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EAVESDROPPING IN A FREE SOCIETY

by

EDITH J. LAPIDUS

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York.

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PREFACE AND ACKNOWLEDGMENT

The first course for which I registered as a student in the Doctoral Program of the Political Science Department of the City University of New York was Constitutional Law II, given at Brooklyn College by the late Professor Samuel F. Konefsky. From the first session to the last it was clear that Professor Konefsky was unique as a scholar and teacher. Political scientist, expert in Constitutional Law, and philosopher combined, he had an extraordinary gift for inspiring his students and making them feel that he was a friend.

We were both deeply interested in problems of constitutional liberties, and I began to work on an article called "The Right of Privacy." It was an appropriate and exciting time for such a study. Congress was debating the Johnson Administration's "Right of Privacy Act" banning eavesdropping except in national security cases. The President's own Commission had taken a position contrary to that of the Executive, and a majority of its members had recommended wiretapping and electronic surveillance by law enforcement officers under proper safeguards. The United States Supreme Court had handed down its decision in Berger v. New York declaring unconstitutional the New York

law authorizing court-ordered eavesdropping. We argued, speculated, and made bold predictions.

Just as the paper on "The Right of Privacy" neared completion, the United States Supreme Court decided Katz v. United States, holding for the first time that eavesdropping was a search and seizure within the meaning of the Fourth Amendment to the Constitution. Now a new study was needed with a focus, not on the right of privacy, but on the right to intercept wire and oral communications, apparently sanctioned by the latest pronouncement of the Court. This dissertation is the result of that study, prepared with the encouragement and under the sponsorship of my teacher and friend, Professor Samuel J. Konefsky, until shortly before his death. I dedicate it to him with gratitude for his unfailing confidence and support.

Edith J. Lapidus

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I. INTRODUCTION

OBJECTIVES, SCOPE, AND METHODOLOGY

This dissertation has a three-fold objective: (1) to analyze a controversial and novel piece of legislation enacted by Congress--Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizing wiretapping and electronic surveillance; (2) to examine the practical operation of Title III and procedures established by Federal and State officials; and (3) to evaluate Title III and its effect on the right of privacy and on freedom in American society. Analysis of key provisions of Title III, decisions of the United States Supreme Court which prompted its enactment, and public documents reflecting Congressional intent, serve as the underpinning for the main focus of this study--the practice and procedures that have been or should be developed under Title III.

Operational problems are interwoven with legal questions, for Title III is an unusually complex law, specifying in detail the steps that must be taken to safeguard against undue governmental intrusions. Practical problems were scarcely considered by Congress in enacting Title III, for many of them could not be foreseen. They have been exposed gradually as key clauses are interpreted and put into effect by Federal and State officials. Interpretations of provisions that are ambiguous or of doubtful constitutionality

are examined critically and tested against results in actual practice. A proposition to be tested in this dissertation is that ambiguities in Title III, lack of clear standards, and failure of officials to follow uniform guidelines create a threat to privacy and liberty that may be intolerable in a free society.

For the sake of clarity and practicality, the vast amount of documentation and empirical data is treated in chronological order. Discussion of action leading up to Title III is followed by analysis of salient features of the Federal statute and some State laws enacted pursuant to Title III. Findings of practice and procedure as revealed in field interviews are then presented, followed by empirical testing of Title III in litigated cases. The concluding section formulates the questions that must be answered in evaluating Title III, and attempts to answer them in the light of the empirical data gathered. It is hoped that the method of evaluation may serve as a guide for subsequent impartial investigation and aid official review.

Prompt and continuing scrutiny of the day-to-day process of wiretapping and "bugging" under Title III is essential, for the law permits radical changes in practice with long-range impact on the administration of justice and, according to its critics, on the nature of our society. Strengths and weaknesses of authorized eavesdropping must be weighed before action taken under the newly formulated procedures has advanced too far. Opponents of Title III continue to charge that some of its provisions are

unconstitutional, that eavesdropping is ineffective in law enforcement and unnecessary, and that it is unduly destructive of the right of privacy and has a "chilling effect" on freedom of expression. Its severest critics claim that it is a "leap into the police state."

Title III is not merely a law enforcement measure; it is a political judgment that can survive only if it is shared by the three branches of government and is accepted by the people of the United States. The legislative, executive, and judicial departments have played a significant role in the controversy over wiretapping and electronic surveillance, and taken a public stand on the subject of privacy. If they are on divergent courses, how can differences be reconciled, and which branch of government is most likely to initiate steps for readjustment? Congress has set the standards to be followed by the States in legalizing eavesdropping. The extent to which the States have accepted national leadership and cooperated with the Federal government is also examined.

An objective fact-finding study has been a constant aim. Every effort has been made in gathering data, analyzing findings, and attempting evaluation to keep an unbiased stance in the conflict, inherent in eavesdropping, between the rights of the individual and the needs of society. Law enforcement officers appear for the most part to be convinced that Title III is a necessary and effective weapon in dealing with organized crime--claimed to be the chief

target of the law. Civil libertarians, including political scientists, sociologists, and legal commenatators are equally certain that authorized wiretapping and electronic surveillance will lead to unwarranted and excessive invasion of privacy. Between the traditional partisans, this article seeks to interpose facts and figures, alternatives and arguments, in search of an acceptable balance between the individual's right of privacy and the public's need for "law and order."

Since the rationale for Title III was claimed to be the need to combat "organized crime," some attention has been devoted to this phenomenon in American life--whether it actually exists, its roots and ethnic composition, its activities, structure, attitudes, code of ethics, mode of operation, ties with legitimate business, and tendency to corrupt public officials. In evaluating Title III, consideration is given to the question of whether the law is being used to deal with organized crime or whether it is being diverted to political or other purposes. Excluded from the dissertation is an explanation of the sophisticated technology of eavesdropping, considered in detail by

several experts.[1] This is referred to only where necessary to an understanding of the practice and procedure followed by law enforcement officers, investigative agents, the police, and the courts.

Some concrete proposals are offered for clarification and modification of provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and procedures to be followed under the law. These proposals are derived largely from the practical experience of Federal and State officials in their efforts to comply with the stringent requirements of Title III during the first two years of operation. Predictions as to the future of authorized eavesdropping are ventured with a maximum of caution in view of the many factors that will determine whether it is the dangerous tool feared by its critics or an indispensable one in combating organized crime, as its most ardent supporters claim.

SOURCES OF DATA ON OPERATION OF TITLE III

Congressional intent as to the meaning of provisions of Title III may be gathered from official records of hearings

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[1]John M. Carroll, The Third Listener (New York: E. P. Dutton & Co., 1969), Chapter 6; Alan F. Westin, Privacy and Freedom (New York: Atheneum, 1967); Robert M. Brown, The Electronic Invasion (New York: John F. Rider Publisher, Inc., 1967), p.30; Sen. Edward V. Long, The Intruders, The Invasion of Privacy by Government and Industry (New York: Frederick A. Praeger, 1967), p.65; Samuel Dash, Richard F. Schwartz, and Robert E. Knowlton, The Eavesdroppers (New Jersey; Rutgers University Press, 1959), p.305. See also "Crime and Justice in America," Congressional Quarterly Service, Washington, D.C., August, 1967, pp.11-12.

and from reports accompanying proposed bills. Judicial attitudes are conveyed through the decisions handed down by the Courts. Executive policy can be gleaned from press releases, memoranda, correspondence, and Government briefs in Court cases. The daily work of officials upon whom is imposed the duty of carrying out the eavesdropping law, however, can generally be known only to the extent that they are willing to reveal it. In wiretapping and electronic surveillance, information as to practice and procedure is not readily available. It is, in fact, most difficult to obtain, for the subject is by its nature shrouded in secrecy. Direct observation is out of the question even if eavesdropping is legal. Questionnaires are not very productive; the researcher soon discovers that even the cooperative law enforcement officer will furnish written answers that are perfunctory and reflect his view of what he should be doing, rather than actual practice. Interrogation in face-to-face interviews offers the most promising results, although readiness to be interviewed may not always be matched by willingness to impart accurate data. It takes patience, persistence, and painfully acquired experience in asking probing questions and getting responsive, meaningful answers. The techniques developed for interviews is discussed in detail in Part IV covering Practice and Procedure.

Public officials and private persons interviewed were uniformly generous with their time, but the amount of information that they were willing to give varied

considerably. Data was more easily obtained at the State than at the national level. State Attorneys General and District Attorneys as elected officers with considerable autonomy are freer to talk than United States Attorneys who are political appointees subject to central control in the Department of Justice in Washington, D.C. State judges elected for a specified term and accustomed to promoting good public relations are generally more communicative than members of the Federal bench who are life appointees with no need for creating a public image. Position and rank rather than personal inclination determined the extent of data furnished. A high official in a telephone company could afford the luxury of greater frankness and less circumspection than an investigative agent or a judge's law assistant. Members of Congress and their aides, directors and counsel of Civil Liberties organizations, attorneys for defendants, could express themselves freely, since their stand on the question of eavesdropping was a matter of public record.

While law enforcement officials and others granted interviews graciously, discussed problems of Title III eagerly, and answered questions as candidly as authority and temperament permitted, there is no doubt that they did not "tell all." A clear pattern of action had to be spelled out in some instances by piecing together bits of information gathered from various sources and checked against one another. An official investigating body with subpoena power could, if

it acted vigorously and objectively, ferret out additional details of how Title III is operating. A limited, tentative study was made in 1969 by the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, based on examination of some eavesdropping applications in New York.[1] However, this Subcommittee is headed by Senator John L. McClellan, Democrat of Arkansas, who was the guiding spirit in enactment of Title III and is still the chief champion in Congress of authorized eavesdropping. No such study has been attempted by opponents of Title III. As one Congressman explained when asked why he was not following up the statute on eavesdropping despite his continued opposition to it: "We deal with the pot that's boiling the hardest." Title III may not be bubbling over at the moment, but it is in active operation and needs close watching.

DEFINITIONS AND ASSUMPTIONS

Eavesdropping is defined in the most recent American Law Reports as the surreptitious overhearing, either directly by ear or by means of some mechanical device such as a wiretap, microphone, or amplifier, of the words of another spoken on a private occasion, or the preservation of such

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[1] U.S. Congress, Senate; Senator McClellan, commenting on "Wiretapping, Privacy, and Title III," characterized the Subcommittee staff study as "a confidential survey in a selected number of instances in New York." Congressional Record, Senate, 91st Cong., 1st sess., Vol. 115, Part 17, August 11, 1969, p.23238. The study was made personally by G. Robert Blakey who serves as chief counsel to the Subcommittee and took a leading part in drafting Title III. The report has not been released.

words by a tape recorder or similar recording device.[1] Justice Hugo L. Black, senior member of the United States Supreme Court, has offered a less formal definition:

> Listening secretly and sometimes "snoopily" to conversations and discussions believed to be private by those who engage in them.[2]

While modern techniques of eavesdropping have become highly sophisticated, surreptitious overhearing of conversations is not new. Justice Black says "the practice has undoubtedly gone on since the beginning of human society." Blackstone characterized eavesdroppers in the eighteenth century as:

> Such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales.[3]

No such connotation of intent to slander is implied in this article, and the term "eavesdropping" is used to include both wiretapping and electronic surveillance or "bugging." Technical explanations of the difference between wiretapping and bugging have been attempted by various writers on the subject of eavesdropping.[4] It would appear

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[1] 11 A.L.R. (3rd) 1297.

[2] Dissent in Berger v. New York, 388 U.S. 41, at p.7 (1967).

[3] Commentaries, Ch.13 5(6), quoted in Dash, The Eavesdroppers, p.426. Dash, an early critic of eavesdropping, defined it as "surreptitious fact-collecting affecting individual privacy," at p. 7. Blackstone's definition is also quoted in Westin, Privacy and Freedom, p. 178.

[4] "Crime and Justice in America," Congressional Quarterly Service, August 1967, p.11; Hal Lipset, Private Eye, "The Case for Bugging," Ramparts, September 7, 1968, Vol.7, No.4, p.39; Notes: "Wiretapping and Electronic Surveillance, Title III of the Crime Control Act of 1968," Rutgers Law Review, Winter 1969, Vol.23,No.2, p.320, footnote (5); Laurens H. Vernon, "Eavesdropping in New York--1968 Legislation," Syracuse Law Review, Spring 1969, Vol.20,No.3, pp.601-627, at p.603.

from these that it is difficult to distinguish where one leaves off and the other begins:

> All telephones have wires; some miniature listening devices too. In both wiretapping and bugging the intercepted dialogue is usually recorded on magnetic tape. . . the technique of the one is sometimes performed by the instruments of the other . . . a telephone may be made to function as a clandestine listening device . . . portions of the telephone system may be used to transmit face-to-face dialogue . . . bugs can be concealed within telephone instruments.[1]

There is, however, some technical difference, and most of the orders obtained under Title III have been for wiretapping, as distinguished from electronic surveillance.[2] Wiretapping is the interception of telephone calls and normally involves a physical entry into a telephone or telegraph circuit.[3] Electronic surveillance can pick up all conversations in a given area without penetration either into a wire or into the physical area where a conversation occurs. Sophisticated electronic devices are able to

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[1]Carroll, The Third Listener, p. 89.

[2]According to the Report to Congress for the period June 20, 1968 to December 31, 1968, all applications seemed to request telephone taps. See p. 6 of Report by the Administrative Office of the U.S. Courts. For the period from January 1, 1969 to December 31, 1969, of the 271 applications that resulted in an intercept, 250 involved a telephone wiretap; 15 intercepts used a listening device such as a microphone, and in 6 requests both a telephone wiretap and a microphone were used. See page 8 of the Report by the Administrative Office of the U.S. Courts. Various explanations were offered by prosecuting officials for this unprecedented development: that wiretapping is less costly, easier to install, may be effected without physical entry into the premises, involves less danger of overhearing innocent conversations, produces a clearer recording of intercepted conversations, and is less likely to be detected.

[3]For a discussion of methods of wiretapping, see Brown, The Electronic Invasion, p.30.

intercept any wire or oral communication under the proper conditions.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 makes no clear distinction between wiretapping and electronic surveillance. It prohibits "interception of wire and oral communications" with certain exceptions, and defines such communications.[1] Wire communication is defined as:

> Any communication made . . . 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.

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." Interception is defined as:

> The aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device.

The term "eavesdropping" is not used in Title III. Congress employed the words "wire and oral communication" to cover both wiretapping and bugging without fusing the two forms of surveillance. Federal power to regulate

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[1]Section 2510(1),(2), and (4). The term "electronic, mechanical, or other device" is defined in Section 2510(5). The distinction between wiretapping and electronic surveillance assumes some importance in determining the power of Congress to regulate under the "commerce clause." See page 79 , footnote 1.

wiretapping is clear, but some forms of electronic surveillance may conceivably elude national control, as discussed on page 79 . For use of the terms "eavesdropping," "wiretapping," and "electronic surveillance" by the United States Supreme Court, see pages 28-29.

Privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[1] Put more simply, privacy is "control over knowledge about oneself."[2] In relation to court-ordered eavesdropping, privacy is "the right to be left alone by government."[3]

This article does not enter into any detailed discussion of the nature of privacy or its function in a democratic society; that subject has been ably and amply covered.[4] In evaluating Title III it is assumed that

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[1]Westin, Privacy and Freedom, p. 32.

[2]Charles Fried, "Privacy," Yale Law Journal, Vol.77, Part I, No.3, January 1968, pp.475-493, at p.483.

[3]U.S.Congress, Senate, Committee on the Judiciary, Controlling Crime Through More Effective Law Enforcement, Hearings before the Subcommittee on Criminal Laws and Procedures, 90th Cong., 1st sess., July 11, 1967, p.12, Statement of Hon. William C. Sennett, Attorney General, Commonwealth of Pennsylvania. Mr. Sennett stated his belief that "the core center of our freedom is undoubtedly the right to privacy," but he testified in favor of court-ordered eavesdropping.

[4]Westin, Privacy and Freedom, p.32. Invasions of privacy discussed in this dissertation are limited to telephone wiretapping and electronic surveillance. Excluded are concealed television-eye monitoring, polygraph devices, personality testing, and collection of other personal data, all of which have been recognized as threats to individual privacy.

privacy is a vital element in a free society and a "cornerstone of the American system of liberty."

A free society can be defined only in relation to the life and liberty of individuals in a particular community. Freedom, used synonymously with the word liberty, has meant different things to different people, depending on what they valued most highly at a particular time. For some, freedom is self-realization.[1] For others, freedom is pursuing one's own good in his own way.[2] A democracy is said to be a free society because its citizens have the political freedom to participate in the governmental process through "free" elections.[3] In the context of eavesdropping, the American view of freedom is rooted in the protection of basic rights as guaranteed by the United States Constitution.[4] Most important among these are: freedom of speech, press, assembly, and the right to petition the government for redress of grievances, under the First Amendment; the right to be secure against unreasonable searches and seizures, under the Fourth Amendment; and the protection

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[1]See Christian Bay, The Structure of Freedom (New York: Atheneum, 1965).

[2]John Stuart Mill, On Liberty (Chicago: Henry Regnery Company, 1955), Chapter II.

[3]Felix E. Oppenheim, International Encyclopedia of Social Sciences (New York: The Macmillan Company & The Free Press, 1968), Vol. 5, p. 554.

[4]For a discussion of the American political and philosophic tradition, see Carl L. Becker, Freedom and Responsibility in the American Way of Life (New York: Alfred A. Knopf, 1945), pp. 1-22.

against self-incrimination under the Fifth Amendment. Equal protection of the law under the Fourteenth Amendment directed against the States as an integral part of freedom in the American system. The right of privacy claimed under a penumbra of constitutional protections has been called the "core center" of freedom.[1]

Freedom in the United States has both a positive and a negative aspect, and embraces social as well as political freedom. Social freedom refers to relationships among persons or groups. Freedom of the mind and the right to exchange ideas are deemed indispensable to a people devoted to the doctrine of self-government. Political freedom relates to the freedom of individuals or groups with respect to the government. The American constitutional system sets limits on governmental power. It places a high value on the privacy of the individual and guarantees his freedom by "letting him alone."

Organized crime, a target of Title III, is not defined in that section of the Omnibus Crime Control and Safe Streets Act of 1968. Title I of the Act, however, states:

> "Organized crime" means the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.[2]

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[1] See page 46.

[2] Part F, Sec. 601 (b).

This is a descriptive or functional definition, rather than a legal one. No accepted legal definition of "organized crime" has as yet been formulated. A descriptive definition that is frequently quoted is that adopted in New York State by the "Oyster Bay Conference on Combating Crime" at its May 1965 meeting:

> The product of a self-perpetuating criminal conspiracy to wring exorbitant profits from our society by any means--fair and foul, legal and illegal . . . It survives on fear and corruption . . . obtains a high degree of immunity from the law . . . is totalitarian in its organization . . . imposes rigid discipline on underlings who do the dirty work while the top men of organized crime are generally insulated from the criminal act and the consequent danger of prosecution.[1]

A description of organized crime and its activities also appears in the Report of the President's Commission on Law Enforcement and Administration of Justice,[2] and in the Organized Crime Control Act of 1970.[3]

An eminent sociologist and expert on organized crime has suggested the following organizational definition reflecting concern with the corrupting influence and violence characteristic of organized crime:

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[1]Quoted in Ralph Salerno and John S. Tompkins, The Crime Confederation, Cosa Nostra and Allied Operations In Organized Crime (New York: Garden City, Doubleday & Company, 1969), p.303.

[2]Task Force Report: Organized Crime (1967), p. 1 et seq.

[3]Public Law 91-452, 91st Cong., S.30, October 15, 1970, Statement of Findings and Purposes.

> An organized crime is any crime committed by a person occupying, in an established division of labor, a position designed for the commission of crime, providing that such division of labor also includes at least one position for a corrupter, one position for a corruptee, and one position for an enforcer.[1]

It has been suggested that legislators enlist the aid of organization specialists and systems analysts to formulate a workable definition of organized crime.[2] A Canadian critic of American efforts to deal with organized crime defines it simply as "the application of corporate principles to the business of crime."[3] This article accepts the premise that organized crime does exist, that it is not confined to any one ethnic group, and that it engages in any form of activity that yields a profit.

Racketeering is distinguished from organized crime by the United States Department of Justice. It has been defined as:

> . . . a pattern of extortion and tribute which urban brigands levy on nightclubs, shopkeepers, bars, manufacturers, trade unions, waterfront companies . . . under threat of despoiling their goods or premises and even death.[4]

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[1]Donald R. Cressey, Theft of the Nation--The Structure and Operations of Organized Crime in America (New York: Harper & Row, 1969), p.313.

[2]Ibid.

[3]Stanley M. Beck, "Electronic Surveillance and the Administration of Criminal Justice," Canada Bar Review (1968), Vol. 46, p.643.

[4]See Gus Tyler, Organized Crime in America (Ann Arbor: The University of Michigan Press, 1962), p.80.

Corruption is defined as the acceptance by an office holder of "some gift, gratuity, money, or something of value, either for doing something against the law or supplying information, or for some type of protection."[1]

Eavesdropping, the right of privacy in a free society, and law enforcement to combat organized crime are subjects on which emotions run high and rhetoric displaces calm reasoning. The motives of those who favor court-ordered eavesdropping under Title III have been questioned by its critics. The sincerity of opponents of eavesdropping has been attacked by its supporters. This dissertation assumes that both sides have at all times acted in good faith and are truly convinced of the correctness of their views as to the proper balance between the right of privacy and the needs of law enforcement. Whether such a balance has been or can be achieved under Title III is the ultimate question to which this dissertation is directed.

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[1]The definition quoted is that of Howard R. Leary, ex-Police Commissioner of New York City. See New York Times, June 8, 1970, p.28, col. 1.

II. EAVESDROPPING AND PRIVACY PRIOR TO TITLE III

LEGISLATIVE AND EXECUTIVE PROPOSALS ON EAVESDROPPING, PRIVACY AND ORGANIZED CRIME

Over the past three decades Congressional Committees have conducted investigations periodically on wiretapping, electronic surveillance, and invasions of privacy. Both the Senate and House of Representatives sought ways to meet increasing threats to privacy created by advances in the technology of surveillance developed during World War II. Between 1934 and 1967 at least sixteen sets of Congressional hearings were held, aimed at filling the gaps and blocking loopholes in existing Federal law relating to eavesdropping.[1] Section 605 of the Federal Communications Act of 1934 prohibiting interception and divulgence of conversations dealt only with wiretapping, and the ban on this form of eavesdropping had proved largely ineffective.[2] No Federal law regulating electronic surveillance existed prior to 1968.

