. 389 U.S. at 350. Referring to the *Olmstead* decision, Justice Stewart ruled:

> [W]e have since departed from the narrow view on which that decision rested. . . .
>
> We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling.

Id. at 353.

[84] *See* 389 U.S. at 354-56.

[85] *Id.* at 353. Justice Stewart noted:

> It is true that this Court has occasionally described its conclusions in terms of "constitutionally protected areas," see, *e.g., Silverman v. United States,* 365 U.S. 505, 510, 512; *Lopez v. United States,* 373 U.S. 427, 438-39; *Berger v. New York,* 388 U.S. 41, 57, 59, but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

Id. at 351 n.9.

involved in the eavesdropping acted in moderation, the lack of judicial review prior to the interception resulted in a fatal constitutional flaw.[86]

For the second time within the same year, the Court outlined the means by which an electronic surveillance might be constitutionally upheld. It was explained in *Katz* that the "restraint" exercised by the agents

> 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.[87]

If these fourth amendment standards had been met, the Court suggested that such a procedure in a similar factual circumstance would be supported.

Enactment and Scope of Title III

Congress had begun to consider legislation dealing specifically with electronic surveillance even before the *Berger* case was decided by the Court. Shortly after certiorari had been granted in that case, Senator McClellan introduced the Federal Wire Intercep-

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[86] *Id.* at 354, 357. The Court, stressing well-established search-and-seizure procedural law, explained:

> [S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.
>
> It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit." And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.

Id. at 357-58 (footnotes omitted).

[87] *Id.* at 356. The Government had contended that the agents, relying upon *Olmstead* and *Goldman*, had used the "least intrusive means" possible:

> They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

Id. at 354 (footnotes omitted).

tion Act in January of 1967.[88] Within days after the *Berger* decision, another bill was introduced by Senator Hruska, referred to as the Electronic Surveillance Control Act of 1967.[89] Title III of the Omnibus Crime Control and Safe Streets Act of 1968 represented a combination of these two acts, modified to meet the standards mandated in *Berger* and *Katz*.[90]

In accordance with the standards expressed by the Court, Congress provided that electronic surveillance "be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court."[91] In other aspects, the dictates of *Berger* and *Katz* had been meticulously complied with in the drafting of Title III. For example, a law enforcement officer must apply for permission to use this investigative technique by describing the particular offense involved, the individuals whose conversations are to be intercepted, and the location of the facilities to be placed under surveillance.[92] Also, a statement must be made concerning what other investigative techniques have been employed and why alternate techniques would be unsuccessful or excessively dangerous if they were to be employed.[93] The time requirement emphasized in *Berger*[94] is a necessary requirement in the application process.[95]

An interception order will be issued by the court in an ex parte proceeding only if the judge is satisfied that the following standards have been met:

> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
>
> (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
>
> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

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[88] S. 675, 90th Cong., 1st Sess. (1967). The Supreme Court had granted certiorari in *Berger* on December 5, 1966. 385 U.S. 967 (1966).

[89] S. 2050, 90th Cong., 1st Sess. (1967) was introduced on June 29. The *Berger* decision had been handed down on June 12. 388 U.S. 41 (1967). Senator Hruska took *Berger* "into full consideration in the drafting of the bill." 113 CONG. REC. 18,000 (1967) (remarks of Senator Hruska).

[90] S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968).

[91] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, tit. III, § 801(d), 82 Stat. 211.

[92] 18 U.S.C. § 2518(1)(b) (1970).

[93] *Id.* § 2518(1)(c).

[94] *See* note 75 *supra* and accompanying text.

[95] 18 U.S.C. § 2518(1)(d) (1970).

> (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.[96]

Finally, on termination of a surveillance, any recordings which were made are to be sealed by the judge, and notice is to be given to the parties whose conversations were intercepted.[97]

Despite the seemingly comprehensive approach taken by the drafters of Title III and the meticulous manner in which the teachings of *Berger* and *Katz* were incorporated, there remained a question as to what treatment the courts would give the new legislation. In the wake of its passage, the new federal wiretapping law has been the subject of allegations of unconstitutionality in a number of circuits.[98] Each court of appeals which has had to answer the question has found that the protections of the fourth amendment were vouchsafed by the Act and that the "imaginative solution" envisioned by Justice Brennan's dissent[99] in *Lopez* was met.[100] The important remaining question is whether law enforcement's use of electronic surveillance in particular cases will adhere to constitutional and statutory standards. However, prior to a meaningful discussion of the standards which courts have insisted law enforcement personnel must meet, it is important to consider the scope of Title III.

Initially, it is evident that the Act contemplated any situation in which an electronic device would be used to intercept speech, either over wire communications or in any situation where a speaker would reasonably expect privacy.[101] These circumstances,

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[96] *Id.* § 2518(3).

[97] *Id.* § 2518(8).

[98] For a listing of various cases and circuits which have considered the constitutionality of the Act see note 100 *infra.*

[99] 373 U.S. at 465.

[100] *See* United States v. O'Neill, 497 F.2d 1020, 1026 (6th Cir. 1974); United States v. James, 494 F.2d 1007, 1012-13 (D.C. Cir.); United States v. Tortorello, 480 F.2d 764, 775 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973); United States v. Bobo, 477 F.2d 974, 978-81 (4th Cir. 1973); United States v. Cafero, 473 F.2d 489, 496 (3d Cir. 1973), *cert. denied,* 417 U.S. 918 (1974); United States v. Cox, 462 F.2d 1293, 1304 (8th Cir. 1972), *cert. denied,* 417 U.S. 918 (1974); United States v. Cox, 449 F.2d 679, 687 (10th Cir. 1971).

[101] In terms of the Act's scope, the definitions relating to "communications," both oral and wire, are comprehensive in their approach. Sections 2510(1) and (2) provide as follows:

> "[W]ire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

however, obviously do not serve as an all-inclusive list of eavesdropping practices. Thus, purely aural eavesdropping, pen register analysis, toll call records, and consensual eavesdropping remain beyond the protection afforded by the Act.[102] At least some of these practices require resort to some other form of court process. For example, the acquisition of toll call records may require a subpoena,[103] and the use of a pen register requires a search warrant when used independently of an audio surveillance.[104]

While it is possible to make use of a pen register independently of a wiretap, almost all wiretap facilities contain pen register

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. . . "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ;

18 U.S.C. §§ 2510(1), (2) (1970). The definition relating to interception, however, is somewhat more restricted in that it is limited to "the aural acquisition of the contents of any wire or oral communication." *Id.* § 2510(4). Practices specifically exempted in the Act are listed at *id.* § 2511(2). Included in these are the general consent situations in both aural and wire circumstances. *See id.* §§ 2511(2)(c), (d). For the text of these subsections see note 56 *supra.*

[102] Regarding the use of pen register analysis, a number of cases have placed this tool outside the definition of "interceptions." *See, e.g.,* Korman v. United States, 486 F.2d 926, 931 (7th Cir. 1973); United States v. Lanza, 341 F. Supp. 405, 421 (M.D. Fla. 1972); United States v. King, 335 F. Supp. 523, 549 (S.D. Cal. 1971), *aff'd in part and rev'd in part,* 478 F.2d 494 (9th Cir. 1973). Toll call records held by the telephone company do not fall within the statutory definition of "interceptions." *See* 18 U.S.C. § 2510(4) (1970). *See also* United States v. Kohne, 347 F. Supp. 1178, 1183 (W.D. Pa. 1972). In the case of consensual eavesdropping see notes 55 and 56 *supra.*

[103] Pursuant to FED. R. CRIM. P. 17(c), this type of process may be used to acquire toll records either at trial or for the purpose of a grand jury investigation. Subpoenas are delivered in blank to the United States Attorney, who then fills in the pertinent information prior to its being served.

In the case of toll records, the United States Attorney will generally direct a subpoena to the telephone company, requesting the subscriber information. A defendant is then unable to object to their acquisition as the property is that of the telephone company. *See generally* Alderman v. United States, 394 U.S. 165, 174 (1969); United States v. Covello, 410 F.2d 536, 542 (2d Cir. 1969); United States v. Kohne, 347 F. Supp. 1178, 1183-84 (W.D. Pa. 1972).

[104] FED. R. CRIM. P. 41(c) regarding issuance of search and seizure warrants provides in pertinent part:

A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

In United States v. Falcone, 505 F.2d 478 (3d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3465 (U.S. Feb. 25, 1975). The court explained the function of a pen register:

The tape recorder records the aural manifestation of the electrical impulse which also discloses, if played at a slower speed and examined by an expert, the telephone number dialed. A pen register functions to facilitate the decipherment of the number dialed. It is a mechanical refinement which translates into a different "language" that which has been monitored already. Simply stated, the pen register avoids a mechanical step; it translates automatically and avoids the interpreter.

505 F.2d at 483 (footnotes omitted).

capacity within them. Recently, an issue has been raised as to whether independent authorization is necessary to employ the pen register when it is used in conjunction with a form of electronic surveillance which falls under Title III. In this regard, the courts seem to be in agreement that separate authorization is not necessary. Recently, the United States Court of Appeals for the Third Circuit was faced with such an issue and

> conclude[d] that an order permitting interception under Title III for a wiretap provides sufficient authorization for the use of a pen register, and no separate order for the latter is necessary.[105]

When used independently of electronic surveillance, law enforcement officers should be careful to employ equipment that contains only the mechanical pen register capacity. In *United States v. Focarile,*[106] the court gave careful consideration to certain problems encountered by the use of pen registers. Defendants attacked the order for a pen register device on the grounds that it failed to meet the standard of Title III and lacked sufficient probable cause.[107] In concluding that the defendants' issues were without merit, the court thoroughly discussed the mechanics of how a pen register device is employed. The court noted initially that the device receives only electronic impulses and that no aural reception results from the implanting or use of the equipment.[108] It was, however, recognized that certain types of pen register equipment do have a "connection with aural frequencies in that electrical impulses can be converted to aural vibrations through a transducer such as a headphone or loudspeaker."[109] The court then observed that because no evidence was presented which indicated that such a transducer was employed, no violation of the Title III provisions had resulted.[110] Thus, as enacted and interpreted by court decision, Title III serves to constrain only a narrow area—the use of electronic equipment to obtain aural communications.

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[105] United States v. Falcone, 505 F.2d 478, 482 (3d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3465 (U.S. Feb. 25, 1975).

[106] 340 F. Supp. 1033 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd,* 416 U.S. 505 (1974).

[107] 340 F. Supp. at 1038.

[108] *Id.* at 1038-39. The court stated in pertinent part:

> [T]his court is of the opinion that the use of a pen register or similar device is not an "interception" within the meaning of section 2510(4) of Title III therefore making compliance with Title III unnecessary.

Id. See also notes 102 & 104 *supra.*

[109] 340 F. Supp. at 1040.

[110] *Id.*

CONSTITUTIONAL STANDARDS

Courts have generally recognized that the validity of electronic surveillance in particular cases will be measured by strict compliance with both fourth amendment standards and the statutory scheme of Title III. Of primary importance in such cases are the safeguards provided in the Constitution, particularly fourth amendment standards relating to probable cause, minimization, and duration.[111]

Initially, it should be observed that Title III mandates a showing of probable cause that specific offenses are being committed, that particular conversations will be obtained, and that the subjects being investigated are known to use the facilities to be monitored.[112] The standard to be employed in this showing has been established as the same degree of probable cause necessary for a valid search and seizure.[113] The indicia for showing such probable cause, however, are necessarily different.[114]

In addition to a judicial finding of probable cause, a judge must also determine that other investigative techniques have either been tried and have failed or that they are impractical in the scheme of a particular investigation.[115] Commonly mentioned alternatives include standard visual surveillance, undercover operations, search warrants, and grants of immunity. This statutory requirement is very often met through the use of these alternate techniques in establishing the probable cause for the electronic surveillance.[116] The actual showing and judicial determination that other methods have been or would be ineffectual nevertheless serve as a valuable safeguard which can prevent law enforcement use of electronic surveillance as a means of mere convenience rather than need.

Once probable cause has been shown and a court order allow-

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[111] For a discussion of fourth amendment standards relating to electronic surveillance established by the Supreme Court in United States v. Berger, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967), see notes 67-87 *supra* and accompanying text.

[112] *See* 18 U.S.C. § 2518(3) (1970). For a listing of the subsections in this particular section see text accompanying note 96 *supra*.

[113] *See, e.g.*, United States v. Kleve, 465 F.2d 187, 190 (8th Cir. 1972); United States v. DeCesaro, 349 F. Supp. 546, 549 (E.D. Wis. 1972); United States v. Scott, 331 F. Supp. 233, 240-41 (D.D.C. 1971).

[114] *Compare* FED. R. CRIM. P. 41 *with* 18 U.S.C. §§ 2518(3)(a)-(b), (d) (1970).

[115] *See* 18 U.S.C. § 2518(3)(c) (1970).

[116] No specific statement relating to the availability and probable success of other investigative techniques need be included in the authorizing order. *See* United States v. Curreri, 363 F. Supp. 430, 435 (D. Md. 1973).

ing electronic surveillance has been issued, additional fourth amendment standards must then be met. Elements of duration and particularity are of special concern when dealing with electronic surveillance. Title III provides dual safeguards for termination: either obtainment of the "objective" of the surveillance or expiration of a period not greater than 30 days, whichever occurs first.[117]

A problem may be encountered when a particular interception order names certain individuals and "others yet unknown." This wording has been held not to constitute a general warrant.[118] While the fourth amendment requires a description of "the place to be searched, and the persons or things to be seized,"[119] it does not require the naming of "the persons from whom things will be seized."[120] Although an interception order naming individuals and "others" is not a general warrant, courts reviewing the termination of such a surveillance will apply a reasonableness standard in deciding when termination should have occurred.[121] Thus, an investigation of a conspiracy, for example, employing electronic surveillance will be allowed to continue for the approved length unless the participants in the conspiracy can be identified and the full scope of the crime revealed before expiration of the authorization.[122]

One district court, in passing on issues relating to termination and notice, concluded that the standards established in Title III were insufficient to safeguard basic constitutional rights. In *United States v. Whitaker*,[123] the trial court in granting a motion to suppress held:

> Title III permits the government to conduct lengthy continuous searches with great discretion in the hands of the execut-

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[117] 18 U.S.C. § 2518(5) (1970).

[118] *See* United States v. Fiorella, 468 F.2d 688, 691 (2d Cir. 1972), *cert. denied*, 417 U.S. 917 (1974).

[119] U.S. CONST. amend. IV.

[120] United States v. Fiorella, 468 F.2d 688, 691 (2d Cir. 1972), *cert. denied*, 417 U.S. 917 (1974).

[121] *See, e.g.*, United States v. Cafero, 473 F.2d 489, 496-97 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974).

[122] *Id.* at 492-93. The court perceived the legislative intent regarding termination to be as follows:

> (1) the length of interception in each case be determined by judicial decision on a case-by-case basis; (2) the interception be terminated automatically, not necessarily on a predetermined calendar date, but when the objective of the authorization is achieved . . . and (3) while there is a maximum statutory life span of thirty days for each approval order, each interception has the very real potential of earlier extinction . . . .