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[1] See Hearings, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S.Senate, 90th Cong., 1st sess., Part 1, March 20, 1967, p.4; Hearings, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 90th Cong., 1st sess., July 11, 1967, pp.909-910. For a list of hearings before Congressional Committees on wiretapping and invasion of privacy, see American Bar Association, "Standards Relating to Electronic Surveillance," June 1968, Appendix E, p.237 et seq.

[2] For the wording of Section 605 and its interpretation, see pages 30-31.

Congressional hearings have also been held from time to time on organized crime.[1] The investigations of 1951 under the direction of Senator Estes Kefauver received much public attention.[2] Also highly publicized were the hearings begun in 1961 before the Permanent Subcommittee on Investigations headed by Senator John L. McClellan, of the Senate Committee on Government Operations. In televised hearings before this Subcommittee in 1963, an underworld informer, Joseph Valachi, described to a nationwide audience the operations of a crime syndicate. In its report on the Valachi hearings in 1965, the Senate Government Operations Committee asked for legislation to authorize wiretapping.[3]

Until the 1960's, Congress seemed more inclined to ban eavesdropping, rather than to permit it. It repeatedly rejected proposals initiated by the Executive to legalize

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[1]See Congressional Record, Senate, 90th Cong., 1st sess., Vol. 113, No.104, June 29,1967, p.1. The Wickersham Commission made a survey of crime in the United States for President Hoover in 1931. For investigations in New York in the 1890's and the Seabury investigation of 1933, see Daniel Bell, "Crime as an American Way of Life," The Antioch Review, Vol.XIII, No.2, June 1953, pp.131-154,at p.131.

[2]See Fred J. Cook, The Secret Rulers--Criminal Syndicates and How They Control the U.S.Underworld (New York: Meredith Press, 1966), p.103. See also "The Attorney General's Conference on Organized Crime," Department of Justice, Washington,D.C.; "Crime and Justice in America," Congressional Quarterly Service, Washington, D.C., August 1967,p.2.

[3]According to Cook, Secret Rulers, the Valachi hearings disclosed little that was new and served merely to gain public and official acceptance of what was already known about organized crime. See Cook, The Secret Rulers, p.18.

wiretapping and electronic surveillance by Federal agencies. In 1954, under the Eisenhower Administration, Attorney General Herbert Brownell proposed a bill to permit wiretapping in national security prosecutions, and to make the evidence obtained admissible in Court. The bill was directed against subversives, not organized crime. It passed the House of Representatives, but was defeated in the Senate.[1]

Eavesdropping to combat organized crime was urged for the first time in 1961 when the Kennedy Administration endorsed a proposal to authorize Federal agencies to wiretap in cases of national security, organized crime, and other serious crimes. This proposal contained no limitation on State wiretapping, and Congress took no action on the bill.[2] During the same year the Department of Justice created an Organized Crime Division and authorized investigations to be made by use of electronic equipment.[3] In 1962 the

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[1]For legislative history, see Hearings, Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, 90th Cong., 1st sess., July 11, 1967, pp.909-910.

[2]See Hearings, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, 90th Cong., 1st sess. on S 928, Part 2, p.381, footnote 1, for a list of bills introduced in the Senate in the 1961 congressional session authorizing wiretapping and electronic eavesdropping.

[3]Ibid., Part I, p.21. Despite repeated refusals of Congress to legalize eavesdropping, over sixty executive agencies had extensive electronic monitoring hardware which they used in investigations. The Internal Revenue Service and the Treasury Department conducted a 7-week course for agents in electronic eavesdropping, installing microphones, and monitoring calls. Hearings, p.27.

Kennedy Administration sent to Congress a bill more restrictive than the one of the previous year; it authorized Federal wiretapping in cases of national security, organized crime, and other serious crime, but limited statewide tapping. Congress again took no action. The Administration bill was reintroduced in the Senate in 1963, but it died in the Senate Committee on the Judiciary.[1]

Pressure on Congress to authorize eavesdropping increased in the 1960's for various reasons: (1) growth of the crime problem; (2) reaction to judicial and legislative efforts to curtail unlawful police practices, and (3) technological advances that made eavesdropping less expensive as a law enforcement tool.[2] Hearings were held before the Subcommittee on Criminal Laws and Procedures, of the Senate Committee on the Judiciary, on "Controlling Crime Through More Effective Law Enforcement," under the Chairmanship of Senator John L. McClellan, Democrat of Arkansas. On January 25, 1967 Senator McClellan introduced a bill, designated S1675, permitting eavesdropping pursuant to Presidential order for national security purposes and where authorized by court order in investigation or prosecution of

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[1] See footnote 1, Senate Bill 1308, 88th Cong., 1st sess.

[2] These reasons were presented in the Report of the American Civil Liberties Union, at hearings of the Subcommittee on Administrative Practice and Procedure on the "Right of Privacy Act, 1967," p. 381. See also Congressional Quarterly Service, August 1967, p.6.

certain crimes. In the House of Representatives, the Committee on the Judiciary and its Subcommittee No. 5 considered a similar bill, H.R. 10037. This was introduced by Rep. William McCulloch, Republican of Ohio, ranking minority member of the House Judiciary Committee. H.R. 10037, like S. 675, permitted use of wiretap and electronic surveillance by law enforcement agencies of Federal and State governments in specific categories of criminal cases under court control. A bill identical with the McCulloh bill was introduced in the Senate as S. 2050 by Senator Roman L. Hruska, Republican of Nebraska, on June 29, 1967.

While Congress was being urged to authorize eavesdropping in order to combat crime, counter-pressures to ban eavesdropping in order to protect privacy continued. Congressional concern with invasions of privacy grew in the 1960's with revelations of widespread tapping and bugging by private and public eavesdroppers. Between 1964 and 1967 hearings on invasion of privacy were held before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee under the Chairmanship of Senator Edward V. Long, Democrat of Missouri. A huge record was amassed by the Committee containing examples of electronic surveillance, wiretapping, and other forms of intrusion.[1]

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[1]The findings were summarized by Senator Long in The Intruders: The Invasion of Privacy by Government and Industry (New York: Frederick A. Praeger, 1967).

Hearings in a Special Inquiry on Invasion of Privacy were also held in 1965 before a subcommittee of the House Committee on Government Operations under Rep. Cornelius E. Gallagher, Democrat of New Jersey.[1]

The outcome of these extensive hearings on invasions of privacy was a bill entitled "The Right of Privacy Act of 1967" introduced in the Senate by Senator Long as S.928 and referred to the Committee on the Judiciary. A similar bill, H.R. 5386, was presented in the House of Representatives by Rep. Emanuel Celler, Democrat of New York, Chairman of the House Committee on the Judiciary and its Subcommittee No.5.[2] In these twin proposals, use of eavesdropping devices without the consent of at least one of the parties to the conversation was prohibited, except in national security cases.[3] The proposed ban on eavesdropping was approved by the Johnson Administration. The President, in his State of the Union Message of 1967, had said:

> We should protect what Justice Brandeis called the "right most valued (by) civilized men"--the right to privacy. We should outlaw all wiretapping, public and

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[1]89th Cong., 1st sess., June 2,3,4,7,23, and September 23, 1965, U.S. Government Printing Office, Washington, D.C., 1966.

[2]The Celler Subcommittee No.5 also considered H.R. 10037 introduced by Rep.William McCulloch, Ohio Republican, permitting eavesdropping.

[3]With respect to wiretapping, the bills went far beyond the restrictions then contained in Section 605 of the Federal Communications Act of 1934. As to electronic eavesdropping, the proposed law sought Federal prohibition through legislation for the first time.

> private . . . except when the security of the nation itself is at stake and only then with the strictest safeguards. We should exercise the full reach of our constitution(al) powers to outlaw electronic "bugging" and "snooping."[1]

His Attorney General, Ramsey Clark, publicly endorsed the prohibition against eavesdropping on the ground that it was "neither effective nor highly productive."[2]

While Congress and the Executive grappled with the problem of whether to ban or to authorize eavesdropping, pressures on the Executive continued to meet the problem of increasing crime. An Executive Order issued July 23, 1965 created a President's Commission on Law Enforcement and Administration of Justice to examine "every facet of crime and law enforcement in America" and to make recommendations to the President on ways to combat crime.[3] This Commission issued its general report in February 1967, "The Challenge of Crime in a Free Society."[4] Included in the Report was a special Task Force Report on Organized Crime in which a

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[1]Quoted in Hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 90th Cong., 1st sess., July 11,1967, p.984, from New York Times, January 30, 1967, p.1, col. 1.

[2]Ibid., p. 978.

[3]Executive Order 11236. See Congressional Digest, Vol. 46 (1967), p.197.

[4]The Commission went out of existence June 30, 1967. See "Crime and Justice in America," Congressional Quarterly Service, August 1967, p.1. For a sharp criticism of the work of this Commission, see Rufus King, Gambling and Organized Crime (Washington, D.C.: Public Affairs Press, 1969), p.98.

divided Commission took a position on eavesdropping contrary to that of the President and the Attorney General; a majority of the members recommended legislation permitting eavesdropping by law enforcement officers.[1] Pending in the United States Supreme Court at the time of the Commission's Report's release was the case of Berger v. New York involving the constitutionality of the New York law authorizing court-ordered eavesdropping.[2] The Commission acknowledged that the decision of the United States Supreme Court on eavesdropping would be controlling:

> A majority of the members of the Commission believe that legislation should be enacted granting carefully circumscribed authority for electronic surveillance to law enforcement officers . . . consistent with the decision of the Supreme Court in Berger v. New York . . . The other members . . . have serious doubts about the desirability of such authority and believe that there is insufficient basis to strike this balance against the interests of privacy.[3]

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[1]The Commission also raised the question of the connection between organized crime and local politics. The original agenda of the Commission did not include "organized crime." It was added later at the suggestion of Henry S. Ruth, Jr., Deputy Director. See Salerno and Tompkins, The Crime Confederation, p.319. In June 1965, President Johnson prohibited all Federal agencies to use wiretapping or bugging except in national security cases, after disclosure of bugging by the Federal Bureau of Investigation. See New York Times, March 13, 1969, p.1, col.1. For articulation of policy by the Executive Branch of the Federal government on eavesdropping, see Congressional Digest, Vol.46 (1967) p.196.

[2]For a discussion of Berger v. New York, see page 50 et seq.

[3]Task Force Report: Organized Crime (1967) p.19. Minority members of the Commission claimed that the majority had made its decision on ideological, rather than factual grounds.

Four months later, on June 12, 1967, the Court handed down its decision in Berger, declaring the New York eavesdropping law to be unconstitutional on its face. The opinion of the majority was delivered by Justice Tom C. Clark, father of Attorney General Ramsey Clark, who favored enactment of the "Right of Privacy Act of 1967" banning eavesdropping and subsequently opposed passage of Title III of the Omnibus Act of 1968 permitting eavesdropping by law enforcement officials. In his dissent in Berger, Justice White said:

> Our decision can be expected to have a substantial impact on current legislative consideration of these issues.[1]

After the Berger decision hearings continued before the Subcommittee on Criminal Laws and Procedures under Senator McClellan on "Controlling Crime Through Effective Law Enforcement." Those who opposed eavesdropping interpreted the Supreme Court's opinion in Berger as a declaration that all wiretapping and electronic surveillance are constitutionally impermissible. Others who favored eavesdropping as a law enforcement technique read Berger as an invitation to Congress to fashion a law permitting wiretapping and electronic surveillance with safeguards to protect constitutional liberties.[2] Under consideration by the Senate Subcommittee were various proposals to authorize eavesdropping, including S. 675 introduced by Senator McClellan and

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[1]388 U.S. 41, at page 113.

[2]See page 50 (discussion of Berger).

S. 2050 proposed by Senator Hruska. These two bills formed the basis for Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the provisions of which will be analyzed after consideration of the development under Supreme Court decisions of the law on wiretapping, electronic surveillance, and the right of privacy.

SUPREME COURT DECISIONS ON EAVESDROPPING AND PRIVACY 1928-1968

A chronological outline of leading decisions handed down by the United States Supreme Court between 1928 and 1968 on wiretapping, electronic surveillance, and the right of privacy is presented as an aid to focusing on the practical and constitutional problems under Title III of the Omnibus Act of 1968, and furnishing a clue as to how the Court may deal with them. Some of these earlier decisions will have to be taken into account in cases involving Title III. Of greatest significance are Berger v. New York[1] and Katz v. United States[2] decided in 1967, for Title III purports to comply with the requirements of the Supreme Court laid down in these two cases. Both Berger and Katz involved electronic surveillance (commonly known as "bugging") not wiretapping. Before the decision in Katz, the Supreme Court made a distinction between wiretapping and "bugging." They were treated separately by the Court, not for technological reasons, but because the only Federal law on the subject, Section 605 of the Federal Communications Act of

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[1] 388 U.S. 41, 87 S.Ct.1873, 18 L.Ed.2d 1040 (1967).

[2] 389 U.S.347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

1934, prohibited only wiretapping.[1] Bugging was outlawed by decisions of the Supreme Court prior to Katz only if there was a physical invasion into a constitutionally protected area. Cases dealing with these two eavesdropping techniques are therefore listed separately, preliminary to a detailed analysis of Berger and Katz. In Berger the Supreme Court used the general term "eavesdropping," following the New York statute under scrutiny.

Supreme Court decisions developing the right of privacy during the 20th century involve Amendments I, III, IV, V, and IX of the United States Constitution, together with Amendment XIV under which constitutional guarantees have been applied against the States. All of these amendments are currently being cited in litigation claiming that Title III is unconstitutional. The history of cases involving the Fourth Amendment prohibiting unreasonable searches and seizures is especially significant in the area of eavesdropping, for both Berger and Katz rested primarily on this provision of the Constitution. These Fourth Amendment decisions are accordingly analyzed in somewhat greater detail.

Supreme Court Decisions Involving Wiretapping

The first case on wiretapping did not reach the United States Supreme Court until 1928. In that year the Court handed down a decision in Olmstead v. United States

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[1] For the wording of Section 605, see pages 30-31.

holding by a 5 to 4 vote that wiretapping did not come within the prohibition of the Fourth Amendment.[1] A statute of the State of Washington made it a crime to intercept a message over a telephone or telegraph line. Federal agents tapped the telephone of Olmstead, a suspected bootlegger, without trespassing on his property. In affirming the conviction for conspiracy to violate the Prohibition Act the majority opinion, written by Chief Justice Taft, was based on the ground that no physical intrusion had occurred. Wiretapping, said the Court, did not amount to a search and seizure within the meaning of the Fourth Amendment. In his classic dissent in the Olmstead case, Justice Brandeis said:

> The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone,. . . the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment.[2]

Justice Holmes, also dissenting in Olmstead, called wiretapping "dirty business" and expressed the view that it is "a less evil that some criminals should escape than that the government should play an ignoble part."[3]

Six years after the Olmstead case Congress passed the Federal Communications Act of 1934, Section 605 of which

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[1]277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

[2]277 U.S. at p.478.

[3]277 U.S. at p.470.

provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person.[1] Since Section 605 prohibited only wiretapping, the Supreme Court treated this form of surveillance separately from "bugging" in considering issues raised by eavesdropping. However, the physical intrusion or trespass theory on which Olmstead was based was also applied later in the development of the law on electronic surveillance.

In 1937, the Supreme Court held in Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275, 62 L.Ed. 314, that evidence obtained by wiretapping in violation of Section 605 of the Federal Communications Act was not admissible in the Federal courts. Two years later in the second Nardone case, 308 U.S. 388, 60 S.Ct. 266, 84 L.Ed. 307, the Court ruled that under Section 605 evidence was barred not only if obtained directly by wiretapping but also through

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[1]48 Stat.1103 (1934) as amended; 47 U.S.C.A. Section 605 (Supp.1969). Federal and State agencies construed Section 605 to prohibit interception only if the conversation and information intercepted was also divulged. See Congressional Digest, Vol.46 (1967), p.195. The United States Supreme Court never passed on this question. The Omnibus Act of 1968 amended the Federal Criminal Code. The new section is directed at the conduct of communications personnel, rather than wiretapping in general. Communications personnel may make interceptions incident to proper performance of their duties, which would otherwise be proscribed. See Duke Law Journal, October 1968, No. 5, pp. 1008-1013, at p.1011; Scoular, St. Louis Law Review, at p. 539.

use of leads obtained in the course of the wiretap, a doctrine known as "fruit of the poisonous tree."[1] In the same year (1939) the Court decided that Section 605 applied to interception and divulgence of intrastate telephone calls, not only interstate. Weiss v. United States, 308 U.S. 321, 60 S.Ct. 269, 84 L.Ed. 298.

In 1942, the Supreme Court ruled that an individual who was not a party to a wiretapped conversation had no standing to object to the use of evidence induced by divulging to witnesses the contents of telephone messages intercepted by Federal officers in violation of Section 605 of the Federal Communications Act of 1934. Goldstein v. United States, 316 U.S. 114, 62 S.Ct. 1000, 86 L.Ed. 1312.

In 1952, the Court held that under Section 605 it was a Federal crime for State officers to divulge information obtained through wiretapping, but that such evidence was admissible in a State Court. Schwartz v. Texas, 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231.[2]

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[1]See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); Nardone v. United States, 308 U.S. 338, 60 S.Ct.266, 84 L.Ed.307 (1939).

[2]The Supreme Court reached an opposite conclusion in 1968 in Lee v. Florida, 392 U.S.378, 88 S.Ct.2096, 20 L. Ed.2d 1166, in which it held that tape recordings of defendant's telephone conversations by State police having a phone connected to a party line without defendant's knowledge were inadmissible in State criminal prosecutions. Section 605 was held to be applicable to the States. Justices Black, Harlan, and White dissented, claiming that the Court should follow Schwartz v. Texas and any change should be made by Congress. For a discussion of Lee v. Florida, see 17 Amer. Jur.POF, Texas Rec., Section 29 Supp.

In 1957, the Court handed down an opinion that no unlawful interception occurred where police officers listened in on a telephone conversation through an extension and one of the parties to the conversation had given his consent to the eavesdropping. Rathbun v. United States, 355 U.S. 107, 78 S.Ct. 161, 2 L.Ed.2d 134. In the same year the Court held that wiretapping by State officers conducted under color of State law violated Section 605 if divulged, and evidence so obtained was not admissible in a Federal Court. Benanti v. United States, 355 U.S.96, 78 S.Ct. 155, 2 L.Ed.2d 126.[1]

Supreme Court Decisions Involving "Bugging"

The first case to reach the United States Supreme Court involving electronic surveillance was Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed.1322 (1942). The Court held in this case that evidence obtained by electronic eavesdropping is inadmissible only where a physical invasion of the premises occurred. Evidence had been obtained through use of a detectophone attached to the wall of an office. Federal agents picked up conversations on the other side of the wall. Since there was no physical invasion, said the Court, no violation of the Fourth Amendment had occurred and the evidence was admissible.

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[1]For a study instituted after the Benanti case by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, see Donald J. Kemper, A Decade of Fear (Columbus, Missouri: University of Missouri Press, 1965), p. 199.

In 1953 the Court upheld the right to wire an informer for sound in order to transmit statements of the suspect to police officers listening at a receiver outside the building. On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270.

In 1961 evidence obtained by inserting a foot-long spike with microphone attached under a baseboard into a party wall, making contact with a heating duct to pick up conversations in another part of the building, was held to be inadmissible under the Fourth Amendment. Since there was physical penetration, this was held to constitute an intrusion into a protected area. Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed. 2d 734.

In 1963 the Supreme Court upheld the right of a Federal agent to conceal a small tape recorder on his person in order to record conversations of the suspect who was unaware of the fact that the agent was "bugged for sound." Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed. 2d 462.

Under the decisions in On Lee and Lopez it appeared to be established that a record of conversations taken by a party to the conversation was not constitutionally objectionable under the Fourth Amendment even without court authorization. This doctrine was placed in doubt by the decision of the Supreme Court in 1966 in Osborn v.United States, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 374. In the Osborn case a private detective recorded a conversation that

he had with one of James Hoffa's attorneys. In this conversation the attorney suggested to the detective that he bribe a particular juror. Two Federal judges thereafter authorized placing a device on the detective to obtain evidence of bribery upon presentation of a private investigator's affidavit outlining earlier conversations relating to bribing a juror. The conviction for bribery was based on the evidence of the recording tapes. The Supreme Court affirmed the conviction on the ground that prior authorization had been obtained.[1] Osborn left unclear whether a conversation recorded by a party to the conversation could be introduced in evidence only if prior judicial authorization had been secured. The issue now appears to be settled. In United States v. White, decided April 5, 1971, the Supreme Court upheld the constitutionality of "consent eavesdropping." It ruled that the Fourth Amendment is not violated by governmental electronic eavesdropping effected by wiring an informer for sound, having him talk to the suspect, and then having agents to whom the conversation is

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[1]Justice Douglas was the lone dissenter in Osborn v. United States. See also the companion case of Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966). In that case the Supreme Court affirmed Hoffa's conviction for trying to bribe members of a jury. The Government's evidence, on which the conviction was largely based, consisted of the testimony of one, Partin, a local union official. Partin, released from jail, made visits to Hoffa's hotel suite and acted as Government informer. The Court ruled that no interest legitimately protected by the Fourth Amendment was involved. Chief Justice Warren in dissent termed the case "an affront to the quality and fairness of federal law."

transmitted repeat the communications at the suspect's trial.[1]

Supreme Court Decisions Involving Right of Privacy

The response of the Supreme Court to inroads on the right of privacy and to public pressure for stemming intrusion has been consistently cautious and sometimes ambiguous. The difficult task of balancing the demands of a free society and the need for surveillance in crime detection has been compounded by the fact that the right of privacy is itself a controversial concept. This right has been claimed as a constitutional privilege and an essential element of a democratic system, entitled to protection against governmental intrusion. No such guarantee appears explicitly in the Constitution. Where then does it come from and on what is it based?

The right of privacy was recognized at common law, and it has been said to be a "natural right" founded on a deep-seated human instinct. It implies respect for the individual and lies at the heart of all human rights. In the historic article written in 1890 on "The Right to Privacy," Samuel D. Warren and Louis D. Brandeis pointed out:

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[1] Reversing judgment of United States Court of Appeals for the Seventh Circuit, 405 F. 2d 838 (1969). For a detailed discussion of the opinion of the Supreme Court, see page 134

> (T)hat the individual shall have full protection in person and property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection.[1]

The common law, they claimed, "secures to each individual the right of determining ordinarily 'to what extent his thoughts, sentiments, and emotions shall be communicated to others.'"[2] Wiretapping began with the invention of the telephone in 1876, but in 1890 neither Warren nor Brandeis foresaw the vast opportunities for invading individual privacy with development of new devices for surveillance.