Id. at 495 (footnote and citation omitted).

[123] 343 F. Supp. 358 (E.D. Pa. 1972), *rev'd*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 950 (1973).

> ing officers, thus violating the Fourth Amendment's prohibition against general searches.[124]

The district court reached this conclusion after having passed with favor upon issues relating to authorization, probable cause, and use of other investigative techniques. However, the Act as a whole was considered to be inadequate in the areas of duration and notice.[125] The court ruled that a maximum of thirty days was so long as to constitute the same sort of continuous surveillance condemned in *Berger v. New York*.[126] Additionally, the court was not satisfied with the statutory provision that the surveillance terminate upon achieving a specific objective. Such a standard in the court's opinion relied too much on the judgment of the executing officer. Thus, executing officers were left "to determine when they [had] learned enough details . . . so that they should and must stop their interception."[127] Finally, the Act was viewed as permitting unreasonable searches and seizures because no prompt notice was required upon completion of the surveillance.[128]

Approximately six months after the district court ruled unfavorably upon the constitutionality of Title III, that court's reasoning was argued to the Third Circuit court of appeals regarding duration in the case of *United States v. Cafero*.[129] The appellate court considered a substantial portion of the lower court's rationale prior to the actual appeal of the *Whitaker* decision. In *Cafero,* the court of appeals rejected the logic of the lower court in *Whitaker.* On examination of the termination requirement, the circuit court expressed their view as follows:

> By terminating interception upon attainment of the objective, Title III has made it possible for courts to exclude evidence obtained through continuation of the interception after the authorization has terminated. Under Title III, the time at which the authorization terminated is an ascertainable fact.[130]

The appellate court in *Whitaker,* one month following the decision

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[124] 343 F. Supp. at 363 (footnote omitted).

[125] *Id.* at 366-68. Referring to the directive in the statute to terminate interception when the authorized objective has been obtained, the court observed: "Such a general direction inserted in every order is not a constitutional substitute for specific pre-search controls imposed by a judge." *Id.* at 367-68.

[126] *Id.* at 363 (citing Berger v. New York, 388 U.S. 41, 59-60 (1967)). *See* note 75 *supra* and accompanying text.

[127] 343 F. Supp. at 367.

[128] *Id.* at 368.

[129] 473 F.2d 489 (3d Cir. 1973).

[130] *Id.* at 498.

in *Cafero,* reversed per curiam on the issue of notice and with reliance upon *Cafero* regarding termination.[131]

Title III also contains within it a necessary requirement of minimization designed to protect against any unchecked interceptions during the time of the actual surveillance.[132] Minimization is the process by which law enforcement officials, under court supervision, attempt to limit interception and monitoring of calls unrelated to the surveillance. An ongoing effort is therefore made to find a middle ground between the need to intercept relevant material and the concern for fourth amendment and privacy rights. Despite the fact that no clear-cut standard for minimization is set out in Title III, the courts have attempted to guarantee the rights of the individual while at the same time granting to the government a degree of latitude necessary for a successful surveillance.[133] Recognizing the impossibility of totally eliminating "non-pertinent, innocent, and unrelated calls,"[134] a balance of rights is maintained through a threshold judicial decision as to the "reasonable" efforts of agents attempting to garner relevant information.

Recent cases may serve to indicate the considerations which a court should take into account in determining whether approved eavesdropping activities have been properly minimized. In *United States v. Bynum,*[135] a separate hearing was conducted to inquire into defense claims that intercepted calls had not been properly minimized. In *Bynum,* fourteen defendants were tried and convicted of conspiring to sell and distribute narcotics in the southern district of New York. At their trial, the Government had introduced a number of conversations between the co-conspirators which had been intercepted using electronic surveillance pursuant to court authorization. Counsel for one of the defendants moved to suppress the product of the government surveillance on the ground that the statutorily required minimization had not occurred. Due to defense counsel's failure to appear, Judge Pollack

[131] United States v. Whitaker, 474 F.2d 1246, 1247 (3d Cir.), *cert. denied,* 412 U.S. 950 (1973).

[132] 18 U.S.C. § 2518(5) (1970).

[133] *See, e.g.,* United States v. Tortorello, 480 F.2d 764, 783-84 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973); United States v. Fino, 478 F.2d 35, 37 (2d Cir. 1973), *cert. denied,* 417 U.S. 918 (1974); United States v. Falcone, 364 F. Supp. 877, 886-87 (D.N.J. 1973), *aff'd,* 505 F.2d 478 (3d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3465 (U.S. Feb. 25, 1975); United States v. Lanza, 349 F. Supp. 929, 932 (M.D. Fla. 1972).

[134] United States v. Falcone, 364 F. Supp. 877, 886 (D.N.J. 1973), *aff'd,* 505 F.2d 478 (3d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3465 (U.S. Feb. 25, 1975).

[135] 475 F.2d 832 (2d Cir.), *on remand,* 360 F. Supp. 400 (S.D.N.Y.), *aff'd,* 485 F.2d 490 (2d Cir. 1973), *vacated,* 417 U.S. 903, *on remand,* 386 F. Supp. 449 (S.D.N.Y. 1974).

denied defendants' motion after trial without holding an evidentiary hearing to ascertain the precise validity of their claims.[136] On appeal from the initial conviction, the Second Circuit court of appeals remanded the case so that such a hearing could be had.[137]

On reconsideration, Judge Pollack conducted an extensive hearing into defendants' claim and announced that the interceptions were sufficiently minimized.[138] The trial court recognized that minimization is not an inflexible yardstick to be applied to every set of facts in order to determine if government activity "measures up."[139] Rather, "[t]he minimization provision should be seen as requiring a limiting process."[140] Necessarily, the court must consider the totality of circumstances which make up the case being considered in order to properly determine whether the requirement has been complied with.[141]

Although consideration must be given to all of the variables in a particular fact situation, the *Bynum* court placed special emphasis on "the degree of supervision over the surveillance provided by an impartial judicial officer."[142] The court explained further that

> [c]lose scrutiny by a federal or state judge during all phases of the intercept from the authorization through reporting and inventory, enhances the protection of individual rights within the context of an extreme, yet essential law enforcement activity. Such scrutiny is basic to the structure and the constitutionality of the Act.[143]

The chance for abuse in the use of electronic surveillance is therefore held to a minimum where law enforcement officials employing it must continually justify their activity to a member of the independent judiciary. Thus, the discretionary use of the Title III procedure which allows a judge to require periodic reports within the period of the authorized interception so as to closely monitor its progress[144] was highly recommended by the court.[145]

A similar practice was followed in *United States v. Falcone,*[146] in

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[136] *See* 475 F.2d at 833-35.

[137] *Id.* at 837.

[138] 360 F. Supp. at 420.

[139] *Id.* at 410.

[140] *Id.* at 409.

[141] *Id.* at 410.

[142] *Id.*

[143] *Id.*

[144] *See* 18 U.S.C. § 2518(6) (1970).

[145] 360 F. Supp. at 410.