The problem presented to the Supreme Court in dealing with the right of privacy has been to balance the individual's interest against the public's need. The cases summarized below did not involve wiretapping or electronic surveillance, but they indicate the attitude of the Court toward the right of privacy and the weight that must be given to it in the balancing process. All of the amendments to the Constitution listed have been cited by counsel for defendants in support of the claim that Title III is unconstitutional.

Amendment I of the United States Constitution provides that Congress shall make no law abridging "the freedom of speech or the right of the people peaceably to

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[1] Harvard Law Review, Vol. IV, No. 5, pp.193-220, at p. 193.

[2] Ibid., p. 198.

assemble and to petition the Government for a redress of grievances." In N.A.A.C.P. v. Alabama (1958), the Supreme Court recognized the "close nexus" between the freedom of speech and assembly.[1] The Court said:

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.[2]

The Court also recognized "the vital relationship between freedom to associate and privacy in one's associations." It decided that a State could not compel the N.A.A.C.P. to reveal the names and addresses of its Alabama members and agents. Disclosure of the identity of members would, in the Court's opinion, expose them to economic reprisals and physical harm. Immunity from State scrutiny of the membership list was related to the right to pursue "lawful private interests privately."[3]

Associational privacy has also been protected by the United States Supreme Court against Congressional investigation. In Watkins v. United States (1957), a witness before a Subcommittee of the Committee on Un-American Activities of the House of Representatives refused to make certain disclosures regarding the political affiliations of others on the ground that the Committee had no power to compel him

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[1] 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488.

[2] 357 U.S. at p. 460.

[3] 357 U.S. at p. 466.

to give such testimony. While admitting the power of Congress to conduct investigations as part of its legislative function, the Supreme Court considered the limitation on the investigating power when First Amendment rights were threatened. The Court held that Watkins' conviction was invalid under the Due Process Clause of the Fifth Amendment.

> The public is entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals (italics ours).

The Court made it clear that there was no general authority to expose the private affairs of individuals without justification, nor could a legislative committee indulge in "broad-scale intrusion into the lives and affairs of private citizens."[1]

In applying the First Amendment to the right of privacy, the Supreme Court of the 20th century was following the lead of Mr. Justice Story who in 1833 wrote, in his "Commentaries of the Constitution of the United States," that the First Amendment guarantees of free speech, press, assembly, and religion were entitled to secure the rights

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[1] 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273, See also Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960). In Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456, the Supreme Court reversed a judgment awarding damages under a New York "Right of Privacy" statute (Sec.50-51, New York Civil Rights Law). Justice Douglas stated that when a private person is catapulted into the news his activities are in the public domain; a person's normal privacy ceases when his life has ceased to be private.

of "private sentiment and private judgment."[1]

Amendment III of the Constitution provides that "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." The quartering of soldiers in private homes without the owner's consent had been one of the flagrant violations of the individual's right to privacy by the colonial government. The purpose of the Third Amendment, according to Justice Story, was:

> To secure the perfect enjoyment of that great right of the common law that a man's house shall be his own castle, privileged against all civil and military intrusion.[2]

Amendment V provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." In Miranda v. Arizona (1966) the Supreme Court held that in prosecution of a person accused of crime, statements made by the accused during custodial interrogation could not be used against him in the absence of procedural safeguards securing the privilege against self-incrimination. Modern in-custody interrogation, the Court pointed out, was psychologically oriented and exacted "a heavy toll on individual liberty." It was as destructive of human dignity

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[1]Quoted in Westin, Privacy and Freedom, p.331. See also discussion of libel, privacy, and the First Amendment and the implications of Time, Inc. v. Hill in Comments: Columbia Law Review, May 1967, Vol.67, No.5, pp.926-952.

[2]Quoted in Westin, Privacy and Freedom, p.331.

as physical intimidation. The privilege against self-incrimination is part of an individual's substantive right, a "right to a private enclave where he may lead a private life."[1] The Constitution guarantees that a person has a right to remain silent.

The First, Third, Fourth, Fifth, and Ninth, as well as the Fourteenth, Amendments were cited in Griswold v. Connecticut to substantiate the claim that a right of privacy is guaranteed by the United States Constitution.[2] The case merits detailed analysis, for members of the Court were sharply divided as to the basis for claiming a constitutional right of privacy, as well as the existence of the right itself.

In Griswold, the Executive Director of the Planned Parenthood League of Connecticut and its Medical Director were convicted in the Circuit Court in New Haven as accessories for violating a State statute prohibiting the giving

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[1] 384 U.S. 436, 460, 86 S.Ct.1602, 16 L.Ed. 2d 694. See also Tehan v. United States ex rel. Shott, 382 U.S.406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966),in which Justice Stewart speaking for the majority said (382 U.S. at p.416):

> The Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values--values reflecting the concern of our society for the right of each individual to be let alone.

[2] 381 U.S. 479, 8 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

of information, instruction, and advice to married persons as to means of preventing conception. The conviction was affirmed in the State appellate courts, but on appeal the United States Supreme Court reversed by a vote of seven to two. The Connecticut law, said a majority of the Justices, was an invasion of the right of privacy of married persons and was unconstitutional.

Justice Douglas expressed the views of five members of the Court. The First Amendment, he said, includes peripheral as well as specific rights, and "has a penumbra where privacy is protected from governmental intrusion;" a zone of privacy is, in fact, created by several fundamental constitutional guarantees:

> The right of association contained in the penumbra of the First Amendment is one . . . The Third Amendment . . . is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[1]

A separate concurring opinion by Justice Goldberg, in which Chief Justice Warren and Justice Brennan joined, relied heavily on the Ninth Amendment:

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[1] 381 U.S. at p. 484.

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.[1]

Justice Goldberg denied hotly that the holding of the majority interfered with any regulation that a State could properly make. No State, he said, had power to experiment with fundamental liberties. In determining what rights are fundamental and protected against the States by the due process clause of the Fourteenth Amendment, judges must look to the "traditions and conscience of our people."[2]

Justice Harlan, while concurring in the conclusion of the majority that the Connecticut law was unconstitutional, objected to basing the decision on "some right assured by the letter or penumbra of the Bill of Rights." To him, the question was whether the State law violated basic values "implicit in the concept of ordered liberty."[3] Justice White, concurring in a separate opinion, argued that the Connecticut law deprived marital couples of "liberty" without due process of law as guaranteed by the Fourteenth Amendment.[4]

The two dissenters, Justices Black and Stewart, could see no violation of any constitutional provision.

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[1] 381 U.S. at p. 488.

[2] 381 U.S. at pp. 493, 496.

[3] 381 U.S. at p. 500.

[4] 381 U.S. at p. 502.

Most emphatically, Justice Black denied the existence of a constitutional right of privacy, and accused the majority of "stretching" the First Amendment.

> The Court talks about a constitutional "right of privacy" as though there is some constitutional provision . . . forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures."[1]

Justice Black warned against substituting words in a constitutional guarantee.

> "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also . . . easily be interpreted as a constitutional bar against many things other than searches and seizures.[2]

Government, he said, has a right to invade privacy unless prohibited by some specific constitutional provision; he could find no such ban in the case of the Connecticut law and accused the Court of claiming power "to invalidate any legislative act which the judges found irrational, unreasonable, or offensive." The power to decide what laws are unwise or unnecessary is a legislative one. The Court has no power to sit as "a supervisory agency" to set aside laws they believe to be "unwise, arbitrary, capricious, or irrational.[3]

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[1] 381 U.S. at pp.508-509.

[2] 381 U.S. at p. 509.

[3] 381 U.S. at pp.511, 521, 523.

Justice Stewart, in dissent, characterized the Connecticut statute as "an uncommonly silly law" but, like Justice Black, found nothing unconstitutional about it. "Which of the six amendments mentioned by the majority is infringed--the First, Third, Fourth, Fifth, Ninth, Fourteenth?" Reliance on the Ninth Amendment, said Justice Stewart, was turning "somersaults with history!"[1]

The decision of the Supreme Court in Griswold applied only to marital relations and was limited to the Connecticut law. Commentators suggested, however, that the ruling furnished the basis for declaring wiretapping and other eavesdropping unconstitutional. This view has not been borne out by later decisions of the Supreme Court and was put to rest, at least for the present, by enactment of Title III authorizing court-ordered eavesdropping.

Search and Seizure under the Fourth Amendment

The Fourth Amendment to the United States Constitution, adopted in 1791 as part of the Bill of Rights, provides:

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

This amendment was a direct repudiation of the

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[1]381 U.S. at pp. 527, 529.

general warrant, the "fishing expedition" which so enraged the American colonists against imperial England in its program for economic exploitation of its overseas possessions. Blanket orders were issued to search for contraband, and opposition to this method of apprehending violators was so strong that it has been claimed the American Revolution began with the speech in February 1771 attacking the general warrant.

At the core of the Fourth Amendment is the right to be secure against arbitrary intrusion by the police, a protection basic to a free society. The emphasis is on unreasonable searches and seizures and the necessity for judicial authorization must be based on probable cause. Justification for a proposed search and seizure must be shown to the proper judicial officer and authorization obtained. The place to be searched, the person or things to be seized, are required to be described with particularity. Since the latter part of the 19th century the Supreme Court has struggled with interpretation of the search and seizure restrictions contained in the Fourth Amendment.

What is "unreasonable?" What is "probable cause?" Does the prohibition apply against the States as well as against the Federal government, and what may or may not be seized? Does the Fourth Amendment apply only to physical, tangible objects, or must it be expanded to include the spoken word, the conversation of an individual? Do wiretapping and electronic surveillance fall within the

prohibitions against unreasonable search and seizure? Since the decision of the Supreme Court in 1967 in Katz v. United States holding that eavesdropping falls within the protections and limitations of the Fourth Amendment, a new question has been raised: should the same criteria of reasonableness, probable cause, and particularity be applied to eavesdropping as to the ordinary search and seizure? Proponents of Title III can see no difference between eavesdropping and normal search and seizure. Critics of Title III disagree.

Prior to 1949 the Fourth Amendment ban on reasonable search and seizure was held to apply exclusively to Federal law enforcement and could not be invoked against the States. This rule was modified in Wolf v. Colorado.[1] The case involved conspiracy to commit abortion. Officers seized a physician's appointment book and a conviction was obtained based on this evidence. The Supreme Court held unanimously that protection against unreasonable search and seizure was part of the fundamental protection which the "due process" clause of the Fourteenth Amendment extended to individuals in relation to their State and local government. But the majority of the Court refused to reverse the conviction; since most of the States had no exclusionary rule barring evidence obtained in an unreasonable search and seizure, the evidence should not

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[1] 338 U.S.25, 69 S.Ct.1359, 93 L.Ed.1782 (1949). For a detailed and scholarly analysis of earlier cases involving search and seizure, see Jacob W. Landynski, Search and Seizure and the Supreme Court (Baltimore: The Johns Hopkins Press, 1966).

be excluded; the Supreme Court should not impose the exclusionary rule on the States. While the conclusion reached by the Court was paradoxical, the decision in Wolf v. Colorado was important in development of the law relating to search and seizure.

For more than a decade after Wolf v. Colorado, Federal agencies were permitted to introduce illegally seized evidence provided it had been obtained by State officials, not Federal. The evidence was handed to Federal prosecutors on a "silver platter." The "silver platter" doctrine was finally repudiated in 1960 in a five to four decision holding that Federal agents could not properly use such evidence.[1] In 1961 the Supreme Court finally overruled Wolf v. Colorado. In Mapp v. Ohio the Court held that tainted evidence must be excluded and that the exclusionary rule applies to the States as well as to the Federal government.[2] Finally, in 1967, the Supreme Court ruled that electronic surveillance was a search and seizure subject to the Fourth Amendment.[3]

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[1] Elkins v. United States, 364 U.S. 206, 80 S.Ct. 437, 4 L.Ed. 2d 1669.

[2] 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081.

[3] Katz v. United States, 389 U.S. 347, 88 S.Ct.507, 19 L.Ed. 2d 576 (1967).

SUPREME COURT DECISIONS IN BERGER AND KATZ

The 1967 decisions of the United States Supreme Court in Berger and Katz were the culmination of a slow and tortuous development during the past four decades of constitutional law relating to eavesdropping and the right of privacy. By these two decisions, the Court appears to have made a fundamental change in constitutional principles governing wiretapping and electronic surveillance. Berger and Katz are of the utmost importance in considering the constitutionality of Title III and procedures developed under the law. Title III purports to comply with the requirements of the Supreme Court in these two cases, and law enforcement officials claim that their practices follow the mandates of the Court.

Berger, which struck down the New York eavesdropping law as unconstitutional, was decided after the President's Commission made its report in which the majority of the Commission members recommended legislation authorizing court-ordered eavesdropping. In Katz, the Supreme Court held for the first time that electronic eavesdropping constitutes a "search and seizure" subject to the protections and limitations of the Fourth Amendment. The Katz decision was widely interpreted as an invitation to Congress to enact a law authorizing eavesdropping by law enforcement

officials under certain safeguards. The views expressed by individual Justices in Berger and Katz must be taken into account in any prognostication as to how the Court will approach Title III problems. The facts in each case, the circumstances under which eavesdropping was conducted, and the basis of majority, concurring, and dissenting opinions illuminate the questions later raised by legislative action and discussed in Part III.

Berger v. New York[1]

Ralph Berger, a Chicago public relations man, was convicted after a jury trial in the New York Supreme Court of conspiracy to bribe the Chairman of the New York State Liquor Authority, a public agency that controls issuance of liquor licenses. The evidence against Berger consisted of tape recordings of conversations intercepted by means of electronic devices installed under a court order obtained under the New York Code of Criminal Procedure, Section 813-a. The trial court upheld the validity of the New York eavesdropping statute; the Appellate Division affirmed without opinion, and the New York Court of Appeals likewise affirmed, but by a divided vote. The United States Supreme Court reversed the conviction by a vote of six to three on the ground that the New York statute was "too broad in its sweep, resulting in a trespassory intrusion into a

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[1]388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed. 2d 1049.

constitutionally protected area, and therefore violative of the Fourth and Fourteenth Amendments. The Court held that the New York statute on its face failed to meet certain standards that were constitutionally mandatory. Berger involved electronic surveillance, but the Court used the term "eavesdropping" as in the New York statute and did not distinguish between wiretapping and bugging.

The Berger case arose out of the complaint of a bar and grill owner in Manhattan to the District Attorney of New York County that agents of the State Liquor Authority had raided his premises and seized books and records in reprisal for failure to pay a bribe for a liquor license. Similar complaints of extortion of large illegal payments from liquor license applicants had previously been filed with the District Attorney's office. Equipped with a minifon recording device, the owner, Ralph Panzini, interviewed an employee of the Liquor Authority who advised him to contact an attorney, Henry Neyer. Neyer informed Panzini that he worked with the Authority employee who knew the "going rate" on liquor licenses.

Based on the evidence obtained through the Minifon recorder, an eavesdrop order was obtained in 1962 from a Justice of the New York State Supreme Court under Section 813-a. The order authorized installation for sixty days of an electronic device in the office of the attorney, Neyer. Through leads from the Neyer recordings, a second court order was obtained permitting installation for sixty

days of a recording device in the office of Harry Steinman, an entertainers' agent who was negotiating a $30,000 pay-off through Ralph Berger to the Chairman of the State Liquor Authority in order to retain the license of the Palladium Dance Hall. Several weeks of eavesdropping uncovered a conspiracy to issue liquor licenses for the Playboy and Tenement Clubs in New York City.[1] Berger's conversations in Steinman's office were recorded, and Berger was indicted as a conduit or "go-between" for the principal conspirators. At the trial of Berger in New York State Supreme Court, relevant portions of the recordings obtained under the Steinman order were received in evidence and played to the jury. Recordings of the Neyer eavesdrop order were not introduced at Bergers trial; Berger had not been present during this electronic surveillance, but one of his telephone calls to Neyer had been intercepted.

The opinion of the United States Supreme Court in Berger was written by Justice Tom C. Clark, father of Ramsey Clark who served as Attorney General in the Johnson Administration and has gone on record as strenuously opposing eavesdropping except, possibly, in national security

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[1] A detailed account of the investigation leading to the indictment of Berger appears in American Bar Association "Standards Relating to Electronic Surveillance," June 1968, pp.58-70. While the Berger case involved only two court orders, 42 eavesdrop orders were obtained in the course of the investigation--23 wiretaps and 19 bugging devices. More than 17 people were indicted, among them the Chairman of the New York State Republican Committee, the Chairman of the New York State Liquor Authority, a judge of the New York State Court of Claims, various employees of the New York State Liquor Authority, several attorneys, and Ralph Berger.

cases. Concurring opinions were written by Justices Douglas and Stewart. Long dissenting opinions were written by Justices Black, Harlan, and White. The views expressed by each must be examined closely, for they discuss questions that raise serious problems under Title III of the Omnibus Act of 1968.

Justice Clark's opinion traces the development of eavesdropping from the days of Blackstone in the 18th century to the modern era of advanced electronic technology. The law has not kept pace with advances in scientific knowledge, says Justice Clark, "though jealous of individual privacy." The history of the right of privacy and the concept that intrusions into it are "subversive of all of the comforts of society"dates back to 1765. Analysis of the New York eavesdropping statute in the light of decisions from Olmstead in 1928 through Osborn in 1966 lead the Court to conclude that the New York law did not provide adequate judicial supervision or protective procedures, and was deficient in the following respects:

1. Particularity: It laid down no requirement for particularity in the warrant as to what specific crime has been or is being committed, nor the place to be searched or persons or things to be seized, as required by the Fourth Amendment.

2. Time period: Eavesdropping for a two-month period is equivalent to a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. The New York statute failed to require present probable cause for a two-month extension.

3. Termination of interception: The statute placed no termination date on the eavesdrop once the conversation sought is seized, leaving it entirely in the discretion of the officer listening to the conversations.

4. Notice or exigent circumstances: No notice was required by the statute, nor was this lack overcome by requiring some showing of special facts or exigent circumstances to avoid notice.

5. Return: The statute did not provide for a return on the warrant, leaving full discretion in the officer as to use of seized conversations of innocent as well as guilty parties.

The Court, said Justice Clark, has found "no empirical statistics on the use of electronic devices in the fight against organized crime" to support the fervent claim that eavesdropping is a most important technique of law enforcement and that outlawing it would severely cripple crime detection, particularly organized crime. Indeed, there are figures on wiretapping to the contrary; the Report of the President's Crime Commission indicates that failure of New York's attack against organized crime "resulted primarily from the failure to commit additional resources of time and men," rather than electronic devices. Concluding, Justice Clark said:

> Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices . . . The Fourth Amendment . . . prescribe(s) a constitutional standard that must be met before official invasion is permissible.[1]

In his concurring opinion, Justice Douglas called wiretapping or bugging "the greatest of all invasions of privacy." He could not see how any electronic surveillance

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[1] 388 U.S. at pp. 63-64.

that collects evidence or provides leads to evidence is or can be constitutional under the Fourth and Fifth Amendments. The opinion of the Court, said Justice Douglas, brings wiretapping and other electronic eavesdropping fully within the privilege of the Fourth Amendment. We could, added Justice Douglas, amend the Constitution and authorize eavesdropping--a step that would take us closer to a totalitarian regime.[1]

Justice Stewart concurred in the result reached by the majority, but agreed with the dissenters (Justices Black, Harlan,and White) that the New York law was entirely constitutional. The real issue was this: was the particular search and seizure reasonable or not? In Berger, the eavesdrop order was not justified, for the affidavits on which it was based did not show probable cause. Electronic eavesdropping for a 60-day period involves a broad invasion of a constitutionally protected area. "Only the most precise and rigorous standard of probable cause should justify an intrusion of the scope and duration permitted in this case."[2]

To Justice Black in dissent, it seemed that the holding of the majority "makes it completely impossible for the State or the Federal Government ever to have a valid eavesdropping statute," despite faint intimations to the contrary. He attributed the decision, in part, to the Court's hostility to eavesdropping as "ignoble" and "dirty

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[1]388 U.S. at pp. 64, 67.

[2]388 U.S. at pp. 68-70.

business," and to fear that science and technology are making eavesdropping more effective. In his opinion eavesdropping is not forbidden by the Constitution, nor should it be deemed inadvisable by legislative policy. Justice Black accused the majority of the Court of rewriting the Fourth Amendment. It is, he said, "judicial substitution" to read the Fourth Amendment as barring invasions of "privacy" rather than prohibiting unreasonable searches and seizures:

> Use of "privacy" as the keyword in the Fourth Amendment simply gives this Court a useful new tool . . . to usurp the policy-making power of the Congress and to hold more state and federal laws unconstitutional when the Court entertains a sufficient hostility to them.[1]

The Court "fabricates" safeguards alleged to be covered by the Fourth Amendment. Like Justice Stewart, Justice Black believed that the question in Berger should have been: was the particular search and seizure reasonable? The Fourth Amendment relates to tangible things, not conversations; it does not apply to eavesdropping. The New York statute, maintained Justice Black, contains more safeguards than the Fourth Amendment.

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[1]388 U.S. at pp. 71, 77. Justice Black saw the conflict between his view and that of the majority as one based on different beliefs as to the duty of the Court in interpreting the Constitution. The Court's duty, according to Justice Black, is to carry out as nearly as possible "the original intent of the framers," not to keep the Constitution "up to date," although he admits the need to use new means in accomplishing the framers' goals. Changes, he insists, should be effected by constitutional amendment, or by acts of Congress or State legislatures.

The dissenting opinion of Justice Harlan, like that of Justice Black, points an accusing finger at the majority. The Court is establishing "newly contrived constitutional rights . . . without any apparent concern for the empirical process that goes with legislative reform"; it is disregarding construction of a State statute by the State's own courts. A "distaste for eavesdropping" is blamed for the Court's haste in disregarding established principles. Electronic eavesdropping as such or as permitted by the New York law is not an unreasonable search and seizure. The time period should be considered on a case-by-case basis.[1] Justice Harlan took up the question of Berger's right to challenge the validity of the Meyer eavesdrop order, and found the invasion of Berger's personal privacy sufficient for that purpose; a portion of a telephone conversation to which he was a party was recorded in the process of interception. He also discussed the validity of the Steinman eavesdrop order; this second order was also valid, said Justice Harlan, although the affidavits on which it was based contained mere conclusory allegations of suspicion by two District Attorneys. Evidence obtained under the first order could properly support issuance of the second order.[2]

Justice White, like the other two dissenters,

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[1] 388 U.S. at p. 89.