[146] 364 F. Supp. 877 (D.N.J. 1973), *aff'd,* 505 F.2d 478 (3d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3465 (U.S. Feb. 25, 1975).

which a federal district court conducted an extensive pretrial examination of government agents' interception of telephone calls in order to determine if proper efforts to minimize unnecessary receptions were made.[147] The court addressed itself to a number of practical problems which even the most careful law enforcement agent may encounter when using electronic surveillance. Such problems as the identification of other conspirators, general or privileged callers, and the use of code words in conversations between co-conspirators create difficulties which must be considered when trying to evaluate the "good faith reasonable effort" made by agents in the process of conducting electronic surveillance.[148]

No amount of practical difficulties would excuse, however, an unbridled reception. The issue must be resolved by a judicial determination of what effort had been made to safeguard a subject from an unwarranted intrusion. This test may be more easily satisfied when the system of discretionary reports to the judiciary is employed. In *Falcone,* agents submitted five-day reports pursuant

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[147] 364 F. Supp. at 879. The court had issued the order authorizing a 20-day wiretap in August 1972, and subsequently extended it twice. The order covered the telephone of defendant Pasquale Falcone, who was suspected of importation and distribution of heroin, and of conspiracy, and who was subsequently indicted, along with others for these crimes. *Id.* The telephone intercept, extending over a total period of fifty days, covered "approximately 2,100 attempted telephone calls." *Id.* at 881. The original order and both extensions had specifically required minimization, pursuant to the requirements of Title III. *Id.* at 879 & n.1. *See* 18 U.S.C. § 2518(5) (1970). The defendants challenged the introduction of evidence gleaned from the Government's electronic surveillance on grounds of failure to minimize in compliance with the order. 364 F. Supp. at 879.

[148] *See* 364 F. Supp. at 883-86. The court conducted an extensive analysis of the defendants' objections to the monitoring agents' conduct. During the Falcone wiretap, the agent supervising the operation, Special Agent Michael Campbell, kept the agents who ran the equipment apprised of those persons commonly called by Falcone who, on the basis of other investigation, had been identified as non-conspirators. Such calls were, generally, not to be recorded. As the list of exempt associates was changed, however, some "innocent" calls were monitored. Yet the court recognized that any supposed "non-conspirator may, in fact, become a conspirator in the near future or even during the very call being monitored." *Id.* at 883. The recording of some "innocent" calls, therefore, would not be fatal to the entire operation under the minimization requirement. *Id.* The court concluded that a "blanket prohibition" on calls to nonconspirators would be an unreasonable interpretation of the statute. The nature of the parties' relationship, their activities at the time of any given call, and the apparent nature of the conversation must be considered. *Id.* at 884.

Campbell had also stipulated that calls between spouses were not to be recorded. This command was generally, although imperfectly, followed. The court found that, "[g]iven the matter of identification [of the callers] and the understandable human lapses, including inattention, this certainly" was not unreasonable. *Id.* at 885. Those few calls which were not minimized, he noted, generally lasted less than a minute. *Id.*

The use of code words by the alleged conspirators, noted the court, added greatly to the agents' problems of identification:

to a court order.[149] These reports are not mandated by the statute and there exists no real standard as to the information which they should contain. The standard to be applied in submitting such a report is dependent upon the desire of the issuing judge.[150] Thus, defendants are generally without grounds to challenge the sufficiency of such reports. These reports, however, would seem to offer an additional safeguard both to an individual's rights and to the validity of the entire surveillance. The use of periodic reports to the judicial branch provides yet another guarantee that an independent review is being directed at the actions of law enforcement personnel.

Upon appeal of the *Falcone* case,[151] another issue under the Title III provisions arose, albeit not of a constitutional nature. The defendants claimed that since the wiretap tapes had not "immediately" been submitted to the judge for sealing, their contents should have been suppressed.[152] The Court of Appeals for the

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> [A]pplying the yardstick of realism, it was impossible for the agents to eliminate all non-pertinent conversations, particularly in an electronic surveillance such as this one involving numerous defendants speaking in coded and guarded conversations . . . .

Id. at 886.

[149] *Id.* at 895. Title III provides that an interception order

> may require reports to be made to the judge who issued the order showing what progress has been made . . . . Such reports shall be made at such intervals as the judge may require.

18 U.S.C. § 2518(6) (1970).

The defendants in *Falcone* had introduced a Department of Justice manual of operations which specified actions such as the making of daily memoranda to the Government attorney and of daily verbatim transcripts of monitored calls, and the procedures to be followed in having the tapes sealed by the judge. The manual had not been complied with by the Government. The court refused to view the manual as controlling. 364 F. Supp. at 894. Whether statutory mandates had been carried out, it stated, "is to be determined on the basis of my own judgment and application of the relevant statutory provisions." *Id.*

[150] *See* note 149 *supra*. In United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971), the reporting procedure was attacked because the reports given pursuant to the court order were oral, not written. Such a variation from formal practice was held to be permissible, as the requirements for reports were statutorily within the judge's discretion. *Id.* at 194.

[151] 505 F.2d 478 (3d Cir. 1974). At trial, the appellants Pasquale Falcone and Wally Berger were convicted on drug conspiracy counts. *Id.* at 479. While the court of appeals affirmed these convictions against several allegations of error, it specifically approved of "the thoughtful and thorough opinion of the district court." *Id.* at 480.

[152] *Id.* at 483. Title III provides that

> [i]*mmediately* upon the expiration of the period of the order . . . such recordings shall be made available to the judge issuing such order and sealed under his directions.

18 U.S.C. § 2518(8)(a) (1970) (emphasis added). There had been an unwarranted forty-five-day delay in submitting the Falcone tapes to the district court. 505 F.2d at 485-86 (Rosenn, J., dissenting). The defendants argued that the tapes should therefore be suppressed. *Id.* at 483. *See* 18 U.S.C. § 2518(10)(a)(i) (1970).

Third Circuit held that, even if the Government's explanation for the delay was not satisfactory, any violation of the statutory provision would not require suppression.[153] Circuit Judge Rosenn, however, dissented from the ruling of his colleagues. His review of the legislative history of Title III led him to conclude that Congress had intended that such a violation of the Act would be so egregious as to require suppression.[154]

STATUTORY STANDARDS

In addition to the constitutional standards incorporated into the Act, Title III includes statutory protections designed to limit the use and potential misuse of electronic surveillance. Among these safeguards, authorization procedure both to intercept and

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Defendants had also argued on appeal that a pen register used in conjunction with the wiretap should have had separate authorization, that the initial authorization was defective, failure to minimize, unconstitutionality of Title III, and various errors at trial. Those claims were rejected by the court. 505 F.2d at 480, 485.

[153] 505 F.2d at 483-84. The court looked to legislative history and found that the intent of Congress in section 2518(8)(a) was "to insure the integrity of the tapes *after interception.*" *Id.* at 483 (emphasis by court). *See* S. REP. No. 1097, 90th Cong., 2d Sess. 104-05 (1968). Since there had been no allegation that the tapes had been tampered with, the court ruled that the doctrine of United States v. Giordano, 416 U.S. 505 (1974), and United States v. Chavez, 416 U.S. 562 (1974), would not require suppression. 505 F.2d at 483. For a discussion of the *Giordano* and *Chavez* decisions see notes 168-76 *infra* and accompanying text.

The court noted that in United States v. Poeta, 455 F.2d 117 (2d Cir.), *cert. denied,* 406 U.S. 948 (1972), "police confusion over the applicable law was held a sufficient explanation" for a delay in sealing tapes of a wiretap. 505 F.2d at 484. Administrative delay, suggested in *Falcone,* should occasion no different result where there had been no tampering. *Id.*

[154] 505 F.2d at 485-88 (Rosenn, J., dissenting). He reasoned that the final provision of the sealing subsection of Title III should control. This language provides:

> The 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 . . . .