[2] Ibid., at pp. 96, 101.

accused the Court of seeming to be "irresistibly determined to strike down the New York Statute" and to be "intent upon creating out of whole cloth new constitutionally mandated warrant procedures carefully tailored to make eavesdrop warrants unobtainable." That, declared Justice White, "is not a judicial function."

> Regardless of how the Court would like eavesdropping legislation to read, our function ends in a state case with the determination of these questions (whether this case complied with Fourth Amendment standards.)[1]

Justice White examined the claim that the eavesdropping violated Berger's right against self-incrimination under the Fifth Amendment and rejected it on the ground that the conversations were "not the product of any official compulsion.[2]

The three dissenters in Berger were convinced that the majority opinion made it impossible to fashion any eavesdropping statute that would meet constitutional requirements. Some commentators interpreted Berger as a veiled prohibition against eavesdropping. Others viewed it as a sanction for more carefully drawn statutes with adequate safeguards. G. Robert Blakey who helped to draft Title III read the Berger opinion as "laying down a constitutional blueprint for electronic surveillance, . . . an invitation by the Court to Congress to get down to the

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[1]388 U.S. at pp. 111,112.

[2]Ibid., at p. 107.

difficult business of drafting a fair, effective, and comprehensive electronic surveillance statute."[1]

Katz v. United States[2]

Charles Katz was convicted in the United States District Court in California of transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a Federal statute. At the trial, the Government was permitted to introduce evidence of telephone conversations by Katz overheard by F.B.I. agents. An electronic listening and recording device had been attached by the agents to the outside of the public telephone booth from which Katz placed his calls. Based on previous visual observations, the agents knew he would use the booth for several minutes at about the same time each morning.

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[1] Hearings, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 90th Cong., 1st sess., "Controlling Crime Through More Effective Law Enforcement," pp. 933,957. See also Congressional Digest, Vol. 46 (1967), p. 195.

[2] 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). For an analysis of Katz v. United States see Edmund W. Kitch, "Katz v. U.S.: The Limits of the Fourth Amendment, 1968 Supreme Court Review 133. See also Kent Greenawalt, "Privacy in One's Home and Person," New York Law Journal, June 15, 1970, Vol. 163, No.114, p.4, col.1; Ibid, June 17, 1970, Vol.163, No. 116, p.4, col.1; "From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection," N.Y.U. Law Review 968, November 1968, Vol.43, p.968 et seq.; Herman Schwartz, "Electronic Eavesdropping—What the Supreme Court did NOT do," Criminal Law Bulletin, Jan.-Feb.1968, Vol.4, No.1, pp.83-89, at p.85; Robert F. Scoular, "Wiretapping and Eavesdropping, Constitutional Development from Olmstead to Katz," St. Louis University Law Journal, Summer 1968, Vol.12, p. 513.

Surveillance was confined to brief periods during which he used the telephone; six recordings, averaging about three minutes each, were obtained and admitted in evidence. They related only to Katz' end of conversations concerning the placing of bets and receipt of wagering information. On one occasion when statements of another person were inadvertently intercepted, the agents refrained from listening to them. There was no physical penetration of the telephone booth, part of which was made of glass through which Katz was clearly visible.

The United States Court of Appeals for the Ninth Circuit affirmed the conviction, holding that no violation of the Fourth Amendment occurred because there was no physical entrance into the area occupied by Katz. The United States Supreme Court reversed the conviction in a seven to one decision. The sole dissenter was Justice Black. Consistent with the position taken by him in Berger, Justice Black insisted that electronic eavesdropping did not constitute a search and seizure within the meaning of the Fourth Amendment. Justice Marshall did not participate. The opinion of the Court was delivered by Justice Stewart. Three separate concurring opinions were written, one by Justice White, another by Justice Douglas in which Justice Brennan joined, and a third by Justice Harlan. The Court held that the electronic listening and recording constituted a search and seizure within the meaning of the Fourth Amendment, and that it violated the privacy on which Katz relied while using the telephone booth.

Justice Stewart, writing for the majority, rejected the view that eavesdropping constituted a "search and seizure" subject to the safeguards of the Fourth Amendment only if the telephone booth was a "constitutionally protected area."

> The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[1]

What Katz sought to exclude when he entered the booth was "the uninvited ear." The reach of the Fourth Amendment, said Justice Stewart, does not turn on presence or absence of physical intrusion into a given enclosure.

> It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry . . . 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.[2]

The issues were formulated by the Court as follows:

1. Did the Government's activities in electronically listening to and recording Katz' words constitute a "search and seizure" within the meaning of the Fourth Amendment?

2. Did these activities violate the privacy upon which Katz justifiably relied while using the telephone booth?

3. Did the search and seizure conducted in this case comply with constitutional standards?

The answer to the first two questions was "Yes"; to the third, "No."

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[1]389 U.S. at p. 351.

[2]Ibid., at pp. 352-353.

As to the right of privacy, Justice Stewart made it clear that the Fourth Amendment could not "be translated into a general constitutional 'right of privacy'." The Fourth Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.

> The First Amendment, for example, imposes limitations upon governmental abridgement of "freedom to associate and privacy in one's associations" . . . (N.A.A.C.P. v. Alabama). The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy. To some extent, the Fifth Amendment also "reflects the Constitution's concern for . . . the right of each individual to a private enclave where he may lead a private life," . . . (Tehan v. Shott, 382 U.S. 406, 416). Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.[1]

While the particular search and seizure did not comply with constitutional standards, it might have done so, said Justice Stewart.

> This surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion, it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place.[2]

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[1] 389 U.S. at p. 350, footnote 5.

[2] Ibid., at p. 354.

A judicial order could have accommodated the legitimate needs of law enforcement by authorizing the carefully limited use of electronic surveillance, but the Court refused to validate the conduct of the F.B.I. agents retroactively. Searches conducted without prior approval by a judge are per se unreasonable under the Fourth Amendment. The Court listed the safeguards that were lacking in the surveillance of Katz:

1. Presenting an estimate of probable cause for detached scrutiny by a neutral magistrate before commencing the search.

2. Observing precise limits during the search, established in advance by a specific court order.

3. Notifying the authorizing magistrate in detail of all that had been seized after completion of the search.

Justice Stewart stated unequivocally that after-the-event justification for the search was not acceptable; the procedure of antecedent justification is central to the Fourth Amendment. However, in a footnote, Justice Stewart declined to apply this rule where "national security" was involved:

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the "national security" is a question not presented by this case.[1]

A more positive stand on dispensing with a court order in national security cases was taken by Justice White in his concurring opinion:

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[1] 389 U.S. at p.358, footnote 23.

> We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.[1]

This view was sharply rejected by Justice Douglas who called it:

> (A) wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases in which the Executive Branch itself labels "national security" matters. Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be.[2]

Under the separation of powers, Justice Douglas pointed out, the Executive Branch is not supposed to be neutral and disinterested. In national security cases, the President and the Attorney General are cast in the role of adversary, and may even be the intended victims of subversive action. The Fourth Amendment "draws no lines between various substantive offenses." Justice Douglas anticipated the serious problem that has developed under Title III in interpreting the meaning of "national security" and eavesdropping without court order in national security cases.

Justice Harlan's concurring opinion emphasized as critical the fact that Katz had an actual <u>expectation of privacy</u> and that the expectation was reasonable. He intimated that interception of conversation in a public telephone

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[1] 389 U.S. at p. 364.

[2] 389 U.S. at p. 359.

could be reasonable even in the absence of a warrant under some other circumstances.[1]

Justice Black's dissent relied on Olmstead and Goldman which, he insisted, had not been "eroded" as the majority claimed. As in his Berger dissent, he accused the Court of distortion, language-stretching, rewriting the Constitution. Had the Framers of the Constitution desired to outlaw or restrict use of eavesdrop evidence they would have done so in the Fourth Amendment by appropriate language. Eavesdropping was known to the Framers, and wiretapping is simply eavesdropping by telephone. Substituting "protection of privacy" for words designed to guard against unreasonable searches and seizures was "clever word juggling." Justice Black derided "broad policy discussions and philosophical discourses on such nebulous subjects as privacy," and he repeated what he had expressed in his Griswold dissent--the dangers involved in the broad, abstract and ambiguous concept of "privacy" used by the Court:

> No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy . . . the Framers . . . did not intend to grant this Court such omnipotent lawmaking authority . . . it is dangerous to freedom to repose such powers in courts. [2]

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[1]389 U.S. at p. 360.

[2]Ibid., at p. 374.

Justice Black pinpointed one of the great dilemmas that now face law enforcement officials and judges under Title III. He foresaw that the particularity requirement of the Fourth Amendment would be difficult, if not impossible to meet in obtaining an eavesdrop order:

> How can one "describe" a future conversation, and if not, how can a magistrate issue a warrant to eavesdrop one in the future?[1]

The Katz case appeared to be a clean break with the past, and it was given wholly prospective application.[2]

Supreme Court Decisions After Berger and Katz

In Alderman v. United States,[3] while petitioners' appeal from convictions for various Federal crimes was pending in the United States Supreme Court, it was revealed that the Federal Government had engaged in illegal electronic surveillance which might have violated petitioners' Fourth Amendment rights and tainted their convictions. The Government claimed that none of the conversations overheard were relevant to the prosecution of the case. The Supreme Court addressed itself to the following issues:

1. Which of the petitioners is entitled to object to admission of the evidence obtained by electronic surveillance?

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[1] 389 U.S. at p. 365.

[2] Desist v. United States, 394 U.S.244, 89 S.Ct. 1030, 22 L.Ed. 2d 248 (1969).

[3] 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).

2. What standards and procedures should be followed by the United States District Court in determining whether government evidence was the product of illegal surveillance?

Two of the petitioners, Alderman and Alderisio, had been convicted of conspiring to transmit murderous threats in interstate commerce. Two others, Butenko and Ivanov, were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States. Alderisio's place of business in Chicago had been subject to electronic surveillance by the government. Each of the petitioners demanded retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose Fourth Amendment rights the surveillance violated.

The Supreme Court, in an opinion delivered by Justice White, ruled that a petitioner had standing to object to admission of conversations in which he himself participated, and all conversations occurring on the accused's "premises" regardless of whether he participated in the particular conversation or not.

> Suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.[1]

The Court further held that persons who have standing to object are entitled to examine the surveillance records without their being first screened in camera by the

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[1] 394 U.S. at p. 171.

trial judge. Unless the Government prefers to dismiss the case, persons with standing to object have the right to have the records turned over to them to determine the extent to which the illegal eavesdropping contributed to the prosecution's case.

Justice Black dissented on the same ground as in Katz: that electronic eavesdropping does not constitute a search and seizure within the meaning of the Fourth Amendment. Justices Harlan and Fortas each wrote separate opinions, dissenting in part and concurring in part. Justice Harlan objected to granting standing to a property owner with regard to third party conversations. Justice Fortas, mindful that illegal electronic surveillance was a serious crime, objected to permitting the Government in any case to disregard the law in pursuit of a lawbreaker.

Several of the justices expressed the view that where information obtained through eavesdropping is vital to "national security," the trial judge should screen the information. Justice Stewart joined in Justice Harlan's dissenting opinion, except as it would authorize in camera proceedings in the Butenko and Ivanov "national security" cases.

The Department of Justice asked the Supreme Court for a rehearing, claiming that the ruling of the Court requiring disclosure of the records of intercepted conversations jeopardized "national security" investigations.[1] In denying the petition for rehearing, Justice Stewart said that government attorneys had misunderstood the Court's holding; disclosure was required only "where the surveillance violated the Fourth Amendment." Eavesdropping necessary to national security may well be legal.[2]

In Giordano v. United States, the Supreme Court appeared to be uncertain as to whether the rule laid down in Alderman was applicable in all cases. In a per curiam opinion, the Court remanded several cases for further proceedings in conformity with Alderman. In a concurring opinion, Justice Stewart said:

> The Court has not . . . addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information . . . necessary for the conduct of international affairs and for the protection of national defense secrets and installations from foreign espionage and sabotage . . . The issue remains open.[3]

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[1]For a discussion of Alderman v. United States, see New York University Law Review, Vol.43, November 1968, p. 968; New Republic, April 26, 1968, p.11; New York Times, March 13, 1969, p.1, col.1; Time Magazine, March 21,1969, pp.39-40 and April 4, 1969, p.55.

[2]394 U.S. at p.310.

[3]394 U.S. 310, 314; 89 S.Ct.1164, 22 L.Ed.2d 297 (1969).

The Court also left open the question of whether a defendant or any other affected individual has been deprived of any constitutional right if a court makes public the conversations obtained through illegal eavesdropping.[1]

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[1] See Greenawalt, New York Law Journal, June 17, 1970, For disclosure of the deCavalcante recordings, see New York Times, June 15, 1969, p.52, col.2.

III. LEGISLATIVE ENACTMENT--TITLE III AND STATE STATUTES

POLITICS OF "LAW AND ORDER" IN ENACTMENT OF TITLE III

Until June 1968 when Title III went into effect,[1] every attempt to enact a Federal law authorizing eavesdropping ended in failure. Thirty or more years of public debates, Congressional hearings, Executive directives, and Supreme Court decisions produced nothing but confusion, uncertainty, and sharp disagreement. No one would have predicted early in 1967 that Congress could pass a law permitting wiretapping and electronic surveillance and encouraging States to adopt similar legislation. Yet Title III, and the Omnibus Act of which it was a part, passed in the Senate by a vote of 72 to 4 and in the House of Representatives by a vote of 368 to 17!

How did near-unanimity replace perennial division on such a controversial subject? Rising concern over invasions of privacy in the modern age of electronics seemed to favor banning eavesdropping, not legalizing it. The recommendation of the President's Commission that law enforcement officials be authorized to eavesdrop in order to combat organized crime was surely not decisive in enactment of Title III; the Commission was divided on the matter, and legislators do not feel bound to take the advice of an

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[1]Public L. No.90-351, 82 Stat.1978, 18 U.S.C.A. §§ 2510-20 (Supp.1968) effective June 19, 1968.

agency created by the Executive. Nor could the decisions of the Supreme Court in Berger and Katz account for Title III; the Court itself disagreed as to whether a law authorizing eavesdropping could be drafted to satisfy constitutional requirements.[1]

Only the political climate of an election year and the assortment of "crime" measures dumped into a single piece of legislation can explain the overwhelming vote in favor of the Omnibus Crime Control and Safe Streets Act of 1968. The very title of the Act made it "politically irresistible."[2] Fear of crime and the clamor for "law and order" produced the first Federal law in the history of the nation to legalize eavesdropping. During the debates on the Omnibus Act, leading Republicans proclaimed that "crime" and "law and order" were to be central issues in the Presidential election campaign of 1968. Existing laws must be strictly enforced, and additional tools provided to obtain convictions. Richard Nixon blamed the courts for lawlessness in the United States and declared himself in favor of the eavesdropping provisions of the Omnibus Act. Crime in the District of Columbia was a national disgrace and complete

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[1] For an analysis of Berger v. New York and Katz v. United States, and the views of members of the Supreme Court, see pages 50 and 59.

[2] Some commentators, however, have expressed the view that while a general fear of "crime in the streets" may have contributed to the passage of the Omnibus Act of 1968, its enactment was due more to pressures of specific individuals and organized groups than to mass opinion. John P. Heinz, Robert W. Gettleman, and Morris A. Seeskin, "Legislative Politics and the Criminal Law," Northwestern University Law Review, July-August, 1969, Vol. 64, No. 3, pp. 277-358, at p. 350.

overhaul of the criminal system of justice in the Federal city was needed. The Supreme Court was accused of coddling criminals" and "handcuffing the police." President Johnson was charged with failing to recognize fully the problem of crime and responding to its challenge. The way to decrease crime, said the Republicans, was by increasing convictions.[1]

"Law and order" emerged as a political issue in 1968, but what did it mean? The true meaning of law and order is the "protection of everyone's rights against coercion, violence, and repression" under uniform rules, evenly enforced. But even if it was recognized as nothing more than a clever slogan, it had powerful appeal.[2] Some libertarians suspected that the call for "law and order" had racial as well as political overtones; that it veiled an attack on the Supreme Court by those who resented the Court's decisions on desegregation of public schools and securing the rights of indigent defendants.[3]

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[1]Criticism of the manner in which the Omnibus Crime Control and Safe Streets Act of 1968 passed through Congress to final enactment appears in Richard Harris, The Fear of Crime (New York: Frederick A. Praeger, 1969). See also Edwin M. Schur, Our Criminal Society: The Social and Legal Sources of Crime in America (Englewood Cliffs, N.J., Prentice-Hall, Inc., 1969), p. 236.

[2]New York Times, Editorial, May 3, 1970, Sec. E, p. 14, col. 1.

[3]Ramsey Clark charges that behind the phrase "law and order" many conceal their opposition to civil rights enforcement and to political dissent. See Crime in America, p. 345.

Democrats, as well as Republicans, wanted a "crime bill" enacted. President Johnson had sent a message to Congress in February 1967 warning that "fear of crime" had developed into a public malady and proposing Federal grants to States in aid of law enforcement. This was the origin of Title I of the Omnibus Act; a provision for "bloc-grants," opposed by the Johnson Administration, had been added to the original proposal.[1]

As finally enacted, the Omnibus Act contains eleven "Titles" covering a wide range of subjects, some of them only remotely related to "crime." Title VI, for example, provides that the Director of the Federal Bureau of Investigation shall be appointed by the President with the consent of the Senate after the present incumbent ceases to serve as Director. The most disputed sections continue to be Titles I, II, and III. Title II is an outright attempt to set aside three decisions of the Supreme Court: Miranda v. Arizona, Mallory v. United States and United States v. Wade.[2] In effect, it limits the power of Federal courts to review State court action. A voluntary confession is declared to be admissible in evidence in any Federal criminal prosecution; mere delay in arraignment does not render it

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[1]The bill was introduced as S.917. For a discussion of the Law Enforcement Assistance Administration program under Title I and its impact on eavesdropping under Title III, see page 312.

[2]Miranda v. Arizona, 384 U.S. 436, 88 S.Ct.1602, 16 L.Ed. 2d 694 (1966); Mallory v. United States, 354 U.S. 449, 77 S.Ct.1356, 1 L.Ed. 2d 1479 (1957); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

inadmissible. Eyewitness testimony is likewise admissible in criminal prosecutions brought in the Federal courts. Title II was based largely on a bill introduced by Senator John L. McClellan, Democrat of Arkansas. The constitutionality of this section is highly doubtful, but Title II is outside the scope of this dissertation except as it reflects the political atmosphere in which the Omnibus Act was passed.[1]

Title III of the Act is a combination of proposals in a bill introduced by Senator McClellan in January 1967, and a bill submitted by Senator Roman L. Hruska, Republican of South Carolina, after the decisions of the Supreme Court in Berger and Katz.[2] Senator Hruska's bill purported to comply with safeguards to constitutional liberties as laid down by the Court. Title III bans private eavesdropping, but authorizes interception of wire and oral communications by designated law enforcement officials provided certain procedures are followed. These procedures will be analyzed in depth, for the language of the law and the manner in which it has been interpreted in practice will determine whether wiretapping and electronic surveillance are tolerable in a free society.

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[1] S.674, introduced January 24, 1967. Senator McClellan is Chairman of the Subcommittee on Criminal Laws and Procedures before which intensive hearings were held on "Controlling Crime Through More Effective Law Enforcement."

[2] S.675, introduced January 25, 1967; S.2050 introduced June 29, 1967.

A provision for limited control of firearms was added to the Omnibus Act as the measure moved through the legislative process. Dr. Martin Luther King, Jr. was assassinated April 4, 1968 during the debates on the Act, and rioting broke out in various cities of the United States including Washington, D.C. Two months later Robert F. Kennedy was killed in Los Angeles. In the wake of this second tragedy, the House of Representatives passed the Senate version of the Omnibus Act without changes, thus eliminating reconsideration of the bill in conference.

In signing the Omnibus Act of 1968, President Johnson said it "contains more good than bad." As to Title III, he urged Congress to repeal its "unwise" provisions. Sanctioning eavesdropping by Federal, State,and local officials in an almost unlimited variety of situations, he said, "could result in producing a nation of snoopers bending to the keyholes of the homes and offices of America, spying on our neighbors." Attorney General Ramsey Clark instructed Federal law enforcers not to exercise their powers under the new law. He considered eavesdropping an invasion of privacy, doubted the constitutionality of Title III, and insisted that effectiveness of eavesdropping in law enforcement had not been proved.[1]

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[1]See "Law and Order," New Republic, June 29, 1968, Vol.158, No.2, pp.5-6. See also Richard Harris, Justice--The Crisis of Law,Order and Freedom in America (New York: E.P. Dutton & Co., 1970), pp.36,39; John N. Carroll, The Third Listener (New York: E. P. Dutton & Co., 1969), p.35.

During the Presidential election campaign, Richard Nixon criticized Clark's refusal to use eavesdropping under Title III, and charged him with being remiss in the fight against organized crime. After his election, President Nixon directed all Federal agencies to cooperate fully with the Department of Justice in its anti-crime efforts, and pledged that he would appoint "law-and-order" advocates to the Federal bench.[1] His appointee as Attorney General, John L. Mitchell, told the Senate Committee on the Judiciary at the hearing on his confirmation that he intended to use eavesdropping powers under Title III.[2]

"Law and order" as a political issue persists. The Nixon Administration intimates it represents the "law-and-order" party.[3] Commenting on current accomplishments in making arrests and obtaining convictions, Attorney General Mitchell notes, as has been done on other occasions, that "the previous administration refused to use court-authorized wiretapping."[4] The present administration, in turn, is charged by its critics with adopting a permissive attitude toward wiretapping, nourishing the fear of crime, and subverting "law and order" by running a highly political

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[1] New York Times, February 12, 1969, p.1, col.3. Appointment of Warren E. Burger as Chief Justice and Harry A. Blackman as Associate Justice seems to fulfill this pledge, but perhaps not in the way the President anticipated.

[2] New York Times, February 12, 1969, p.1, col.3.

[3] New York Times, Sec.E, February 12, 1971,p.12, col.3.

[4] Department of Justice, Attorney General's Report, January 19, 1971.