18 U.S.C. § 2518(8)(a) (1970). He did not believe that the Government's explanation for failure to comply with all the sealing requirements was "satisfactory," and distinguished United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), *cert. denied,* 406 U.S. 948 (1972) (ambiguities of state procedure held to excuse 13-day delay in sealing). In that case, he pointed out, the Government's delay had been satisfactorily explained. 505 F.2d at 486-87.

He also found that the basis for suppression was stronger than in United States v. Giordano, 416 U.S. 505 (1974), and United States v. Chavez, 416 U.S. 562 (1974). Those cases had construed the general suppression section, whereas here the exclusionary rule was built into the same section which defined the specific procedure to be followed. 505 F.2d at 487-88. *Compare* 18 U.S.C. § 2518(10)(a) (1970) *with id.* § 2518(8)(a).

Finally, he noted that while the trial court had found no tampering with the tapes, the defendants had argued some evidence to the contrary. 505 F.2d at 487 n.6. He feared that if any alterations were to be made in wiretap tapes, they could be well-nigh undetectable. *Id.* at 488.

disclose,[155] provisions for suppression,[156] and enumerated criminal and civil remedies[157] are most significant.

In the area of initial authorization, the Supreme Court has recently set a standard of strict compliance with the statutorily mandated procedure. In considering *United States v. Giordano*[158] and *United States v. Chavez*,[159] the Court was presented with an

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[155] 18 U.S.C. § 2516 (1970) outlines the requirements for authorization to intercept any wire or oral communications. The procedure prescribed in section 2518 must be conformed to. *See* note 156 *infra*.

Section 2517 limits disclosure of the contents of intercepted communications. Generally, a law enforcement officer may divulge such legally discovered contents to another officer only "to the extent that such disclosure is appropriate to the proper performance of the official duties of" both, and he may use such contents only in carrying out his official duties. 18 U.S.C. § 2517(1) (1970). Anyone may testify as to properly intercepted conversations either before a grand jury or in a criminal trial, federal or state. *Id.* § 2517(3). If the contents reveal evidence of a crime other than as specified in the court order allowing interception, court testimony is permitted only if the evidence would otherwise have complied with the provisions of the Act. *Id.* § 2517(5). Whether or not the Act has been conformed to, privileged communications must remain privileged. *Id.* § 2517(4).

[156] Title III contains its own exclusionary rule:

> 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 (1970).

A motion to suppress intercepted communications, or the fruits thereof, may be made prior to their admission into evidence, or, if possible, before the proceeding begins,

> 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.

18 U.S.C. § 2518(10)(a) (1970). Should the motion be granted, the objected-to evidence "shall be treated as having been obtained in violation of" the Act. *Id.*

[157] Those whose conversations or other wire communications are illegally intercepted may recover civil damages from "any person who intercepts, discloses, or uses . . . such communications" or procures another to do so. 18 U.S.C. § 2520 (1970). The recovery shall comprise actual damages (not less than $1,000), punitive damages, and costs. *Id.*

Likewise, illegal interception, use, or disclosure of protected communications, or manufacture, possession, or advertisement of intercepting devices (other than by a government contractor or agent), will subject the violator to criminal sanctions of up to a $10,000 fine or five years imprisonment. *Id.* §§ 2511-12. Such devices are subject to confiscation. *Id.* § 2513.

Both remedies, however, are limited by the Act's final caveat:

> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

Id. § 2520.

[158] 416 U.S. 505 (1974), *aff'g* 469 F.2d 522 (4th Cir.), *aff'g on other grounds* United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972).

[159] 416 U.S. 562 (1974), *rev'g in part* 478 F.2d 512 (9th Cir. 1973).

opportunity to dilute the exacting standard for internal Justice Department authorization as set forth in Title III. According to the precise wording of the Act, either the Attorney General himself or a "specially designated" assistant may authorize an application to be made in court.[160] However, in *Giordano,* the initial approval had been made by the Attorney General's Executive Assistant, who had not been "specially designated" to review such applications. The Executive Assistant, in the Attorney General's absence, had placed the Attorney General's initials on a memorandum approving the authorization.[161] In turn, the Assistant Attorney General notified a field attorney and agents that the request had been reviewed and that probable cause did exist based upon the "facts and circumstances" related therein:

> "Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by § 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an order of the court pursuant to § 2518 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs to intercept wire communications from the facility described above, for a period of 21 days."[162]

The district court viewed this letter as identifying the Assistant Attorney General as the reviewing authority and so indicated in its order allowing electronic surveillance.[163] Subsequent to this authorization, the Attorney General himself approved a request for an extension.[164]

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[160] 18 U.S.C. § 2516(1) (1970).

[161] 340 F. Supp. at 1051-52. The affidavit of the Executive Assistant stated that the Attorney General, John Mitchell, "had refrained from designating any Assistant Attorney General to authorize" approvals of wiretap applications, but had reviewed each application himself. *Id.* at 1051. Under a "general authorization," however, his Executive Assistant had been empowered to act upon such applications when Mitchell was called away from the office. *Id.* at 1051-52.

[162] *Id.* at 1059 (quoting from Letter from Will Wilson, Oct. 16, 1970). This conclusion, if true, would certainly comply with the Act's requirements. *See* 18 U.S.C. §§ 2516(1), 2518(1)(a) (1970). Yet not only had Attorney General Mitchell not "specially designated" any of his Assistants, but "neither Mitchell nor Wilson had heard of the Giordano application or signed the letters bearing their respective initials and signature." 469 F.2d at 524 & n.3. It was never determined who did sign the "Will Wilson" letters. *See* 416 U.S. at 510.

[163] 340 F. Supp. at 1059-60. Acting on the papers filed, the wiretap was authorized

> " . . . [p]ursuant to application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the power conferred on him by § 2516 of Title 18, United States Code . . . . "

Id. at 1060 (quoting from the order of the court).

[164] 416 U.S. at 550 (Powell, J., concurring in part and dissenting in part).

Evidence acquired by the wiretaps led to an indictment in the district of Maryland which charged defendants with violations of the federal narcotics laws.[165] The defendants' pretrial motion to suppress, which attacked the validity of the electronic surveillance, was granted by the district court on the grounds that the authorizing officer within the Justice Department had been misidentified, and thus the surveillance had been accomplished in contravention of law.[166]

The district court relied upon the precise language in section 2518(4)(d) which provides that " '[t]he identity of . . . the *person* authorizing the application' " shall be made in the court order which permits an interception.[167] The court read the initial authorization process and the requirement that the person authorizing be designated in the court's order to be a "two-prong test."[168] This test, although "statutory" in nature, was then analogized to the constitutional standard for search and seizure[169] which then called for listing in a warrant "the names of the persons whose affidavits have been taken in support thereof."[170] Hence, the misidentification in the court's order was fatal to the fruits of the

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[165] *See* 469 F.2d at 525.

[166] 340 F. Supp. at 1060.

[167] *Id.* at 1055 (quoting from 18 U.S.C. § 2518(4)(d) (1970)) (emphasis by court).

[168] *Id.* at 1057. After reviewing the legislative history of the Act, the court came to the conclusion that the "person" in section 2518(4)(d) "was meant to mean a specific, identifiable, individual human being." *Id.* at 1056. Likewise, the court interpreted section 2516(1) to have intended

> that *the person who actually authorized* the application *must be made known* to the judge to whom the application was submitted and to those others to whom the contents of his order would be disclosed. . . .

Id. (emphasis by court). This conjunction of meaning, then, led to two "equally important" requirements: The judge must know who in fact authorized the application, and the person authorizing the application must in fact be either the Attorney General or an Assistant Attorney General who had been actually delegated this authority. *Id.* at 1057. Both tests would have to be met to support the validity of the subsequent court order, because

> [i]f the only important fact were that one of the persons given the power to act by § 2516(1) had in fact authorized the application, it would not have been necessary to add the additional provisions of § 2518 to require the identity of the acting official to be set forth in the application and order.