Department of Justice.[1] Whether the politics of "law and order" surrounding enactment of Title III has been carried over to operation of the eavesdropping section is a matter to be tested by the data gathered for this dissertation.

QUESTIONS RAISED BY TITLE III

Title III is the first comprehensive Federal enactment in the field of wiretapping and electronic surveillance in the history of the United States. It is a complex, detailed law containing many provisions whose meaning and application are in dispute and need prompt clarification by Congress or the Courts. Title III purports to serve a dual function:

1. To give law enforcement officers an effective tool--wiretapping and electronic surveillance--under specified conditions and with proper safeguards, to combat organized crime and other serious offenses.

2. To protect the privacy of individuals by banning eavesdropping other than by duly authorized law-enforcement officers, and prohibiting manufacture, sale, possession, or advertising of eavesdropping devices designed primarily for surreptitious interception.

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[1]See Alan M. Dershowitz, "Crimes of Degree," New York Times, Sec.7, February 21, 1971, p.4; Alexander M. Bickel, "Crime, the Courts and the Old Nixon," New Republic, June 15, 1970, Vol.158, No.25; New York Times, Editorial, April 26, 1970, p.12, col.1; March 15, 1970, p.16, col.3, and January 18, 1970, Sec.L, p.24, col.3; Sally Fry, "The Orwell Law--New Taps on Freedom," Nation, June 2, 1969, p. 698; Review by W.Carey McWilliams of Richard Harris, "Justice," in New York Times Book Review, March 22,1970, p.7; Victor S. Navasky, "A Famous Prosecutor Talks About Crime," New York Times Magazine, February 15, 1970, p. 32, at p.100.

The statute is based largely on the plenary power of Congress under the "commerce clause."[1] It imposes a blanket ban on interception and disclosure of wire or oral communications, but lists certain offenses for which a court order may be obtained by Federal and State law enforcement officers, authorizing eavesdropping under certain conditions. The law specifies the officials who may apply for an order, the judges to whom applications are to be presented, and the findings of "probable cause" on which orders must be based. An order may be granted for a period not exceeding thirty days, with renewals. Notice of the interception must be given within ninety days after termination. Judges and prosecuting officials are required to file reports on each eavesdrop order with the Administrative Office of the United States Courts in Washington, D.C. and the Administrative Office, in turn, must file an annual report with Congress.

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[1]U.S. Constitution, Art. 1, Sec.8, subd.3. Wiretapping clearly falls within the power of Congress under the commerce clause. The power is not so clear with respect to "bugging." If the electronic device uses the telephone, although it is not a wiretap, the commerce clause would seem to give the Federal government power to regulate. Similarly, if a wireless radio transmitter is used, it may fall within the power of Congress. A homemade "bugging" device such as a microphone, non-telephone wire, or tape recorder, may, however, be outside the scope of Title III restrictions. The uncertainty of Federal power in "bugging" cases is discussed in Laurens M. Vernon, "Eavesdropping in New York; 1968 Legislation," Syracuse Law Review, Spring 1969, Vol.20, No. 3, p.615. The Senate Report on Title III (No. 1097) acknowledged this uncertainty (p.92).

In addition to court-ordered eavesdropping, Title III permits interceptions without court order in national security cases and for forty-eight hours in emergency situations. The Act permits eavesdropping by a person who is acting with the consent of one of the parties to the communication. It excludes from the ban on eavesdropping interceptions by Telephone Company employees or agents in the normal course of employment and by the Federal Communications Commission in discharging its official responsibilities.

Penalties are provided for violations of Title III, consisting of imprisonment up to five years and a fine of $10,000 or both. Civil damages are also recoverable, consisting of actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is higher; punitive damages and counsel fees and other litigation costs are also recoverable.[1]

A person who has received any information concerning a wire or oral communication by authorized means, or evidence derived therefrom, may disclose the contents of the

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[1]Section 2514 of Title III, under which a witness may be compelled to testify on granting of immunity, was repealed by Pub. L.91-452, Title II, §227(a), 260, October 15, 1970, 84 Stat. 930, 931, effective four years following the sixtieth day after October 15, 1970. The repeal does not affect any immunity to which any individual is entitled by reason of any testimony or other information given before the effective date.

communication or evidence while giving testimony under oath in any proceeding held under the authority of the United States or any State or political subdivision.[1]

If an applicant requests it, an order authorizing interception must direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant with all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively. Compensation for furnishing such facilities or technical assistance must be made by the applicant at the prevailing rates.[2]

The following questions have generated the most heated discussion regarding Title III and will be considered in detail:

1. Nature of offenses covered--Does Title III permit eavesdropping for any offense, without limitation? Should offenses be limited to activities engaged in by organized crime or to serious crimes? May eavesdropping be used to obtain strategic intelligence as distinguished from tactical intelligence?

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[1]Sec.2517(3) authorizing disclosure and use of intercepted communications was amended by Pub.L. 91-452, Title IX, §902(b) October 15, 1970, 84 Stat. 947. Prior to the amendment, disclosure was authorized to be made only in a criminal proceeding in a United States or State court or in a Federal or State grand jury proceeding.

[2]This provision was added by Pub. L.91-358, Title II, §211(b), July 29, 1970, 84 Stat.654. Prior to that time, cooperation of the Telephone Company or of a landlord or custodian was on a voluntary basis.

2. Procedure to obtain court order-- Is the group of officials who may apply for an order authorizing eavesdropping too broad? How is "probable cause" to be spelled out in the application and kept current? Does Title III comply with the "particularity" requirements of Berger and Katz? Is it possible to show in an application that "normal investigative procedures" are inadequate, as required by Title III?

3. Time period for interceptions-- Is the permissible time period too long? Does the period--up to thirty days--permitted by Title III, with an unlimited number of extensions, violate constitutional limitations as stated in Berger and Katz?

4. Termination of interceptions--Is automatic monitoring of recordings allowable under Title III or is "live" monitoring required? Must interception end immediately upon obtaining the conversation sought? How is a monitoring agent to decide whether a particular conversation is the one authorized to be intercepted? How can interception of innocent conversations and privileged communications be minimized?

5. Notice and disclosure--To whom must notice be given that interception of conversations has taken place? To what extent should the contents of intercepted communications be disclosed? At what point in a proceeding may a motion to suppress eavesdropping evidence be made?

6. Reports--Do the reports required to be filed by prosecuting officials and judges with the Administrative Office of the United States Courts serve any significant purpose? Do the reports need improvement and clarification? Is the annual report to Congress required by Title III adequate for evaluating the statute?

7. 48-Hour emergency eavesdropping--Is the provision of Title III permitting eavesdropping without a court order for forty-eight hours in an emergency constitutional? Does it violate the mandates of Berger and Katz?

8. National security--Is the provision of Title III permitting eavesdropping in "national security" cases without a court order constitutional? What does "national security" mean?

Each of these areas of controversy will be analyzed, preliminary to an examination in Part IV of how the Congressional enactment has been interpreted and carried out in actual practice. Particular reference will be made in this section to the wording of relevant provisions of Title III, the Senate Report on the bill, testimony of witnesses at Congressional hearings, professional commentary in periodicals, books, and newspapers, and the statements of legislators, their associates, and critics. The ban in Title III on private eavesdropping, and withdrawal of consent eavesdropping from the restrictions of Title III will also be discussed. Problems of Title III are approached in this section essentially from a theoretical standpoint, and in

Part IV from a practical one. Unavoidably, theory and practice occasionally overlap. State statutes authorizing court-ordered eavesdropping pursuant to Title III are analyzed on page 173 et seq.

1. Nature of offenses

Eavesdropping under Title III is justified by its proponents largely on the ground that it is an indispensable tool in fighting organized crime. Critics of the law point out that Title III permits eavesdropping for many offenses that are not and will not be associated with organized crime. The offenses for which court-ordered eavesdropping by Federal officers is permitted are listed in detail in Section 2516(1). They include:

(a) Offenses relating to espionage, sabotage, treason, riots, and enforcement of the Atomic Energy Act of 1954.

(b) Violation of Federal law restricting payments and loans to labor organizations, or offenses in labor racketeering.

(c) Bribery of public officials and witnesses, and sporting contests; [unlawful use of explosives] transmission of wagering information; influencing or injuring an officer, juror, or witness; obstruction of criminal investigations; [obstruction of State or local law enforcement] Presidential assassinations; kidnapping and assault; interference with commerce by threats or violence; interstate and foreign travel or transportation in aid of racketeering; influencing operations of employee benefit plan; [prohibition of business enterprises of gambling] theft from interstate shipment; embezzlement of pension and welfare funds; interstate transportation of

stolen property; [violations with respect to racketeer influenced and corrupt organizations].[1]

(d) Counterfeiting.

(e) Bankruptcy fraud; manufacture, importation, receiving, concealment, buying, selling, or dealing in narcotic drugs, marihuana, or other dangerous drugs.

(f) Extortion, including extortionate credit transactions.

(g) Conspiracy to commit any of the enumerated offenses.

These Federal offenses were selected, according to the Senate Report, because of their seriousness or because they were characteristic of the activities of organized crime.[2] The Report states that "because of the importance of privacy . . . interceptions should . . . be limited to major offenses."[3] However, use of Title III in <u>any</u> offense seems to be sanctioned on the theory that organized crime has not limited itself to the commission of any particular offense.[4] The American Bar Association "Standards Relating to Electronic Surveillance" which follows the Senate Report closely and was prepared by the same personnel states in conclusion:

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[1]The offenses in brackets were added in 1970. Pub.L. 91-452, Title VIII,§810, Title IX,§902(a), Title XI,§1103, October 15, 1970, 84 Stat.940, 947, 959.

[2]Senate Report No.1097, 90th Cong.,2d sess., p.97.

[3]Ibid., p. 80.

[4]Ibid., p. 97.

> We ... . find that the use of electronic surveillance techniques is necessary in the administration of justice in the area of organized crime . . . The use of these techniques to get evidence of organized crime is not, we feel, the "dirty business" rightly condemned by Mr. Justice Holmes.[1]

The need for eavesdropping in combating organized crime was stressed by witnesses at the Congressional hearings on Title III. Jacob Grumet, Chairman of the New York State Commission of Investigation who favored eavesdropping, said:

> In the area of organized crime, there wiretapping is important.

Senator Edward M. Kennedy, Democrat of Massachusetts, who questioned the wisdom of official eavesdropping under Title III, asked:

> You do not see a relationship between the possibility of wiretapping and solving homicides?

To which Mr. Grumet replied:

> In homicides, no, not too close a relation . . . I was in charge of the Homicide Bureau in New York for many years and handled hundreds of homicides and prosecuted many myself. Wiretapping was not too frequently used at all, in investigating homicides.[2]

Section 2516(1)(g) lists as a separate category of offenses covered by Title III "any conspiracy to commit any of the foregoing offenses." This reflects a recognition of the utility of conspiracy theory in prosecution of organized

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[1] American Bar Association Project on Minimum Standards for Criminal Justice, Tentative Draft (1968), p.96. The Standards of the A.B.A. recommended January 1971 affirm the desirability of electronic surveillance as a law enforcement technique but make no mention of "organized crime."

[2] Hearings, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, 90th Cong., 1st sess., April 19, 1967, p.517.

crime. Conspiracy has been defined as:

> A combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.[1]

Conspiracy theory has developed as a substantive legal tool against criminal groups who present a special danger to society because they are insulated from normal investigative techniques and have great potential for corrupting government officials. Laws prohibiting and punishing conspiracy have been enacted by the Federal government and by various States.[2] A conspiracy constitutes a continuing crime. Punishment is meted out irrespective of the probability of success of the conspiracy. Knowledge of the identity of co-conspirators is not required to establish criminal liability; only knowledge of the existence of co-conspirators is needed. All members of the group are subject to penalties for the crime of conspiracy by association, and those in leadership roles may be held accountable not only for the conspiracy but for specific offenses committed by other members in furthering the unlawful enterprise. Each is responsible for the whole, and the conspiracy may be remote in time from the crime itself.

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[1] Commonwealth v. Hunt, 45 Mass.(4 Met.) 11, 12 (1842). See also G. Robert Blakey, "Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis," Appendix C, annexed to Task Force Report: Organized Crime, 1967.

[2] 18 U.S. Code Sec. 371.

The legal concept of conspiracy has been a useful weapon in law enforcement, but it does pose a threat to individual liberty. A conflict is created between exercise of freedom of speech and association and the right of government to place limitations on those rights. A conspiracy case is often based largely on circumstantial evidence. An individual may be linked to other suspected wrongdoers with no direct evidence of his connection with the group. One of the arguments advanced by those who favored legalization of eavesdropping by law enforcement officers was that electronic surveillance could provide direct evidence of the identity of leaders of organized crime and their connection with specific criminal offenses.[1] Whether it has been successful in this respect is a matter to be tested by empirical data.

The list of offenses in which State officers may obtain eavesdropping authorization is even broader than that permitted the Federal government and it has been claimed that the list is practically unlimited.[2]

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[1]Blakey, "Aspects of the Evidence Gathering Process in Organized Crime Cases," Task Force Report: Organized Crime, 1967, p.83.

[2]Herman Schwartz, "The Legitimation of Electronic Eavesdropping: The Politics of 'Law and Order,'" Michigan Law Review, January 1969, Vol.67, No.3, pp.455-510, at p.482. The list of offenses is criticized as overly broad in Athan G. Theoharis and Elizabeth Meyer, "The 'National Security' Justification for Electronic Eavesdropping: An Elusive Exception," Wayne Law Review 749, Summer 1968, Vol.14, p.749, at p.771. Criticism that Title III allows States to tap "in cases involving just about any felony at all, no matter how disorganized" is made in The New Republic, May 18, 1968, Vol.158, No.20, p.4.

Section 2516(2) of Title III provides that State statutes may authorize eavesdropping in connection with "the offense of murder, kidnapping, gambling, robbery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year," or any conspiracy to commit any of these offenses. Commenting on the phrase "dangerous to life, limb, or property, and punishable by imprisonment for more than one year," the Senate Report states:

> This limitation is intended to exclude such offenses as fornication and adultery, which do not involve danger to life, limb, or property. The term "property," however, is not to be read restrictively. For example, the activities of organized crime in "cigarette bootlegging" which pose a substantial threat to the revenue of some cities and States could be made a designated offense if the penalty were made high enough.[1]

The phrase "dangerous to . . . property" has been criticized as highly ambiguous. It has been suggested that this means physically dangerous to property and should not include importing cigarettes as the Report contends. The wisdom of the open-ended clause "punishable by imprisonment for more than one year" has also been questioned. This gives the States much leeway and may not be an accurate way of distinguishing between petty and serious crimes.[2]

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[1]Senate, 90th Cong., 2d sess., Report No. 1097, "Omnibus Crime Control and Safe Streets Act of 1967," to accompany S.917, at p. 47.

[2]Comment of Chief of Appeals Bureau, Office of District Attorney, New York County.

G. Robert Blakey, one of the principal drafters of Title III, agrees that the statute as enacted contains practically no limitation as to the nature of the offense covered, other than the one-year imprisonment limitation in certain cases. The drafters of Title III, says Blakey, made a judgment--that it was not necessary to limit the nature of the offenses.[1] In the Senate hearings on Title III, however, he recognized the potential for abuse inherent in eavesdropping over a wide area:

> The use of electronic surveillance . . . presents a very serious problem and as a society we should not authorize people to use these techniques except . . . where it is absolutely necessary and a serious criminal problem is presented . . . If we found that the possibility of abuse was higher in certain areas than others, and that therefore certain kinds of investigations perhaps ought not to be undertaken using these techniques, we could exclude them.[2]

Critics of Title III point out that enumeration of offenses that may be covered by State law may raise problems where Federal and State laws call similar crimes by different names. For example, under Federal law a crime may be designated as extortion; under State law the equivalent offense may be known as blackmail. Is blackmail a covered offense? Is forgery a covered offense? How about

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[1]Comment in interview in Washington, D.C. May 11, 1970.

[2]U.S. Congress, Senate, Committee on the Judiciary, Controlling Crime Through More Effective Law Enforcement, Hearings, before the Subcommittee on Criminal Laws and Procedures, 90th Cong., 1st sess., July 11, 1967, p.975.

tax evasion?[1]

Other questions relating to the nature of offenses, unforeseen by the drafters of Title III, are emerging in the States. The 1969 New York eavesdropping law which purports to conform to Title III permits court-ordered eavesdropping for the offense of second degree gambling--a misdemeanor punishable by six months in prison. It is claimed by New York law enforcement officials that this is authorized by Title III, but the subject of an eavesdrop order in a second-degree gambling case is litigating the matter.[2]

One of the most pressing problems is whether Title III permits the gathering of strategic intelligence, that is, general information on the criminal activities of an individual that may ultimately enable law enforcement officers to link him to other suspects or to some specific crime. Application for an eavesdrop order must show that a particular offense has been, is being, or is about to be committed (Sec.2518(1)(b)(i)). This would seem to limit interceptions to obtaining specific information about a particular crime, or tactical intelligence. Some commentators have assumed that Title III outlaws the gathering of

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[1]Professor Blakey expressed the view that tax evasion is not among the offenses covered by Title III. This has also been noted by John A. Carroll in The Third Listener (New York: E. P. Dutton & Co. Inc., 1969),p.38. Herman Schwartz, however, believes that State officials can eavesdrop when investigating State income tax evasion. See Michigan Law Review, p.482.

[2]Reported by District Attorney of Dutchess County in New York State.

strategic intelligence.[1] Others claim that under Title III two types of orders are available:

1. Prosecutorial--to get evidence with respect to a specific offense by the person surveilled.

2. Investigative--to link a subordinate suspected of crime with his unknown superiors and to ascertain their identity and activities.[2]

An investigative surveillance generally involves a series of interceptions based on a single showing of "probable cause." This appears to violate the proscriptions set forth in Berger, and its constitutionality is doubtful.

Those who believe that Title III permits gathering strategic intelligence as well as tactical point out that the purpose of Title III is primarily to give law enforcement officers an additional investigative tool against organized crime. An eavesdrop order may be issued only upon a showing that "normal investigative procedures" are inadequate (Sec.2518(3)(c)). Members of organized crime, particularly top echelon, are insulated from police detection by

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[1]Herman Schwartz, Michigan Law Review, p.471. Schwartz believes that outlawing strategic information is in line with the holding of the Supreme Court in Katz and Berger. See also Vernon, Syracuse Law Review, p.619. Vernon claims that use of eavesdropping in petty cases aimed toward obtaining evidence of suspected major crimes is an abuse of the statutory authorization scheme. To Kent Greenawalt it seems plain that "general fishing expeditions against suspected criminal figures, said to be of great value against organized crime, are not permitted. New York Law Journal, June 17, 1970, p.1, col.4.

[2]Comment, "Electronic Surveillance by Law Enforcement Officers," Northwestern Law Review, March/April 1969, Vol.64, No.1, pp.63-85, at pp.71-75. This article argues that on a policy level, investigative search should be maintained.

the organizational structure of the syndicate. Investigative eavesdropping is the means for piercing this wall of protection. At the Senate hearings, Professor Blakey explained the difference between strategic and tactical surveillance to Senator Hruska and the need for obtaining strategic intelligence in investigation of organized crime:

> In investigation of organized crime you have known criminals but unknown crimes . . . it is necessary to subject the known criminals to surveillance . . . to identify their criminal and noncriminal associates . . . their areas of operation, both legal and illegal. Strategic intelligence attempts to paint this broad, overall picture of the criminal's activities . . .[1]

Blakey acknowledged that "the use of electronic equipment for strategic intelligence purposes is fraught with the possibility for abuse."[2] Senator McClellan suggested that perhaps there should be separate sections to deal with the two types of intelligence, one for longer periods and one for shorter periods.[3] The dilemma was defined simply by Senator Kennedy:

> The problems are how you get the bigshots . . . if there could be any legitimate reason for wiretapping in organized crime it is . . . to get the bigshots. And the problem . . . is how to get probable cause as to the bigshots. . . without listening in on an inordinate number of calls of little shots and innocent people.[4]

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[1] Hearings, Subcommittee on Criminal Laws and Procedures, 90th Cong., 1st sess., July 11, 1967, pp.957-958.

[2] Ibid., p. 958.

[3] Ibid., p. 976.

[4] Ibid., April 20, 1967, p.617.

Some writers on organized crime recognize the fact that the use of wiretap evidence in court is of less importance to law enforcement officials than tapping for "general surveillance" and to develop "leads."[1] Former Attorney General Ramsey Clark says that if the Government has been wiretapping suspects' lines to catch others, it has gone beyond the authority of Title III.[2] For a discussion of varying attitudes and practice among law enforcement officials with respect to gathering "strategic intelligence" under Title III, see page 255.

The problem of eavesdropping for strategic intelligence is further complicated by Section 2517(5) which permits interception and use of a communication relating to an offense other than that specified in the order if the judge finds, on subsequent application, that the contents of conversations were intercepted as provided by Title III. The constitutionality of this provision is open to doubt. It is questionable whether the Supreme Court would find subsequent judicial approval acceptable in lieu of antecedent justification as required by the Fourth Amendment.[3]

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[1]See Rufus King, Gambling and Organized Crime (Washington, D.C.: Public Affairs Press, 1969), p.176; Stanley M. Beck, "Electronic Surveillance and the Administration of Criminal Justice," Canada Bar Review, Vol. 46, 1968, pp.643-693, at p.649.

[2]New York Times, Sunday, October 11, 1970, Sec. E, p.9, col. 4.

[3]See Notes: Eavesdropping Provisions of the Omnibus Crime Control and Safe Streets Act of 1968. How Do They Valparaiso University Law Review, Fall 1968, Vol.3, No.88, pp.89-101, at p.94.
Valparaiso University Law Review, Fall 1968, Vol.3, No.88, pp.89-101, at p.94.

2. Procedure to Obtain Court Order for Eavesdropping

Federal authority to apply for an eavesdrop order is centralized by specific provision in Title III. Section 2516(1) restricts it to "the Attorney General, or any Assistant Attorney General specially designated" by him. The Senate Report offered the following explanation for this high degree of control:

> Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen.[1]

By contrast, State authority to make applications is widely dispersed. Section 2516(2) lists State applicants as "the principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof," provided they are authorized by State statute. Most State applications have been made by District Attorneys or Attorneys General. In New York State, twenty or more District Attorneys applied for eavesdrop orders during 1969.[2] Policy in use of electronic surveillance has not been made on a statewide basis. Critics of Title III claim that State power to use eavesdropping has been left in too many hands. No serious claim of abuse has as yet been leveled against any State official, but it is apparent that

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[1] Senate Report No. 1097, p. 97.

[2] See Report of Administrative Office of the U.S. Courts, January 1, 1969 to December 31, 1969, Tables A and B.

wide divergence in attitude and practice exists even within a particular State.

Application for an eavesdrop order must be made to a judge of competent jurisdiction. This is defined in Section 2510(9) as:

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications.

It is charged that Title III provides no safeguard against "judge-shopping," that applicants can go to any "judge of competent jurisdiction" who is known to be lenient in signing eavesdrop orders. From data supplied by various State and Federal officials as to how they decide which judge to apply to for an eavesdrop order under Title III and State statutes, selection of a friendly judge would seem always to be possible.[1]

Before a judge can sign an order, he must find from the facts set forth in the application that there is <u>probable cause</u> for belief that:

1. an individual is committing, has committed, or is about to commit an offense covered by Title III.
2. particular communications concerning that offense will be obtained through interception.
3. the facilities from which the communications are to be intercepted are being used, or are about to be used, in connection with such offense, or are

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[1] See page 224 and page 304.

> leased to, listed in the name of, or commonly used by the particular individual.

These findings are intended to link up a specific person, a specific offense, and a specific place, to satisfy the requirements of Berger as to particularity.[1] The Act appears to meet the particularity requirements with one possible exception: both the application and order must contain a particular description of the type of communication seized (Section 2518(1)(b)(iii); Section 2518 (4)(c)). In Berger the Court said that the order must particularly describe the"communication, conversation or discussion to be seized." However, in Katz the Court did not mention this and failure to do so may indicate that it had softened the requirements.[2]

One of the most troublesome problems in applying for an eavesdrop order is the question of probable cause. The requirement of probable cause is imposed:

> . . . so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy may be invaded.[3]

Neither Title III nor the Senate Report provide any guidelines for determining whether or when probable cause

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[1]Section 2518(3). See Senate Report No. 1097, p. 102. The provision lends support to the view that Title III is not intended to be used for gathering strategic intelligence.

[2]This is suggested in Valparaiso University Law Review, Fall 1968, Vol.3, No. 88, p.8.

[3]Jones v. United States, 362 U.S. 257, 80 S.Ct.725, 4 L.Ed.2d 697 (1960). See 362 U.S. at pp.270-271.

exists. According to former Justice Tom C. Clark of the United States Supreme Court, reliance must be placed on the impartial judgment of the judicial officer that probable cause clearly exists "in the true tradition of that term."[1] But what is the true tradition? The elusive meaning of "probable cause" is hard to pin down.

In Berger, the Court defined "probable cause":

> Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.[2]

In determining whether probable cause exists to obtain a court order for eavesdropping under Title III, Supreme Court decisions in probable cause cases involving ordinary search and seizure will have considerable bearing.[3] These cases generally dealt with the question of when a search may be based on information furnished by an informant. Informers' tips have been held to be a basis for probable cause, but they must be supported by facts on which the reliability of the informer is based. In Aguilar v. Texas, the Court invalidated a search warrant based on an affidavit stating that the police "have

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[1] "Wiretapping and the Constitution," California Western Law Review, Fall 1968, Vol.5, No.1, p.1, at p.6.

[2] 381 U.S. at p. 55.

[3] This definition of "probable cause" in Berger is the same laid down by the Supreme Court in Carroll v. United States, 267 U.S. 132,162, 45 S.Ct. 280, 69 L.Ed. 543 (1925). See also Kent Greenawalt, New York Law Journal, June 15, 1970, p.4, col.1.

received reliable information from a credible person" and "do believe" that the suspect possessed narcotics at a certain place. The Court deemed this to be mere conclusion; the affidavit failed to set forth the underlying circumstances or to support the claim that the informant was reliable or credible.[1] In McCray v. Illinois, the Court ruled, five to four, that where the police acted on credible information furnished by a reliable informant, a search might be lawful even if the informant's identity was not disclosed.[2] In Spinelli v. United States, the Court considered the difficult question of how much corroborating information is needed to constitute "probable cause." Applying the established doctrine that a magistrate may issue a warrant only if he can judge for himself the validity of the conclusions set forth by the applicant, the Court decided that the facts presented by an F.B.I. agent were insufficient; no reason was given to support the conclusion that the informant was reliable, nor were the underlying circumstances from which the informant inferred that the defendant was engaged in illegal gambling adequately stated.[3]

Justice Stewart, who wrote the majority opinion in Katz, had previously stated in his concurring opinion in

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[1]378 U.S. 108, 84 S.Ct. 1509,12 L.Ed. 726 (1964).

[2]386 U.S. 300, 87 S.Ct.1056, 18 L.Ed.2d 62 (1967).

[3]393 U.S. 410, 89 S.Ct.485, 21 L.Ed. 2d 637 (1969).

Berger that "only the most precise and rigorous standard of probable cause should justify an intrusion of this sort." Does this mean that standards of probable cause are higher in authorizations for electronic eavesdropping than in a conventional search and seizure warrant? Justice Stewart seemed to indicate that they are. In his opinion, the affidavits on which the judicial order was issued in Berger did not constitute a showing of adequate probable cause to justify an intrusion of the scope and duration permitted in this case.[1]

Section 2518(5) of Title III requires that an eavesdrop order be executed "as soon as practicable." The purpose of this provision is to prevent probable cause from becoming stale. Timeliness must exist at the time the application is presented and remain so during the period specified in the order. An interval between the time when surveillance begins and conversation sought is overheard is common. The longer the interval, the weaker is the stated "probable cause." Whether or not probable cause has become stale is said to "be a question of fact in each case[2]." The possibility of staleness is increased by extension of an order, and applications for extension must show new probable cause. As to how this is done in practice, see

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[1] Berger v. New York, 388 U.S. 41, at p. 69 (1967).

[2] Senate Report No. 1097, p. 103.

page 217 . The issue of staleness of probable cause in eavesdropping has been formulated as follows:

> [T]he issue . . . is whether the probable cause existing at the time of the order is current enough to justify a later seizure of the type of communication sought . . . if a law enforcement officer can establish probable cause, he should be able to show when the activity under investigation is more apt to occur . . . an affiant will have to demonstrate a pattern of conduct over a period of time.[1]

Section 2518(5) also provides that "every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception" of innocent conversations. Title III does not indicate how they can be minimized, although the question was raised at the Hearings of the Senate Subcommittee on Criminal Laws and Procedures. Senator McClellan asked an attorney from Houston, Texas, who had come to testify in behalf of another bill what he thought about court-ordered eavesdropping, and was surprised to get the following answer pointing out the inevitability of overhearing innocent conversations:

> Mr. Walsh: There is no way you could tap a telephone under a court order that would satisfy the Fourth Amendment. If somebody wants to tap my telephone they are not only listening to me; they are listening to every individual who may choose to call my law office . . . that is the essential difference between the search warrant contemplated by the Fourth Amendment.

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[1]Edward G. Mascolo, "The Staleness of Probable Cause in Affidavits for Search Warrants: Resolving the Issue of Timeliness," Connecticut Bar Journal, June 1969, Vol.43, No.2, pp.189-219, at p.217.

> Sen. McClellan: In searching your office would he not see many things you would not want him to see besides what he is looking for?
>
> Mr. Walsh: That may be, but he is not listening to every conversation with every client who would call me. If I got a search warrant to search Senator McClellan's telephone I would be listening to every constituent, every Federal employee who might have an occasional call to you. There would be no way to limit it. That I think is the ultimate vice in the wiretapping situation.[1]

Senator Edward Kennedy also raised the question of overhearing innocent conversations in interrogating the District Attorney of Nassau County in New York State regarding the New York eavesdropping law who had testified in favor of Title III:

> Sen. Kennedy: [W]e do not know . . . how many innocent conversations they listened in to get a certain lead, do we?
>
> Mr. Cahn: No sir. It would be almost impossible to give you those figures.
>
> Sen. Kennedy: Does the person listening on the other end make the decision on the spot as to whether a certain conversation is relevant or not?
>
> Mr. Cahn: Yes, it has to be done that way.[2]

Those who opposed wiretapping stressed the fact that inevitably and uncontrollably innocent conversations would

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[1]U.S. Congress, Senate, Committee on the Judiciary, Controlling Crime, Hearings before the Subcommittee on Criminal Laws and Procedures, 90th Cong.,1st sess.,July 12, 1967, p.1089.

[2]Hearings, April 20, 1967, p.606.

be overheard.[1]

The question of intercepting privileged communications, such as those between attorney and client, was also raised at the hearings on court-ordered eavesdropping. The American Civil Liberties Union claimed that wiretapping and electronic surveillance are inherently uncontrollable.

> There is no way to limit the tap to the persons or conversations in which the police officer may have a legitimate interest . . . Such invasions cannot possibly be avoided once the tap is put in . . . the necessary confidentiality of legally privileged conversations is inescapably destroyed, even if unintended.[2]

Section 2517(4) of Title III attempts to protect privileged communications by providing that they shall not lose their privileged character whether the interception is lawful or unlawful.

In addition to findings of probable cause the judge must decide if the facts submitted in the application show that normal investigative procedures have been tried and failed, or reasonably appear to be unlikely to succeed if tried or to be too dangerous (Section 2518(3)(c)). The purpose of this requirement is to establish that "exigent

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[1] Hearings, April 20, 1967. See testimony of Ray Girardin, Police Commissioner of Detroit, Michigan, Hearings March 9, 1967, p.299, 312; Ramsey Clark, Attorney General, p.358-9. Clark said:"Of necessity, when a line is tapped a large mass of material is intercepted and recorded, the great preponderance of which has no relationship whatever to the purpose of the tap."

[2] Statementof Lawrence Speiser, Director, Washington, D.C. office,American Civil Liberties Union. U.S. Congress, Senate, Committee on the Judiciary, Hearings of Subcommittee on Criminal Laws and Procedures, 90th Cong.,1st sess., July 12, 1967, p. 1179.

circumstances" exist to justify search without prior notice, as required in Berger and Katz.[1] Title III does not define "normal investigative procedures, but as stated in the Senate Report it would include:

> Standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants.[2]

How is the judge to decide whether normal investigative procedures are unlikely to succeed or be too dangerous? It is suggested that the "judgment would involve a consideration of all the facts and circumstances" and that it has to "be tested in a practical and common sense fashion.[3] The question is one of need and what constitutes proof of that need.[4] No one denies that the need for electronic surveillance is difficult to show. Some claim that it is impossible to demonstrate that normal techniques could not produce the same result (see page 218).

Under Section 2518(6) of Title III an eavesdrop order may require periodic reports to the judge showing what progress has been made and the necessity for continued interception. Failure to make such progress reports mandatory

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[1]Stephen Linzer, "Federal Procedure for Court-ordered Electronic Surveillance: Does it Meet the Standards of Berger and Katz?" The Journal of Criminal Law, Criminology and Police Science, 1969, Vol.60, pp.203-214, at p. 209.

[2]Senate Report No. 1097, p.101.

[3]Ibid.

[4]Comment, Northwestern Law Review, March/April 1969, Vol.64, No.1, pp.63-85, at p.65,footnote 12.

has been criticized as seriously undermining judicial supervision of the operator of the intercept.[1] Progress reports are intended to serve as a check on the continuing need to conduct the surveillance and to prevent abuse, as the Senate Report clearly recognized:

> At any time the judge is convinced the need is no longer established, he may order the surveillance discontinued. [It] will serve to insure that extended surveillance is not undertaken lightly. This provision will serve to insure that it is not unthinkingly or automatically continued without due consideration.[2]

Few, if any State judges have required progress reports. Guidelines for Federal applications indicate that the order shall specify the intervals at which progress reports to the judge are to be made (see page 280), and it can reasonably be assumed that orders issued by Federal judges do call for such reports. For progress reports made in a Federal test case under Title III, see page 331.

Safeguards to insure the keeping of accurate records of intercepted communications are provided in Section 2518 (8) of Title III. The contents of intercepted communications must be recorded on tape, wire, or other comparable device, if possible, in such a way as to protect the recording from editing or other alterations. Immediately on expiration of the time period specified in the order, or any extension, the recordings must be made available to the judge who issued the order, and sealed under his direction.

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[1] Linzer, The Journal of Criminal Law, Criminology and Police Science, p. 212.

[2] Senate Report No. 1097, p. 104.

Custody of the recordings shall be wherever the judge orders. The recordings may not be destroyed except on court order and must be kept for ten years. Duplicate recordings may be made for authorized disclosure.

Applications and orders authorizing eavesdropping must be treated confidentially. They must be sealed by the judge, and custody of the papers "shall be wherever the judge directs." They may be disclosed only on a showing of good cause, may not be destroyed except on court order, and must be kept for ten years (Section 2518(8)(b)). The Senate Report states that most law enforcement agencies' facilities for safekeeping will be superior to the court's and that the agency normally should be ordered to retain custody.[1] It can be argued that since this is the responsibility of the Court, that is where custody should be and adequate facilities can be provided without too great expense.

3. The Time Period for Interceptions

A vulnerable point of attack on Title III is the clause permitting interceptions to continue for a period up to thirty days, with an unlimiated number of 30-day extensions (Section 2518(5)). This provision raises both constitutional and policy problems. In Berger, the Supreme Court disapproved of authorized surveillance over a 2-month period and characterized uninterrupted interception as

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[1]Senate Report No. 1097, p. 104.

"indiscriminate" seizure. It looked at the face of the New York law and held it unconstitutional. In Katz, however, the Court took into consideration the circumstances of the particular interceptions, indicating that it had turned to a case-by-case approach. The Senate Report probably took this into account in expressing the view that the duration of surveillance would have to be justified on a case-by-case basis:

> What is important is that the facts in the application on a case-by-case basis justify the period of time of the surveillance.[1]

A narrow construction of Katz would seem to indicate that interception for an entire 30-day period constitutes a general search and is therefore unconstitutional.[2] As a matter of policy, if an application asks for a period that is longer than necessary, it may indicate a "lack of caution and sloppiness" in preparing the application.[3] There should be no greater invasion of privacy than is necessary under the circumstances.

For a variety of opinions expressed in interviews as to the constitutionality of the 30-day period of time allowed for eavesdropping under Title III, see page 222. The time period allowed has been attacked in a test case (see page 346).

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[1] Senate Report No.1097, p.104.

[2] See Stanley M. Beck, Canada Bar Review, at p.691; Linzer, Journal of Criminal Law, Criminology and Police Science, at p.210.

[3] Comment of head of Appeals Bureau, District Attorney's Office, New York County.

4. Termination of Interceptions

A limitation on length of surveillance may be spelled out from Section 2518(1)(d) and Section 2518(4)(e) of Title III. Section 2518(1)(d) requires that interception end automatically when the described type of communication has been first obtained, unless the application shows probable cause to believe that additional communications of the same type will occur later. Section 2518 (4)(e) requires the eavesdrop order to include a statement as to whether or not interception shall terminate automatically when the described communication has been first obtained. One critic of Title III claims that this limitation on length of surveillance is no limitation at all. A continuous series of intrusions, possibly lasting for years, is envisaged as a possibility under Title III.[1]

One of the rules laid down by the United States Supreme Court in Berger was that the order authorizing surveillance must state that as soon as the conversation sought is recorded, the authorization shall cease. The subject of termination was not discussed in Katz. The recording obtained and introduced at the trial in Katz consisted of six conversations lasting an average of three minutes each. The opinion does not indicate whether these all took place on the same day or over a period of three days.

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[1]Schwartz, Michigan Law Review, at p.463.

If the rule stated in Berger is applied rigidly and authorization must terminate as soon as the conversation sought is recorded, it is possible that the purpose of the order will be thwarted. Recording of one conversation covering the information sought may not furnish adequate evidence for conviction. Suppose, on the other hand, that the officer continues his electronic surveillance after he has obtained the recording of a conversation as specified in the order. Does continuance of surveillance constitute an invasion of privacy that invalidates all the interceptions?

5. Notice and Disclosure: Motion to Suppress

Title III requires that within a reasonable time but no later than ninety days after termination of interception (or filing of an application which is denied), notice must be served on those named in the order or application and on such other parties to the intercepted communications as the judge determines (Section 2518(8)(d)). The purpose of the notice, termed an "inventory," is to give "aggrieved persons" an opportunity to make objections to the eavesdropping order by a motion to suppress evidence.[1] An aggrieved person is defined by Section 2510(11) as any person "who was a party to any intercepted wire or oral communication or . . . against whom the interception was directed." The statute is ambiguous as to who is entitled to move to suppress and at what stage of the case. Title

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[1] Senate Report No.1097, pp.91,101.

III appears to leave some injured persons without a remedy:

> [A] third person may be adversely affected or incriminated by unlawfully seized communications and yet have no standing to object, even though [Title III] plainly states that no such communication will be admissible. If police are able to use improperly intercepted communications against persons who have no standing to object, the Court may follow the position set forth in Elkins (364 U.S. at 222-24) and reaffirmed in Lee (392 U.S. at 385-6) that a procedure which subverts the clear intent of Congress will not be allowed . . .[1]

A further problem may be raised by the fact that the notice need not state exactly what was intercepted. It is required only to state: (1) the fact of entry of the order or application, (2) date of entry and period authorized, and (3) whether communications were or were not intercepted. Title III leaves it to the judge's discretion to determine what portions, if any, of the intercepted communications shall be made available for inspection in the interests of justice. This seems to be constitutionally deficient in the light of the Supreme Court's decision in Alderman v. United States requiring the Government to make available to defendants the record of conversations illegally intercepted even if the Government claimed that

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[1]Recent developments: "Inadmissibility of Wiretap Evidence in State Courts," Duke Law Journal, October 1968, Vol.1968 No.5, pp.1008-1013, at p.1012. See also Northwestern Law Review 63, March/April 1969, Vol.64, No.1, pp.63-85, at p.85, raising the question whether the subject or anyone else is entitled to notice where the order isapproved but no prosecution results.

they were not relevant to the case.[1]

The Senate Report justified giving only limited access to intercepted communications or evidence derived therefrom:

> The motion to suppress . . . should not be turned into a bill of discovery by the defendant in order that he may learn everything in the confidential files of the law enforcement agency . . . Nor should the privacy of other people be unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications.[2]

The duty of causing service of an "inventory" is placed on the judge by Section 2518(8)(d), and it has been noted that it may be postponed by a judge indefinitely.[3] The Senate Report acknowledges the possibility of postponement almost indefinitely but states that the provision for giving notice should assure the community that the techniques are reasonably employed; eventually the interceptions must become known to the subject who can then seek redress if he believes his privacy has been invaded illegally.[4] As to how authority to postpone notice has been exercised by judges in actual practice, see page 259.

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[1]394 U.S. 165, 89 S.Ct.961, 22 L.Ed. 2d 176 (1969). See page 69 for details of Alderman. The Omnibus Crime Control Act of 1970 also provides that disclosure of illegal surveillance is not required unless the information is relevant. See Public Law 91-452, 91st Cong., S.30, October 1970, Title VII.

[2]Senate Report No.1097, p.106; but note the extent to which such recordings and transcripts were made available to defendants in the test case of United States v. Tantillo, discussed on page 337.

[3]Schwartz, Michigan Law Review, January 1969, at p. 484.

[4]Senate Report No. 1097, p.105.

An "aggrieved person" may move to suppress eavesdropping evidence on one of the following grounds: (1) that the order was insufficient on its face; (2) that interception was not in conformity with the order, and (3) that communication was unlawfully intercepted. Title III is ambiguous as to when such a motion may be made. Section 2518(10)(a) says it must be made "before the trial, hearing, or proceeding" unless there was no opportunity to do it or the person was not aware of the grounds of the motion. Is the motion premature if made before arrest and indictment? This issue was raised by the United States Department of Justice in its brief submitted to the Court of Appeals, Fifth Circuit, in Dudley, Skaroff et al v. United States. The Court of Appeals declined to make a substantive ruling on the issue and merely held that it had no jurisdiction to entertain the appeal.[1]

The United States has a right of appeal from an order granting a motion to suppress on certification that the appeal is not taken for purposes of delay (Section 2518(10)(b)). After more than two years of operation under Title III, not a single motion to suppress appears to have been granted.

In addition to the 90-day "inventory" discussed

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[1] 427 F.2d 1140 (1970). See page 325 et seq. The appeal was taken to the Court of Appeals from denial by the United States District Court for the Southern District of Florida of a petition for disclosure of intercepted telephone conversations and a motion to suppress prior to arrest or indictment.

above, Title III requires that within ten days before trial, hearing, or proceeding, a copy of the court order and accompanying application be furnished to each party; otherwise the interceptions may not be received in evidence or disclosed in the proceeding (Section 2518(9)). The 10-day notice may be waived by the judge if he finds it was impossible to furnish the information within the designated time and that delay will not be prejudicial. An attempt to clarify this vague "waiver" clause is made in the Senate Report:

> Such a situation might arise . . . when an intercepted communication became relevant only as a result of the character of a defense presented by the defendant. Ordinarily, prejudice would be shown only where it was established that the trial could not be reasonably recessed in order that the motion to suppress could be fully heard or that the granting of a mistrial . . . would be grossly unfair.[1]

It has been suggested that Title III may have deliberately left some matters of notice and disclosure unsettled on the ground that procedural details should be left to the States.[2] Since the procedural requirements of Title III touch the heart of the right to eavesdrop, this view is highly questionable. Lack of clarity can only jeopardize court-ordered eavesdropping.

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[1] Senate Report No.1097, p.106.

[2] View of head of Appeals Bureau, District Attorney's Office, New York County, expressed in interview June 9, 1970.

6. Statistical and Evaluating Reports under Title III

To assure the public that court-ordered eavesdropping is being properly administered and to provide some basis for evaluating operation of Title III, the following reports are required:

1. Report by the judge issuing or denying an order, to the Administrative Office of the United States Courts, within thirty days after expiration of the order or its denial.

2. Report by prosecuting officials in January of each year on each application for an order or extension during the preceding year.

3. Annual report to Congress in April of each year by the Director of the Administrative Office of the United States Courts.[1]

The intent, nature, and effect of these reports have been explained officially as follows:

> They are intended to form the basis for a public evaluation of its operation. The reports are not intended to include confidential material. They should be statistical in character . . . It will assure the community that the system of court-ordered electronic surveillance . . . is properly administered and will provide a basis for evaluating its operation.[2]

It is one of the themes of this article that the reports are not fully adequate for the purposes intended. An analysis and critique of the form of reports by prosecuting officials and judges, examined personally at Washington, D.C. headquarters of the Administrative Office of the United States Courts appear on page 261 et seq., with changes suggested in the interest of clarity and usefulness. These

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[1]Section 2519(1), (2), and (3).