Id. In the case at bar, it was the court's view that the application—and hence the court-ordered intercept—had failed the first half of the test, at the very least. *Id.* at 1060.

[169] *Id.* at 1058.

[170] Fed. R. Crim. P. 41(c), 327 U.S. 863 (1946). This requirement has been dropped from the current rule by the Advisory Committee:

> The requirement that the warrant itself state the grounds for its issuance and the names of any affiants, is eliminated as unnecessary paper work. . . . A person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued.

[Rule 41] Notes of Advisory Committee on Rules: 1972 Amendment (U.S.C., 1 Supp. III (1974)).

surveillance. The district court specifically declined to decide any issue presented by the Executive Assistant's authorization.[171]

On appeal, the Fourth Circuit chose not to rely upon the "two-part test" envisioned by the district court, concluding only that the authorization itself was improper.[172] Under different reasoning the suppression was affirmed. The court explained that

> there was no authorization at all, which is the equivalent of failing to identify anyone. Furthermore, the pattern of the Government's behavior in ignoring statutory requirement after statutory requirement necessarily leads to our determination that any communications derived from the wiretap were unlawfully intercepted and therefore properly suppressed.[173]

Since the problem regarding authorization affected a number of cases at various stages in the judicial process, resulting in a conflict between certain circuits, the Supreme Court granted certiorari.[174] The Court, speaking through Justice White, examined Title III's legislative history and concluded that Congress had intended to place the responsibility for the proper use of wiretapping on an official responsive to the political process.[175] Failure to comply with these legislatively mandated standards required suppression even though the departures from the statutory scheme did not reach constitutional dimensions.[176]

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[171] 340 F. Supp. at 1059. Such a decision was, in light of the misidentification issue, unnecessary for the resolution of the motion to suppress. *Id.*

[172] 469 F.2d at 529-30. Other courts had treated the issue of mistaken identification of the authorizing individual—where in fact the Attorney General *had* given initial authorization—as insufficient to overturn the interception order. Such a defect would be "a matter of form, not substance." *Id.* at 530. *See, e.g.*, United States v. Ceraso, 467 F.2d 647, 649-52 (3d Cir. 1972); United States v. D'Amato, 340 F. Supp. 1020, 1021 (E.D. Pa. 1972); United States v. Iannelli, 339 F. Supp. 171, 174 (W.D. Pa. 1972), *aff'd*, 480 F.2d 919 (1973), *cert. denied*, 417 U.S. 918 (1974); United States v. Aquino, 338 F. Supp. 1080, 1081 (E.D. Mich. 1972); United States v. LaGorga, 336 F. Supp. 190, 194-95 (W.D. Pa. 1971); United States v. Cantor, 328 F. Supp. 561, 564 (E.D. Pa. 1971).

Here, there was no authorization by a qualified individual in the first place; thus, apart from any question of identification, there had never been proper authorization. This was at the heart of the appellate court's rationale. 469 F.2d at 530.

[173] 469 F.2d at 531.

[174] 411 U.S. 905 (1973). *See* 416 U.S. at 511 & n.3.

[175] 416 U.S. at 515-20 & n.9. As Justice White summed up the Court's legislative findings:

> The Act plainly calls for the prior, informed judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. The mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order.

Id. at 515-16.

[176] *Id.* at 524.

The Government had argued that the procedure followed in *Giordano* did not violate Title III. It viewed the Act as placing the authorization procedure in the Justice Department, with the use of "Attorney General" being only a general reference to the office.[177] In the alternative, the Government claimed that even if the statute had not been followed, no constitutional violation had occurred and the evidence obtained should have been admissible.[178]

In reviewing these arguments, the Court concluded that the legislative history evidenced an intent "to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate."[179] The improper authorization was a statutory violation and once this violation had been squarely established, the Court had no difficulty in affirming the suppression of evidence. For support of this remedy, the Court noted that this "issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III" itself.[180] The Court relied upon sections within the Act which prohibit the

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[177] *Id.* at 512-13. While Title III vested the responsibility of authorizing wiretaps in the Attorney General or a specially designated Assistant Attorney General, 28 U.S.C. § 510 (1970) 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.

This authority, argued the Government, was a general provision which should not be held to preclude the Attorney General from delegating his section 2516 responsibility to his Executive Assistant. 416 U.S. at 513.

Further, ran the argument, the broad authorization powers granted to state officials by 18 U.S.C. § 2516(2) (1970) would not reasonably comport with the strict limitations of authorization powers on the federal level which the lower court's interpretation of section 2516(1) would require. 416 U.S. at 522-23.

[178] 416 U.S. at 524. The Government had argued that section 2518(10)(a)(i) of the Act, which provided for suppression of evidence if it were "unlawfully intercepted," had been intended by Congress to embrace only constitutional—not statutory—violations. *Id.* at 525. Although this interpretation could be rationalized by the statute's subsections (ii) and (iii) providing for suppression for violations of specific requirements of the Act, the Court rejected this limited construction. *Id.* at 525-27.

[179] 416 U.S. at 514. The Court, in light of the considerably detailed procedures interwoven throughout Title III, decided that a literal interpretation of the statutory language was called for. *Id.* at 515-16. The power to authorize wiretaps, other than as specified in the Act, was thus implicitly nondelegable. *Id.* at 521-22.

[180] *Id.* at 524. The Court concluded that the phrase "unlawfully intercepted" in section 2518(10)(a)(i) was not in itself

> 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.

Id. at 527.

use of evidence obtained in violation of the statute and the general suppression section.[181]

On these points, the Court was unanimous. However, when it considered the effect of the initial authorization on the validity of the extension orders—which had been properly authorized—a division of opinion resulted. The majority viewed the propriety of the extensions as being dependent upon the validity of the initial surveillance and, consequently, the fruits thereof as being subject to suppression. Failing at the same time were records made by pen registers during the time period of both extension orders. This was due to the fact that the extensions for both the pen register and the wiretap were dependent upon the improper initial authorization for their probable cause.[182] Because the Act requires that extensions contain a report of any prior surveillance, including results, the majority concluded "that the communications intercepted pursuant to the extension order were evidence derived from the communications invalidly intercepted pursuant to the initial order."[183]

Dissenting, Justice Powell, joined by Chief Justice Burger and Justices Blackmun and Rehnquist, was of the opinion that evidence derived from the pen register extensions and the wiretap extensions should not be suppressed.[184] The rationale behind this view was that

> the derivative taint of illegal activity does not extend to the ends of the earth but only until it is dissipated by an intervening event.[185]

Thus, the question decided by the Court should have turned upon "whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause."[186] The dissent was particularly critical of the majority's treatment of the pen register evidence. It was not questioned that the original pen register was installed prior to the initial electronic surveillance and upon sufficient probable cause.[187] On the issue of

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[181] *Id.* at 524-25. *See* 18 U.S.C. §§ 2515, 2518(10)(a)(i) (1970).

[182] 416 U.S. at 531-33 & n.19.

[183] *Id.* at 531-32.

[184] *Id.* at 548-49 (Powell, J., concurring in part and dissenting in part).

[185] *Id.* at 554.

[186] *Id.* at 555.

[187] *Id.* at 556-57. The initial district court order was for the use of a pen register only on Giordano's telephone, issued for fourteen days on October 8, 1970. In that it was based upon probable cause, it was concededly valid under the fourth amendment. *Id.* at 549. A 21-day wiretap order was then issued on October 16. This was the order based on the defective authorization by Attorney General Mitchell's Executive Assistant. *Id.* "[B]ased in

subsequent pen register extensions, the dissenters would have held that the results of at least the first pen register extension should have been admissible.[188]

In its consideration of the electronic surveillance extension, the dissent again viewed the issue of taint as essentially not being considered by the majority. After reviewing the independent probable cause, the dissent concluded that an issue was established warranting a remand to consider whether sufficient untainted probable cause existed to support the surveillance.[189]

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part, *but,*" as Justice Powell emphasized, "*only in part,*" upon the results of this wiretap, the pen register order was twice—on October 22 and on November 6—extended, and the wiretap extended once, also on November 6. *Id.* at 549-50 (emphasis in original). Though the October 8 order was unquestionably valid, and the October 16 order likewise invalid, Justice Powell questioned the degree of taint in subsequent orders. *See id.* at 556-57.

The majority opinion had affirmed the invalidity of the pen register extensions in a footnote. In conclusory language, the Court—after noting that the application for the October 23 extension had had attached to it transcriptions of the conversations intercepted under the October 16 wiretap—annunciated:

> In these circumstances, it appears to us that the illegally monitored conversations should be considered a critical element in extending the pen register authority. We have been furnished with nothing to indicate that the pen register extension of November 6 should be accorded any different treatment.

Id. at 533-34 n.19. *See also id.* at 511 n.2.

Justice Powell, finding the basis for this conclusion "far from apparent," found the majority's decision on this issue to be "an unexplained conclusion—not a rationale." *Id.* at 557. The extension applications for the pen register incorporated not only the "tainted" conversation logs but also the probable-cause allegations of the first and valid pen register application. Thus, even if the "tainted" material were disregarded, the subsequent applications would have the same probable-cause basis. Under fourth amendment principles, then, the results of the pen register extensions should have been admissible. *Id.* at 556-57.

[188] *Id.* at 557. The record before the Court included the application for the first pen register extension order, but not the second. While the dissenters assumed that the latter also incorporated the original application's grounds, they would have remanded the case for a fact-finding hearing on this point. *Id.*

[189] *Id.* at 559-61. The minority opinion characterized the majority's treatment of this issue as "a baffling interpretation of the statute." *Id.* at 559 n.7.

> The statutory requirements for an intercept application include
>
> > a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application . . . and the action taken by the judge on each such application; and
> >
> > . . . where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

18 U.S.C. §§ 2518(1)(e), (f) (1970). As the results of prior investigations must be submitted in any application for an extension, they similarly must be considered by the judge in deciding whether or not to extend the interception order. *See id.* §§ 2518(3), (5). After scrutinizing the statutory procedure, the majority had concluded that, even disregarding the contents of the original Giordano wiretap,

> the Act itself forbids extensions of prior authorizations without consideration of the results meanwhile obtained. . . . Moreover . . . the Government itself had stated that the wire interception was an indispensable factor in its investigation and that ordinary surveillance alone would have been insufficient. In our view, the results of

The improper identification issue raised by the district court in *Giordano,* but not addressed by either the Fourth Circuit or the Supreme Court, was considered in the case of *United States v. Chavez.*[190] As in *Giordano,* the defendants in *Chavez* were indicted for their part in conspiring to import and distribute narcotics. Two electronic surveillance orders furnished the main source of evidence against the defendants. The district court granted the defendants' motions to suppress based upon the Government's failure to properly identify the authorizing Department of Justice employee in the wiretap orders.[191] The Ninth Circuit court of

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the conversations overheard under the initial order were essential, both in fact and in law, to any extension of the intercept authority.

416 U.S. at 533. Hence, the wiretap extension was per se "derivative evidence" which was rightly suppressed. *Id.*

The dissent, however, could find no indication in the legislative history of Title III that Congress had intended such an "automatic" rule. *Id.* at 559 n.7. To the contrary, there was evidence that Congress "explicitly" intended that the Act was to incorporate the contemporary state of constitutional law on the exclusionary rule, including the attenuation principle. *Id.* at 558-59. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 96 (1968).

The original wiretap was not the only surveillance technique used to gain incriminating evidence against Giordano and his alleged associates in crime, although certainly it was the most substantial. Since the minority did not view the statute as mandating suppression of the results of the extension wiretap, it would have remanded the case for a determination of the attenuation issue. 416 U.S. at 561.

[190] 416 U.S. 562 (1974). *See* United States v. Giordano, 416 U.S. 505, 512 n.4 (1974).

[191] 478 F.2d at 513. Umberto Chavez and James Fernandez, along with ten other defendants, were indicted in California for conspiring to bring in heroin from Mexico. The Government's case largely depended on the results of telephone intercepts on Chavez' and Fernandez' telephones. The authorization for each wiretap, however, was defective. *Id.* The evidence from the Fernandez tap was suppressed by the district court and the court of appeals affirmed this action on the authority of United States v. King, 478 F.2d 494 (9th Cir. 1973), decided the same day. 478 F.2d at 513.

The circumstances surrounding the Fernandez authorization were identical to the procedures used for the invalid Giordano authorization. *Compare id. with* United States v. Focarile, 340 F. Supp. 1033, 1051-52 (D. Md. 1972).

The Chavez authorization, however, was different. Here Attorney General Mitchell, not his aide Lindenbaum, personally reviewed and approved the interception order, and he himself initialled a memorandum to Will Wilson to proceed in the case. From this point, the procedure was the same: The memo addressed to Wilson, purporting to delegate to him the authority to authorize wiretap applications; together with a letter purportedly from Wilson addressed to the agent who filed the papers with the district court, claiming to authorize—in Wilson's name and authority—the application for the intercept order, were filed in the district court, and an order to tap Chavez' phone resulted. 478 F.2d at 513-15. The order recited, as only could have been concluded from the face of the papers filed, that Will Wilson had authorized the application. *Id.* at 515. However, the Government later admitted to the trial judge that Wilson had never seen the intercept application at any time. *See id.* at 517. Since the actual person who authorized the wiretap had been misidentified to the court, resulting in a " 'complete frustration of the opportunity for Congressional and public scrutiny required by the statute,' " the district court ordered suppression of the evidence. *See id.* (quoting from memorandum and order of the district court).

appeals affirmed that decision, quoting the trial court's memorandum to the effect that " 'neither of the individuals who authorized the applications was in any way identified to Chief Judge Carter, Congress or the public.' "[192] The Supreme Court granted certiorari in order to clarify a division of authority that had developed between the Ninth Circuit's view and others.[193]

In evaluating the problems presented in *Chavez,* the Court first eliminated consideration of one of the two wiretap orders by relying upon the *Giordano* decision, since the wiretap on the home of one Fernandez had been improperly authorized by the Attorney General's Executive Assistant.[194] However, the wiretap on the Chavez residence was properly authorized by the Attorney General, although there was an allegation of misidentification in the authorization similar to that found in the district court's consideration of *Giordano.*[195] Despite the fact that "the interception order clearly identified 'on its face' Assistant Attorney General Wilson as the person who authorized the application," the Court found no statutory violation sufficient to warrant suppression as the Attorney General had given approval.[196] The Court reviewed legislative history as well as the precise wording of the Act, and concluded in part:

> While adherence to the identification reporting requirements . . . can simplify the assurance that those who Title III makes responsible for determining when and how wiretapping and electronic surveillance should be conducted have fulfilled their roles in each case, they do not establish a substantive role to be played in the regulatory system.[197]

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[192] 478 F.2d at 517 (quoting from memorandum and order of the district court). The court reasoned that, despite Attorney General Mitchell's subsequent assumption of responsibility for the authorization, the finger of accountability must not be permitted to point in the wrong directions, particularly if some later Attorney General should not be as responsible to his public duty. *Id.* at 516-17. Circuit Judge Duniway, writing for the court, envisioned "no rational explanation for the elaborate paper charade . . . unless it be to deceive the Congress and the court." *Id.* at 515. While the Justice Department did comply with section 2516(1) of the Act, the violation of section 2518(1)(a) amounted to a misrepresentation to the court. *Id.*

[193] 412 U.S. 905 (1973). *See* 416 U.S. at 568 & n.2.