[2]Senate Report No. 1097, p.107.

reports have not been made available to the general public as a matter of policy. A few States, Massachusetts for example, require the filing of a report with a State authority and specify that it shall be made public. The Report to Congress has been more freely distributed although Title III is silent as to whether it must be made public. Evaluation of the effectiveness of court-ordered eavesdropping and its impact on the right of privacy will be based, to some extent at least, on these reports.

The format of the Report to Congress is shown in the excerpts from the report in Appendix 6 and 7. This report has been helpful in disseminating information as to the number of orders obtained under Title III, the areas throughout the United States where court-ordered eavesdropping has occurred, the names of the prosecuting officials who applied for orders and of the judges who signed them, the general nature of the offenses involved, and the number of arrests and convictions. The statistical nature of the Report has been criticized as a "head count," a simple compiling of figures that tells us something about the operation of Title III, but not enough. The Reports do not tell us if the crimes were serious, whether targets were involved in organized crime, or whether they were top, middle, or low echelon members. They may,

however, tend to inhibit any one judge from granting eavesdrop warrants too freely.[1]

Under Title III, a Commission (formally designated as a National Commission for the Review of Federal and State Laws relating to Wiretapping and Electronic Surveillance) will come into existence June 19, 1974. It will be composed of fifteen members, four Senators appointed by the President of the Senate, four members of the House of Representatives appointed by its Speaker, and seven non-members of Congress appointed by the President of the United States. For a criticism of the limited function of the Commission, see page 420. The Commission may make interim reports, but a final report is due by June 19, 1975 (Section 804(h)). The Commission is not a continuing one; it ceases to exist sixty days after submission of its final report.

Many commentators have complained that six years is too long to wait for an evaluation. In the interim much unlawful surveillance can occur and questionable procedures and practice may crystalize. This study was undertaken to examine the operation of Title III during its first two years and to suggest the bases for an official evaluation of its constitutionality and impact on the right of privacy in a free society.

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[1]See C. Albert Parente and Jack C. Muratori, The Advocate, Bronx County Bar Association, November 1969, Vol. 16, No. 5, p. 131.

7. 48-Hour Emergency Eavesdropping Without Court Order

Widespread criticism of Title III centers around the provision permitting eavesdropping without a court order for forty-eight hours in an emergency (Section 2518 (7)). The clause has been attacked as extremely vague, overly permissive, open to serious abuse, and constitutionally unsound. It is not clear what is an "emergency," nor are adequate guidelines provided for limiting the individuals who may initiate emergency eavesdropping. Emergency situations are characterized in Title III as involving two types of conspiratorial activity:

(1) Threatening national security, and

(2) Characteristic of organized crime.

National security is nowhere defined, nor is any indication given of what offenses are "characteristic of organized crime."[1] In the debate on a proposed amendment to restrict an emergency situation to one involving imminent threat to human life, Senator Philip Hart, an opponent of eavesdropping, said: "If one is a good policeman,

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[1] It would appear not to include all the offenses covered by Title III. See Comment: Northwestern Law Review, March/April 1969, Vol.64, No.1, pp.68-85, at p.78. Congress appears to have created the emergency provision to deal with the conspiratorial meetings of organized crime, such as took place at Apalachin, New York, in 1957. The Senate Report recognized that this was a purpose of the emergency provision. See Senate Report No.1097, at p.104.

everything is an emergency to him."[1]

Persons who may carry on emergency eavesdropping are listed as "any investigative or law enforcement officer" who may be specially designated by the Attorney General or by the chief prosecuting attorney of any state or subdivision acting under a state statute." Title III contains no standard as to who can be so designated. So far, the United States Attorney General has designated no one and has reserved the right of emergency eavesdropping to himself. The statutes of New Jersey and the District of Columbia permit emergency eavesdropping but under greater restrictions than appear in Title III.

It is charged that the 48-hour emergency provision is an invitation to misuse, that it opens up great possibilities for "leads" and corroborative information rather than obtaining specific evidence of a particular crime.[2] Former Supreme Court Justice Tom C. Clark maintains that it invites a laxness reminiscent of Berger and is suspect on its face.[3]

Serious constitutional questions are raised by the 48-hour emergency clause. The language of the Supreme Court in Katz would seem to indicate that surveillance without a

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[1]Notes: "Wiretapping and Electronic Surveillance--Title III of the Crime Control Act of 1968," Rutgers Law Review, Winter 1969, Vol.23, No.2, pp.319-388, at p.362.

[2]Stephen Linser, The Journal of Criminal Law, Criminology and Pàlice Science, at p.214.

[3]California Western Law Review, at p.5.

court order is unreasonable under the Fourth Amendment to the Constitution.[1] Katz did not have to deal with the question of what is an emergency, but it did state that a court order precedent to surveillance was necessary. The opinion in Katz terms search warrants without prior judicial authorization "per se unreasonable."[2] Under Section 2518(7) of Title III control comes after the invasion of privacy has occurred. It is argued that subsequent judicial approval is not a neutral assessment of justification for search prior to commencement, and that it is doubtful if an emergency can ever justify dispensing with the court order.[3] Allowing a search to proceed without judicial authorization, even for forty-eight hours, seems to violate expressly the Fourth Amendment.[4] It is "patently indiscriminate," represents a "broadside authorization" to engage in wiretapping and bugging in violation of the Fourth Amendment, and should be declared unconstitutional.[5]

The 48-hour emergency provision requires that all conditions necessary for issuance of an order under Title III be present before emergency surveillance begins.[6]

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[1]Linzer, The Journal of Criminal Law, Criminology, and Police Science, p.213. See also Rutgers Law Review, at p.334.

[2]Rutgers Law Review, at p.351.

[3]Comment: Northwestern Law Review, March/April 1969, Vol.64, No.1, at p.78.

[4]Valparaiso University Law Review, at p.100.

[5]Rutgers Law Review, at p. 366.

[6]This would appear to limit surveillance to situations based on a finding of probable cause. See Linzer, at p.213.

Critics of the emergency clause say it would be unrealistic to assume that these conditions will always be satisfied. A law enforcement officer facing what he believes to be an emergency will have a hard time deciding whether the technical and stringent standards of probable cause and other requirements outlined in Section 2518(3) exist.[1] It is charged that the 48-hour provision defeats the purpose of requiring a court order.[2] Suppose that after forty-eight hours of interception a judge decides the conditions did not exist and denies an application for an order. The evidence obtained may still be used outside of court.[3] Or, if after forty-eight hours of eavesdropping the law enforcement officer decides not to apply for an order the invasion of privacy that occurred during the emergency surveillance may never become known to anyone but himself.

The 48-hour clause permits surveillance without court order in a wide variety of situations including many where the law enforcement officer may offer as justification the lack of time to get an order and the possibility that evidence of a crime may be lost. It is questionable whether lack of time can ever be the real reason for

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[1] Rutgers Law Review, at p. 366.

[2] This is the view of Samuel Dash, currently Director of the Institute of Criminal Law and Procedure at Georgetown University Law Center, Washington, D.C. See Sally Fly, "The Orwell Law: New Taps on Freedom," The Nation, June 2, 1969, Vol.208, No.22, pp.697-699, at p.698.

[3] Northwestern Law Review, Vol. 64, at p. 84.

eavesdropping without a court order. Law enforcement officers, asked whether they felt the 48-hour emergency clause was essential, stated frankly that in case of necessity a court order could always be obtained without delay.

The constitutional and practical problems involved in emergency eavesdropping as presently allowed by Title III are so patent that little use has been made of it, at least so far as can be known. Title III does not require that any report be made of 48-hour emergency eavesdropping and no such report has been filed by either Federal or State officials. It has been suggested that emergency eavesdropping be restricted to cases involving a threat of actual or potential attack by a foreign power, the collection of foreign intelligence information, or the investigation of espionage activity.[1] To this might be added cases involving imminent threat to life. In no other cases does power with such potential for invasion of privacy and abuse seem justified.

8. National Security Eavesdropping Without Court Order

Title III provides a broad exemption from court-order requirements for national security related eavesdropping undertaken "by authority of the President." Section 2511(3) states that nothing in the Act "shall limit the constitutional power of the President to take such measures as he deems necessary":

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[1] See Rutgers Law Review, at p.359,386.

1. To protect the Nation against actual or potential attack or other hostile acts of a foreign power.

2. To obtain foreign intelligence information deemed essential to the security of the United States, or

3. To protect national security information against foreign intelligence activities.

Furthermore, nothing in Title III is to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against: (a) overthrow of the Government by force or other unlawful means, or (b) any other clear and present danger to the structure or existence of the Government. Neither a court order nor "probable cause" is required in national security cases. No disclosure to a judge or anyone else need be made,nor is notice to be given to the subject of the eavesdrop. However, communications intercepted under this provision may be introduced in evidence in criminal prosecutions only if the interception was "reasonable." No guidelines are offered to determine reasonableness and the Senate Report's comment on this point seems to confuse rather than clarify its meaning:

> The only limitations recognized . . . is that the interceptions be deemed reasonable based on an ad hoc judgment taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself. The possibility that a judicial authorization for the interception could or could not have been obtained . . . would be only one factor in such a judgment.[1]

The language of the national security provision is highly ambiguous. National security is not defined. Section

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[1] Senate Report No. 1097, p.336.

2511(e) speaks of "constitutional power of the President" but seems to imply that the constitutional limitations of the Fourth Amendment may be suspended if the President determines that there is a threat to national security.[1] It extends the national security exemption to any domestic activities that the President believes threaten the security of the United States, implying that wiretapping and electronic surveillance may be undertaken during investigation of domestic groups, even if it has no connection with attacks of another country or foreign intelligence activities. The Senate Report indicated that Section 2511(3) was intended to apply to both international relations and internal security, but made a distinction between "internal security" and "domestic affairs":

> It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for the acquisition of counter-intelligence against the hostile action of foreign powers. Nothing in the proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of domestic affairs . . . become artificial when international relations and internal security are at stake.[2]

The domestic Communist Party and its front groups were singled out as instruments of the foreign policy of a foreign power, but the Senate Report did not consider what

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[1]It has been suggested that this section explicitly recognizes that the actions of the Executive are limited by the Constitution. Linzer, The Journal of Criminal Law, Criminology and Police Science, p.214.

[2]Senate Report, No. 1097, p.69.

bearing the provision might have on political dissenters other than Communists.[1]

Congress appears to have blurred the meaning of national security and raised some fundamental issues: (1) whether a total absence of judicial supervision is justifiable under the Constitution; and (2) whether two distinct governmental interests--domestic and foreign--should be given equal weight. These issues will have to be decided by the Supreme Court, for "national security" is politically so sensitive an area that Congress is unlikely to make any changes in Section 2511(3). The Supreme Court may conceivably reject a concept of national security so broad as to include any kind of anti-government activity, and may limit the term "national security" to the actions of foreign powers.[2] Failure to construe the provision narrowly might result in widespread harassment of unpopular domestic organizations. The President's power in national security cases to determine "clear and present danger" is seen as the sort of "Big Brother" power that George Orwell envisaged in his "1984."[3] A national labor dispute, draft protest, civil rights demonstration, could be termed a "clear and present danger."

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[1] Senate Report, No. 1097, p.69.

[2] See Rutgers Law Review, Winter 1969, at p.349.

[3] Sally Fly, "The Orwell Law; New Taps on Freedom," The Nation, June 2, 1969, Vol.208, No.22, pp.697-699, at p. 697.

The Senate Minority Report on Title III anticipated the dangers of a national security provision that left so much discretion in the hands of the President:

> Under Sec.2511(3) a President on his own motion could declare a militant right wing political group . . . or left wing group . . ., a national labor dispute, a concerted tax avoidance campaign, draft protesters, the Mafia, civil rights demonstrations, a "clear and present danger to the structure of the Government" . . . Sec.2511(3) gives the President a blank check to tap or bug without judicial supervision . . . in many areas totally unconnected with our traditional concept of "national security." [1]

Since enactment of Title III it has been pointed out that a "clear and present danger to the structure of the government" could be interpreted to permit surveillance without a court order of a domestic group that continually opposed the policies of a particular Federal agency, even if the group had massive public support. The power could be used to counter legitimate opposition to government policies within the United States.[2] As to current interpretation of the meaning of "national security" by the Attorney General and use of eavesdropping without court order

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[1] Senate Report No.1097, p.174. Comment of Sen. Philip Hart, Democrat of Michigan.

[2] Rutgers Law Review, Winter 1969, at p.346. Every President since Franklin D. Roosevelt has authorized Federal intelligence agencies to make taps in investigation of national security cases. See New York Times, March 13, 1969, p.1, col.1. Basic authorization for "national security" eavesdropping was a memorandum sent by President Franklin D. Roosevelt to Attorney General Robert Jackson on May 21, 1940, without the knowledge of Congress. See Senator Edward V. Long, The Intruders, The Invasion of Privacy by Government and Industry (New York: Frederick A. Praeger, 1967), pp.89-90. Bills were introduced in Congress in that year to authorize wiretapping in national security cases but failed of passage. Subsequent attempts likewise failed.

against domestic groups, see page 282.

It can be argued that organized crime also constitutes a threat to "national security" and that therefore no court order is needed to eavesdrop in investigating an organized crime activity. The possibility of such a construction was raised by Senator Roman L. Hruska, Democrat of Nebraska, in the hearings before the Subcommittee on Criminal Laws and Procedures:

> Sen. Hruska: Is there room for the conclusion in view of your description of organized crime . . . that the threat posed by organized crime, and in particular "La Cosa Nostra," falls within the label of national security?
>
> Prof. Blakey: I think that anybody who really knows what he is talking about . . . must conclude that it represents a serious threat to our domestic security.[1]

One might go further and ask: Would conspiracy among several giant corporations to curtail production or fix prices endanger the national security? Or perhaps, the infiltration of the Communist Party into an organization such as the National Council of Churches, the peace movement, or civil rights organizations?[2]

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[1] Hearings, 90th Cong., 1st sess., July 11, 1967, p. 969.

[2] These possibilities were actually raised by G. Robert Blakey in Hearings before the Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, on "Right of Privacy Act of 1967", p.416. The "national security" clause then under discussion spoke of "serious threat to the security of the United States."

PRIVATE EAVESDROPPING BANNED BY TITLE III

One of the avowed purposes of Title III is to protect privacy by making it a Federal offense for private individuals to manufacture, sell, advertise, distribute, transport, or possess wiretapping and electronic devices designed primarily for surreptitious eavesdropping. Violations are punishable by fine up to $10,000 or imprisonment up to five years, or both (Section 2512). In the event of violation, the devices are subject to seizure and forfeiture (Section 2513). The test of whether a device falls within the ban of Title III is whether its design renders it primarily useful for surreptitious listening. The obvious difficulty of applying this criterion was recognized by the Senate Report:

> The sort of judgment called for . . . in close cases would warrant the use of expert testimony . . . The prohibition will . . . be applicable . .to the martini olive transmitter, the spike mike, the infinity transmitter and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler or cigarette pack . . . Size alone is not the criterion.[1]

Is the prohibition against private eavesdropping contained in Title III meaningful? Prior to its enactment eavesdropping devices were sold widely to private individuals who used them for a variety of purposes--in domestic

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[1] Senate Report No.1097, p.95.

relations suits, business competition, supervision of employees, simple curiosity--and blackmail. Today suppliers claim they sell such equipment only to law enforcement officials. Sceptics ask if the vast private eavesdropping industry has not simply gone underground. A private individual desiring an eavesdropping device need not go to a manufacturer or distributor in the business. It is cheaper, in fact, to buy parts at electronics supply houses that can be put together with a little radio or electronics knowhow and experience.[1]

Long-standing laws in the various States prohibiting wiretapping, say critics of Title III, did not deter private eavesdropping nor result in extensive prosecution.[2] Section 605 of the Federal Communications Act banning wiretapping likewise produced few cases against violators; in more than thirty years less than thirty cases were brought against private wiretappers and none against law enforcement officers.[3] Detection of unlawful tapping is difficult, and

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[1]Brown, The Electronics Invasion, pp.26-27;Carroll, The Third Listener, p.15; Brenton, The Privacy Invaders, p.155.

[2]Carroll, The Third Listener, p.14. Illinois and Pennsylvania had statutory causes of action for illegal eavesdropping for eleven years, but no such actions were brought. See Laurens M. Vernon, Syracuse Law Review, Spring 1969,Vol.20, No.3, pp.601-627, at p.622. But see Hearings, Subcommittee on Criminal Laws and Procedures, 90th Cong., 1st sess., July 12, 1967, p.1117, in which Frank Hogan, District Attorney of New York County, testified as to indictments against 27 private detectives, investigators, and attorneys for eavesdropping.

[3]Long, The Intruders, p.185. See also Dash, The Eavesdroppers, pp.82-83, 402; Brenton, The Privacy Invaders, p.168.

it may be even harder where an electronic device is installed.

Effectiveness of any statute prohibiting eavesdropping must depend largely on receipt of complaints and vigorous enforcement. State law enforcement officials report that few, if any, complaints have been received since enactment of Title III. Some say that the Federal Government has now preempted the field, although it is quite clear from the Senate Report that no such preemption was intended.[1] The United States Department of Justice has been more active than the States in dealing with complaints against private eavesdroppers under Title III, but few prosecutions have resulted. Paucity of complaints and prosecutions may be explained, in part, by the comparative ease with which the ban on private eavesdropping can be circumvented. An expert offers the following suggestions to manufacturers and sellers of eavesdropping equipment:

1. Change the advertising . . . sell "telephone sound augmentation devices for the hard-of-hearing" instead of radio wiretapping equipment.
2. Sell separate parts. There are at least 200,000 individuals in the United States who have the expertise to assemble an electronic eavesdropping device.
3. Manufacture and sell visual surveillance equipment which is not banned by Title III.
4. Set up manufacturing in Canada and fill mail orders.[2]

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[1] Senate Report No. 1097, p.94.

[2] Carroll, The Third Listener, p.163.

The victim of eavesdropping is advised not to complain to the authorities but to use a "scrambler" that changes the words electronically, making them unintelligible except at the receiving end where similar equipment reconverts the conversation into understandable language![1]

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[1]Carroll, The Third Listener, p.17.

CONSENT EAVESDROPPING PERMITTED BY TITLE III

A question left unsettled by the Supreme Court in Katz and Berger was whether consent by one of the parties to a conversation to listening by a third person or recording the conversation removes it from the prohibition of the Fourth Amendment against unreasonable search and seizure.[1] Title III declares that it is not unlawful for a law enforcement officer to intercept a wire or oral communication if he is a party to the communication or if one of the parties to the communication gave prior consent to the interception (Section 2511(2)(c)). No court order is required. The same exception is granted to private individuals, unless the interception is made to commit a crime or other injurious act (Section 2511(2)(d)). The Senate Report on Title III asserts that this exception of "consent eavesdropping" largely reflects existing law:

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[1]See Mary E. Bisantz, "Electronic Eavesdropping under the Fourth Amendment--After Berger and Katz," Buffalo Law Review, Winter 1968, Vol.17, No.2, pp.455-470, at p.462.

Where one of the parties consent, it is not unlawful. (Lopez v. United States, 373 U.S. 427 (1963); Rathbun v. United States, 355 U.S. 107 (1957); On Lee v. United States, 343 U.S. 747 (1952)). Consent may be expressed or implied.[1]

The constitutionality of Section 2511(2) was questioned by some commentators.[2] It was suggested that court order requirements should be applied to consent eavesdropping or "participant monitoring."[3] The traditional principle on which consent eavesdropping rests is that a party to a conversation takes his chances that the other participant may increase his present or future audience. Justice Brennan, dissenting in Lopez v. United States, cited above, protested that "in a free society people ought not to have to watch their every word so carefully.[4]" The decision of

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[1]Senate Report No. 1097, p.94. For a discussion of Rathbun v. United States, see Notes: "Wiretapping and Electronic Surveillance--Title III of the Crime Control Act of 1968," Rutgers Law Review, Winter 1969, Vol.23, No.2, pp. 319-388, at p.319.

[2]The Association of the Bar of the City of New York found the consent provision of dubious constitutionality and seriously objectionable. See Sally Fly, "The Orwell Law: New Taps on Freedom," The Nation, June 2, 1969, p.698. For a contrary view, see Hal Lipset, Private Eye, "The Case for Bugging," Ramparts, September 7, 1968, Vol.7, No.4,

[3]Kent Greenawalt, "The Consent Problem in Wiretapping and Eavesdropping, Surreptitious Monitoring with the Consent of a Participant in a Conversation," Columbia Law Review, February 1968, Vol.68, No.2, p.189; Kent Greenawalt, "Privacy in One's Home and Person," Part IV, "'Searches' to which the subject consents," New York Law Journal, June 18, 1970, p.4, col.1. Recording of calls as logged by a "pen register" without a court order was upheld where the pen register was attached with consent of the intended recipient of the calls. People v. Green, 312 N.Y.Supp. 2d 290, 63 Misc.2d 435 (1970).

[4]373 U.S.427, 83 S.Ct.1381, 10 L.Ed.2d 462 (1963).

the Supreme Court in Osborn v. United States[1] raised doubts as to the implications of On Lee and Lopez. Before Title III was enacted, opposition was expressed to excepting consent eavesdropping from safeguards provided by statute on the ground that "permitting eavesdropping with the consent of one party would be to sanction a means of reproducing conversation that could choke off much vital social exchange.[2]

Since Title III went into effect, two cases came before the United States Court of Appeals involving evidence obtained through conversations with bugged agents. In a counterfeiting case, Koran v. United States,[3] the Court of Appeals for the Fifth Circuit held that Katz was not applicable to bugged agents and that evidence so obtained was not a search and seizure within the meaning of the Fourth Amendment. In a narcotics case in the Court of Appeals for the Seventh Circuit, United States v. White,[4] the Court held that it was a search and seizure under the Fourth Amendment. The two Circuit Courts disagreed on the extent of risk assumed by a party to a conversation. The Seventh Circuit in White stated that the risk undertaken by the speaker was simply that the listener might memorize and repeat the conversation, and not that he would allow a

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[1]385 U.S. 323, 87 S.Ct.429, 17 L.Ed.2d 394.

[2]Westin, Privacy and Freedom, at p.390.