[194] 416 U.S. at 569-70.

[195] *Id.* at 570-73.

[196] *Id.* at 573-74 & n.5. Although the specific individual who authorized the application was misidentified, reasoned the Court, it could not be claimed "that the order failed to identify an authorizing officer who possessed statutory power to approve the making of the application." *Id.* at 574.

[197] *Id.* at 577-78. The Court noted that while S. REP. No. 1097, 90th Cong., 2d Sess. 101, 103 (1968), had claimed that the purpose of the identification requirements was "to fix responsibility," there had been "no real debate" on the provisions prior to adoption. 416 U.S. at 579. Only that one source contained such an intention; hence, concluded the majority,

Thus, although the procedure may not have been completely accurate in terms of identification and reporting, the infraction failed to reach the safeguards of either constitutional or statutory levels.

A separate opinion to both *Giordano* and *Chavez* was filed by Justice Douglas joined by Justices Brennan, Stewart, and Marshall.[198] Although the opinion concurred with the result in *Giordano*, Justice Douglas did not agree with the standard expressed by the *Chavez* majority that evidence collected in violation of Title III will only be suppressed if the violated section " 'directly and substantially implement[s] the congressional intention to limit the use of intercept procedures.' "[199] The classification by the majority of portions of the Act as being " 'substantive,' 'central,' or 'directly and substantially' related to the congressional scheme" was strongly criticized.[200] Justice Douglas viewed the proper representation of the authorizing individual as bearing upon both statutory safeguards and the individual's right of privacy.[201]

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[n]o 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.

Id.

[198] 416 U.S. at 580 (Douglas, J., concurring in part and dissenting in part). These Justices concurred in the Court's decision in *Giordano* and concurred in part and dissented in part in *Chavez*. While they agreed with the affirmance of the *Fernandez* suppression, they dissented from the disposition of the *Chavez* tap. *Id.* at 580-81.

[199] *Id.* at 584 (quoting from United States v. Giordano, 416 U.S. 505, 527 (1974)). The *Giordano* majority determined that 18 U.S.C. § 2518(10)(a)(i) (1970) applied to statutory as well as constitutional violations. *See* note 180 *supra*. With this statement Justice Douglas was in wholehearted accord. 416 U.S. at 584-85. The majority in *Chavez*, however, turned this language around: Only if a violation of Title III reached the magnitude of infringement upon Congress' "direct and substantial" limitations of Government intrusionary powers, would the Court afford the invaded citizen the protective sanction of the law—suppression of the evidence. *Id.*

[200] 416 U.S. at 585. Justice Douglas would not agree that a fair reading of the Act should allow the Court "to pick and choose among various statutory provisions" and give effect to the suppression section on a subjectively selective basis. *Id.* at 584-85. A brief review of various sections of Title III led the minority in *Chavez* to conclude that

[t]he 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 (emphasis added). Nor was there in the language of the Act itself or in any congressional documents the slightest indication that any provision was intended to be "more important than any other." *Id.* at 586-87.

[201] Reviewing the various proposals considered prior to final enactment of Title III, he saw the identification provisions of the Act as a gradually accepted culmination crystallizing the Title III policy of strictly delimited controls on the use of electronic surveillance. The reason for this need for an immediate identification of the responsible official, he felt, should be evident: The officials allowed authorization powers by Title III are dependent upon the electoral process for their offices; if they could wait to acknowledge their participation in questionable authorizations until after they had left office, any deterrent effect on their decisions would be dissipated. *See id.* at 592-94. In both *Giordano* and *Chavez*, the actual

While not enforcing the statute in the manner suggested by the dissenting opinion in *Chavez*, the majority nevertheless served notice that future transgression of the statutory standard might be treated more severely. In conclusion, the Court warned:

> Though we deem this result to be the correct one under the suppression provisions of Title III, we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought.[202]

Thus, under both the majority and dissenting opinions in *Giordano* and *Chavez*, the emphasis of the Court was placed squarely upon a strict construction of the statute by the judiciary.

While the Supreme Court's only consideration of statutory safeguards exceeding basic fourth amendment concerns has been in the area of initial authorization, there is nothing to suggest in the Court's ruling that the same standard would not apply to other statutory protections. Of particular interest are the Act's provisions for criminal and civil remedies relating to the sale, advertising, and illegal use of electronic surveillance equipment. Whether it is possible for the Government to bring prosecutions in sufficient number to effectively deter the illegal use of such devices remains to be seen. An additional unresolved question is whether civil remedies will provide a useful deterrent beyond that which is obtained in each particular case.

No matter what result is had generally concerning remedies for illegal use, the fact that the Supreme Court has served notice that the provisions of Title III will be firmly applied should buttress the basic consideration—electronic surveillance is illegal except when used by the Government in a carefully circumscribed manner meeting both constitutional and statutory considerations.

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identity of the authorizing office-holder became known only after the intrusions on privacy ran their course, the suspects had been indicted, and the sufficiency of the authorizations challenged on the defendant's motion to suppress. Only then did the Government reveal all the background in "after-the-fact" affidavits. The Act, concluded the dissenters, "requires an accountable public official to exercise political judgment." *Id.* at 594. Such an official should not have been shielded from "the harsh light of public scrutiny at the crucial beginning of the wiretap process, only to emerge later when he chooses to identify himself." *Id.* Even under the majority's test in *Chavez*, therefore, the evidence should have been suppressed. *Id.*

In addition, claimed the minority, an "overriding concern of Congress" in drafting Title III was the protection of the right to privacy. *Id.* at 596. Only a strict interpretation of the terms of the Act would effectuate this broad legislative purpose. *Id.* at 597.

[202] *Id.* at 580.

CONCLUSION

As enacted, Title III represents an attempt to remedy the forty-odd years of confusion concerning the role of and procedure for electronic surveillance. When the legislature was first considering the enactment of a bill regarding electronic surveillance, careful concern was given to the incorporation of the teaching of the judicial branch of government. Not only does Title III incorporate constitutional safeguards, but it goes further in providing for individual rights through a comprehensive statutory scheme. Since signed into law, the Act has survived attacks regarding its constitutionality as well as its propriety. Since 1968, case law has indicated that, when used properly and in limited situations, electronic surveillance may be of great service to society.

Authorization of electronic surveillance under court auspices, however, is only one aspect of the Title III legislation. While this section may receive the most attention from judges and commentators, the context of the entire Act must not be lost. It serves as a prohibition on the use of electronic surveillance equipment, providing both criminal and civil remedies for failure to adhere to the proscription.

Though allowing electronic surveillance in limited situations, the actual process is tightly controlled. Because this form of investigation involves the potential for violations of individual rights, the courts have been meticulous in enforcement of the statutory as well as constitutional protections. To this end, continued close scrutiny by the judiciary is necessary at every stage of the surveillance procedure. So long as the Government is forced to meet the existing standards of fourth amendment and statutory mandate, the system of law enforcement cannot be said to be going to excess.