[3]408 F. 2d 1329 (1969).

[4]405 F. 2d 838 (1969).,cert. granted 394 U.S.957, 89 S.Ct. 1305 (1969).

third party to eavesdrop.[1] The United States Supreme Court on April 5, 1971 handed down a decision in United States v. White reversing the Court of Appeals for the Seventh Circuit by a vote of six to three. It held that the Fourth Amendment does not bar from evidence the testimony of governmental agents who related certain conversations that had occurred between defendant White and a government informant, and which the agents overheard by monitoring the frequency of a radio transmitter carried by the informant and concealed on his person. The opinion, written by Justice White, was joined by the Chief Justice, Justice Stewart, and Justice Blackmun. Justice Black concurred in the judgment for the reasons set forth in his dissent in Katz v. United States. Justice Brennan joined in reversal of the Court of Appeals judgment only on the ground that under Desist v. United States the case of Katz had prospective application and did not apply to White.

Justice White and the three who joined in his opinion saw no difference for constitutional purposes between the case where an agent records conversations with electronic equipment that he is carrying on his person (as in Lopez) or where he carries radio equipment that transmits the conversations to recording equipment located elsewhere or to other agents monitoring the transmitting frequency (as in On Lee and in White).

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[1] See Recent Developments: Villanova Law Review, Summer 1969, Vol. 14, p.758, at p.761; Frederick Henzi, "Electronic Eavesdropping, The Illinois Supreme Court Forsakes the Surreptitious Interception Limitation," Illinois Bar Journal, July 1968, Vol.56, No.11, pp.938,946.

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks..If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence...Lopez v. United States, 373 U.S.427 (1963).

Justice White buttressed his opinion by noting that it was currently shared by Congress, the Executive Branch, and the American Bar Association. Justice Brennan disagred (although he concurred in the result of the decision) and went beyond the dissenters who accepted a warrant requirement in a situation such as On Lee and White but not in Lopez:

> It is my view that current Fourth Amendment jurisprudence interposes a warrant requirement not only in cases of third-party electronic monitoring (the situation in On Lee and in this case [White] but also in cases of electronic recording by a government agent of a face-to-face conversation with a criminal suspect, which was the situation in Lopez.

Justice Douglas in dissent attacked all electronic surveillance and those who use it in the name of "law and order."

> What the ancients knew as "eavesdropping," we now call electronic surveillance;" but to equate the two is to treat man's first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known.....concepts of privacy vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency....to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life.. That is why a "strict construction" of the Fourth Amendment is necessary if every man's liberty and privacy are to be constitutionally honored..... electronic surveillance..uncontrolled..promises to lead us into a police state...

In a long dissenting opinion Justice Harlan kept reminding the Court that it had handed down a "plurality" not a "majority" opinion. On Lee, said Justice Harlan, can no longer be regarded as sound law; a distinction must be made between third-party monitoring (used in On Lee and in White) and electronic recording by an agent in a face-to-face conversation. The question is, according to Justice Harlan:

> Whether under our system of government as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

The question had to be answered in the light of the nature of a practice and its impact on the individual's sense of security balanced against the utility of the conduct as a law enforcement technique. Using this test, Justice Harlan concluded:

> The impact of the practice of third-party bugging must..be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society...third-party monitoring, subject only to the self-restraint of law enforcement officials, has no place in our society.

Justice Harlan could not find in Title III any justification for ignoring the difference between impact on privacy of single-party informer bugging and third-party bugging.

In a short dissenting opinion, Justice Marshall indicated his agreement with Justices Douglas and Harlan and his belief that On Lee cannot be considered viable in the light of the constitutional principles in Katz and other cases.

TITLE III AND ORGANIZED CRIME

Prior to enactment of Title III the justification offered most frequently and with greatest fervor for legalizing eavesdropping was that wiretapping and electronic surveillance by law enforcement officials were necessary in order to combat organized crime. Congress acknowledged this need in its introductory findings in Title III (Section 801 (c)):

> Organized criminals make extensive use of wire and oral communications....The interception of such communications....is an indispensable aid to law enforcement and the administration of justice.

Section 2518(7)(a) of Title III provides for 48-hour emergency eavesdropping without court order in the case of "conspiratorial activities characteristic of organized crime." No other direct reference to organized crime appears in the statute. Was Title III intended by Congress to be directed primarily against organized crime? If so, then any evaluation of the statute in operation must meet the issue of whether it has been used to deal with organized crime or diverted to other purposes. If eavesdropping under Title III has not succeeded in flushing

out leaders of organized crime, it may be inferred that this method of surveillance is ineffective for the purpose.

Senator John L. McClellan, chief sponsor of court-ordered eavesdropping, has stated unequivocally that organized crime was a prime target:

> [O]ur major purpose in enacting Title III was to strike at organized crime.[1]

The Senate Report on Title III likewise states that "the major purpose of Title III is to combat organized crime."[2] Several pages of the Report are devoted to discussion of the growth of modern organized crime with its attendant corruption of political and law enforcement processes, its activities, and its threat to the democratic system. Explaining the need for electronic surveillance as a weapon against organized crime, the Senate Report quotes from the Report of the President's Crime Commission, "The Challenge of Crime in a Free Society" (1967):

> In organized crime enterprises . . . the possibility of loss or seizure of an incriminating document demands a minimum of written communication. Because of the varied character of organized crime enterprises, the large numbers of persons employed in them, and frequently the distances separating elements of the organization, the telephone remains an essential vehicle for communication.[3]

In the hearings before the Subcommittee on Criminal Laws and Procedures on the proposed bill authorizing court-

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[1] Congressional Record, Senate, 91st Cong., 1st sess., Vol.115, Part 17, August 11, 1969, p.23238.

[2] Senate Report No. 1097, "Omnibus Crime Control and Safe Streets Act of 1967," to accompany S.917, April 20, 1968, p. 70.

[3] Ibid., pp.70-74.

ordered eavesdropping, the following colloquy took place between Senator McClellan and a witness, William Walsh, an attorney from Houston, Texas:

> Sen. McClellan: Are we to permit organized crime, the hoodlums, the underworld, to continue to use this technique but not combat it with the same effort, the same instrumentalities?
>
> Mr. Walsh: Senator,. . . You do not have organized crime without the consent and toleration of the police. We do not have organized crime in Houston.
>
> Sen. McClellan: I think the end justifies the means [italics ours] because of conditions we have in this country today with organized crime increasing. It is definitely entrenched in many localities and wiretapping is one of the most effective ways to get to the top.[1]

The issue was put clearly by Senator McClellan as a choice between combating organized crime or insisting on the right of privacy:

> Is the risk of having an occasional conversation overheard where something is said that you would not want anybody else to hear going to deter our law enforcement officials from combating organized crime, or is that presumed right of privacy more precious to us than using this instrumentality to effectively combat organized crime . . . that is the issue before us.[2]

Senator McClellan concluded that "if we are unwilling to take this small risk, then organized crime will continue to flourish."[3]

G. Robert Blakey, one of the chief draftsmen of Title III testified at the hearings that court-ordered

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[1] Hearings, 90th Cong., 1st sess.,July 12,1967,p.1090.

[2] Hearings, Senate, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, 90th Cong.,1st sess., July 12, 1967, p.1094.

[3] Ibid.

eavesdropping was needed because without "effective legal tools" it was impossible to "move against the top people" in organized crime.[1] Similar testimony was presented by Frank S. Hogan, District Attorney of New York County for more than a quarter of a century and one of the staunchest supporters of court-ordered eavesdropping. According to Mr. Hogan, wiretapping is "the single most valuable and effective weapon" of law enforcement, and this is true particularly in the battle against organized crime."[2] In his office, it was "almost exclusively . . . used in the field of organized crime."[3]

The use of eavesdropping to combat organized crime has also been stressed by Attorney General Mitchell. At the Senate Judiciary Committee hearing on his confirmation as Attorney General, Mr. Mitchell said his administration would be different in the "extent to which electronic surveillance may be used, particularly in the area of organized crime."[4] In July 1970 he declared that investigative wiretapping against organized crime under court order increased 100% over the 33 orders obtained in 1969.[5] More recently,

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[1] Hearings, July 11, 1967, p. 962.

[2] Hearings, July 12, 1967, p.1092. See also p.980.

[3] Ibid., p.1101. See also page 161 for a discussion of Federal investigation of organized crime.

[4] See Richard Harris, Justice--The Crisis of Law, Order and Freedom in America (New York: E. P. Dutton & Co., 1970), p. 132.

[5] Quoted in New York Times, October 11, 1970, Sec.E, p. 9, col. 4.

in an address before the International Association of Chiefs of Police in Atlantic City, New Jersey, the Attorney General reminded the group that the Democrats were against wiretapping, and said:

> In this period of intensive organized crime activity, we cannot afford to shun a method that is both effective and compatible with constitutional law.

It would appear from these comments that Title III was intended by Congress to deal primarily with organized crime. Whether that intent has been carried out is one of the questions that will be tested by the empirical data presented in Part IV. The problem is complicated by the fact that no generally accepted definition of "organized crime" has ever been formulated.[1] The very existence of organized crime is disputed, as well as its ethnic composition, method of operation, internal structure, extent of power, and role in American society.

Sociologists have been saying for almost two decades that organized crime is a product and reflection of our national culture; that it is interrelated with behavior patterns and social institutions in American life. Like the political machine, crime has a "functional role" in the society; it serves as a means for marginal groups to wealth, fame, and power, a shortcut to the great American dream of individual success. The gangster in the

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[1] See page 14 for definition of "organized crime."

crowded slum tries to acquire what is denied to him by the "complex orderings of a stratified society." His goals are normal; he wants what the ordinary citizen strives to attain: independence, social advancement, prestige.[1]

In 1953 Daniel Bell wrote a persuasive article in which he traced the involvement of immigrant groups in marginal business and crime, in their attempt to establish a place for themselves in American life.[2] One after another, the Irish, the Eastern European Jews, and then the Italians tried to climb the ladder of social mobility through the urban rackets, the illicit activity organized for continuing profit. Bell criticized the Kefauver Committee for failing to understand that organized gambling was a function of a mass consumption economy and that crime was a route of social ascent. The Italian community was simply achieving wealth and political influence much later and in a harder way than previous immigrant groups. The foundation of many distinguished older American fortunes was laid by sharp practices and morally reprehensible methods not unlike those currently used.

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[1]See Edwin M. Schur, Our Criminal Society; The Social and Legal Sources of Crime in America (Englewood Cliffs, N.J.: Prentice-Hall Inc., 1969), p.112; Gus Tyler, Organized Crime in America (Ann Arbor: The University of Michigan Press, 1962). See also New York Times, July 24, 1970, p.1, col.1; p.18, col.1.

[2]Daniel Bell, "Crime as an American Way of Life," The Antioch Review, Vol.XIII, No. 2, June 1953, pp.131-154.

> The early settlers and founding fathers, as well as those who "won the west" and built up cattle, mining, and other fortunes, often did so by shady speculation and a not inconsiderable amount of violence. They ignored, circumvented, or stretched the law when it stood in the way of America's destiny, and their own--or were themselves the law when it served their purposes.[1]

Bell predicted--inaccurately--that the lush profits were passing from gambling and that organized crime would therefore abandon this form of illegal activity. He foresaw that attempts to regulate public morals and discourage gambling by outlawing it would meet with continuing failure.[2]

Sixteen years after Bell's seminal study, another sociologist, Stuart L. Hills, complained that "little attention has been directed to the recognition that organized crime is an integral and vital part of the American way of life."[3] It is impossible, said Hills, to cope with this pattern of syndicated, systematic criminal activity, if it is viewed as a detached social phenomenon--alien to American values and institutions. Increased use of wiretapping and electronic bugging devices may be useful, but it will not suffice and the "dangers of abuse may outweigh the benefits." Persistent efforts to curb the human appetite by legislation reflected a puritanical value system that brooked no compromise with an "evil," although the laws

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[1]Bell, "Crime as an American Way of Life," The Antioch Review, p. 152.

[2]Ibid., p.153, p. 132.

[3]Stuart L. Hills, "Combating Organized Crime in America," Federal Probation, March 1969, Vol.XXXIII, No.1, pp.23-28.

were unenforceable.[1] Hills restated the reasons, intimated by Bell, for the difficulties in coping effectively with large-scale organized crime: criminality was viewed in terms of individual malady rather than a consequence of participation in a social system; activity in which significant segments of the public desired to indulge was made illegal; the society placed a higher value on the rewards of individual success, than the means of achievement; and opportunities for these rewards were becoming increasingly limited for various minority groups.[2]

Despite the protests of the sociologists that "organized crime" is not the exclusive domain of any one ethnic group and that it is rooted in the American get-rich-quick culture, the term is often used synonymously with the "Mafia" or "La Cosa Nostra," implying that it is composed exclusively or largely of persons of Italian extraction. Since 1957, when eavesdropping revealed the meeting in Apalachin, New York, of about seventy-five alleged leaders of the "Mafia," many law enforcement officers, prosecutors, and Congressional investigators have become convinced that organized crime does exist and that it is controlled by a

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[1]Hills, "Combating Organized Crime in America," Federal Probation, p. 24.

[2]Ibid., p. 27.

confederation of persons of Italian extraction.[1] Federal agencies, including the Federal Bureau of Investigation and the Bureau of Narcotics and Dangerous Drugs, say they have identified thousands of members of a highly organized criminal group related by nationality, marriage, and other ties, most of them Italians.[2] The President's Commission on Law Enforcement and Administration of Justice shared this view of the ethnic nature of organized crime. In 1967 the Commission reported:

> Today the core of organized crime in the United States consists of 24 groups operating as criminal cartels in large cities across the Nation. Their membership is exclusively Italian, they are in frequent communication with each other, and their smooth functioning is insured by a national body of overseers . . . These 24 groups work with and control

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[1]See Donald R. Cressey, Theft of the Nation--The Structure and Operations of Organized Crime in America (New York: Harper & Row, 1969); Ralph Salerno and John S. Tompkins, The Crime Confederation, Cosa Nostra and Allied Operations in Organized Crime (New York, Garden City: Doubleday & Company, 1969); See also Nicholas Pileggi, "The Story of T--To Be a Mafia Boss--It's Better Than Being President of the United States," New York Times Magazine, March 29, 1970, p.12. For disagreement as to existence of the "Mafia" among New York law enforcement officials, see New York Times, September 14, 1970, p.15, col. 1. For a discussion of the 1957 Apalachin meeting, see Donald R. Cressey, "The Functions and Structure of Criminal Syndicates," Appendix A, annexed to Task Force Report--Organized Crime, 1967, pp.32-33.

[2]See Hearings, Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, 90th Cong., 1st sess., July 10, 1967, pp.942-954.

other racket groups, whose leaders are of various ethnic derivations.[1]

Unlike the sociologists, the Commission attributed failure of efforts to curb the growth of organized crime in the United States to the difficulties in obtaining proof, lack of resources and coordination among law enforcement agencies, failure to develop strategic intelligence, leniency of judges, and absence of sustained public commitment. "The public," said the Commission, "does not see or understand the effects of organized crime in society."[2] Former Attorney General Ramsey Clark agrees that the "Mafia" exists in the United States, but believes that the monopoly of the Mafia in organized crime is giving way to the Blacks and Spanish-speaking entrepreneurs. He sees organized crime as minor part of total crime in the United States.[3] The present Administration, particularly the Criminal Division of the Department of Justice, has been criticized for transferring emphasis from crime in general to crime against "La Cosa Nostra" as a "political move."[4] In protest, Italian-American organizations have picketed Federal agencies, charging them with discrimination and harassment of persons of Italian extraction. The Italian-American Civil

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[1]Report, The Challenge of Crime in a Free Society (U.S. Government Printing Office, Washington, D.C., February 1967), p.192.

[2]Ibid., p.198-200.

[3]Crime in America (New York: Simon and Schuster, 1970), p.68, 83.

[4]Richard Harris, Justice, p.162.

Rights League claims that 20,000,000 Italian-Americans feel they are being stereotyped in the public eye by the activities of a few underworld figures.[1] The "Mafia," says the League, is a figment of the imagination of the police and press.

Major activities of organized crime are usually listed as gambling, loan-sharking,[2] and narcotics. Organized crime supplies goods and services desired by a large part of the public. Within recent years it has diversified its operations and has begun to infiltrate legitimate business. It is also generally undisputed that organized crime can flourish only where local officials have been corrupted. The President's Commission reported:

> All available data indicate that organized crime flourishes only where it has corrupted local officials . . . In different places at different times, organized crime has corrupted police officials, prosecutors, legislators, judges, regulatory agency officials, mayors,

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[1] New York Times, July 5, 1970, Sec.E, p.2, col.7; July 14, 1970, p.75, col.4; July 19, 1970, Sec.L, p.57, col.1. See also New York Times, July 31, 1970, p.27, col.3, for report on picketing of the New York Times West Side Plant for using the terms "Mafia" and "La Cosa Nostra." The New York Times reported that Attorney General Mitchell had ordered Justice Department officials to stop using these terms.

[2] Loansharking is the lending of money at rates higher than the limit prescribed by law; the rate is what the traffic will bear, generally 20% per week. See Salerno and Tompkins, The Crime Confederation, p.229. Next to gambling, loansharking is said to be the greatest income producer for organized crime. See Cressey, Theft of the Nation, p.77. Cressey suggested government competition in lending to eliminate loansharking by organized crime. Ibid.,p.296.

> councilmen, and other public officials . . . It is impossible to determine how extensive the corruption of public officials by organized crime has been.[1]

The connection between organized crime and official corruption was recognized decades ago.[2] The United States has been called a racket-ridden, corrupted society, "a society in pursuit of the meretricious and the unreal, with each man scrambling to grab a piece of the racket for himself according to the business ethic that only profit counts".[3]

The vast majority of eavesdrop orders obtained during 1969 under Title III related to gambling (102) and drugs and narcotics (71), and this trend appears to be continuing. Gambling accounted for more than one-third of the orders in 1969; narcotics for almost one-fourth.[4] In the

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[1]"Challenge of Crime in a Free Society," p.191.

[2]Burton B. Turkus and Sid Feder, Murder, Inc., The Story of "the Syndicate" (New York: Farrar, Straus and Young, 1951), pp.492-3. See also Cook, A Two-Dollar Bet Means Murder, p.63; Allen, Merchants of Menace, p.173; Cressey, Theft of the Nation, p.249; David Burnham, "How Corruption Is Built Into the System--And a Few Ideas for What to Do About It," New York, September 21, 1970, Vol.3, No.38, pp.30-37. The news media has given extensive coverage to the subject of police corruption during the past year. A six-month study by the New York Times revealed widespread belief that police collect millions a year in graft and that city officials fail to act on specific information of corruption. New York Times, June 8, 1970, p.28, col.1; May 9, 1970, p.28, col.2; April 28, 1970, p.1, col.2.

[3]Fred J. Cook, The Corrupted Land--The Social Morality of Modern America (New York: The Macmillan Company, 1966), pp.73, 255, 331, 335.

[4]Report by Administrative Office of the U.S.Courts to Congress, January 1, 1969 to December 31, 1969.

first seven months of 1970, over 60% of the wiretaps used were in gambling cases; narcotics represented almost 23%.[1] In the light of this trend, it may be useful to examine the various levels at which gambling and narcotics operations are conducted. If the objective of eavesdropping is to expose the higher echelons of organized crime who are shielded from investigation and prosecution under normal investigative techniques, then the status within the criminal group of those reached with the aid of Title III is significant in evaluating its operation.

Gambling and Organized Crime

Gambling has been called "the very heartbeat" of organized crime, the largest single producer of income, the treasure chest of the underworld that makes loansharking and all other rackets possible. It has been estimated that gambling yields a gross income of forty or fifty billion dollars annually, but the amount is really unknown.[2] Illegal gambling may take any one of a variety of forms:

1. Bookmaking and poolselling.[3]

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[1] New York Times, October 6, 1970, p.1, col.4.

[2] Fred J. Cook, A Two-Dollar Bet Means Murder (New York: Dial Press, 1961), p.22. For a history of gambling in the United States, see Rufus King, Gambling and Organized Crime (Washington, D.C.: Public Affairs Press, 1969), p.23.

[3] For an explanation of bookmaking and pool selling, see King, Gambling and Organized Crime, p.64.

2. Numbers, policy, bolita, and lotteries.[1]
3. Dice games and roulette.
4. Card games.
5. Coin-operated devices.

A bookmaker accepts the bets of others on a particular event, fixes the odds, and pays off winners. Numbers, policy, or bolita are more widespread than any other gambling activity except bookmaking. It can be played for pennies, nickels, dimes, quarters, or higher stakes. Today the play is often 50¢, $1, or $10. It is popular with the urban poor, but has also spread to Wall Street.[2] Money "moves upward from the street" through at least six levels, beginning with the bettor who hands his few cents or dollars to the runner on the street. A chief target of eavesdrop orders has been the person who handles the "layoff," a type of gambling insurance carried on by bookmakers on a neighborhood, regional, or national basis. A bookmaker who has received too large an amount in bets on a particular horse or other event spreads the play with another "bookie" or "layoff man" with less bets on that event.[3] The layoff

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[1]For an explanation of numbers betting, see Hearings, Subcommittee on Criminal Laws and Procedures, 90th Cong., 1st sess., July 11, 1967, p.90.

[2]See Cook, A Two-Dollar Bet Means Murder, p.128. The player bets he can guess the 3-digit number that will appear on a certain tabulation, such as the total amount bet at a designated race track on a particular day. Cressey, Theft of the Nation, p.134. For the history of lotteries, see King, Gambling and Organized Crime, pp.72-74.

[3]Cook, A Two-Dollar Bet Means Murder, p.32.

man, in turn, has arrangements with individuals on the next level of the hierarchy.

It is almost impossible for gambling on a large scale to function without the knowledge of local law enforcement. New York State Supreme Court Justice John M. Murtagh, in sentencing two gamblers recently said that the case clearly demonstrated widespread police corruption by gamblers, and that gambling is accompanied almost inevitably by police corruption. Judge Murtagh made it clear that he disapproved of laws that made gambling illegal:

> I don't believe that gambling is a violation of any moral law. But our society has seen fit to make it illegal.[1]

Traditionally, gambling has been considered a problem for State regulation. Large-scale gambling, however, operates across State lines, as witnesses at Congressional hearings explained to Senators:

> You cannot have professional gambling unless you get the morning line from somewhere, and that is usually out in West, either in Chicago or Minneapolis. Big gamblers, when they want to lay off any bets, lay them off either in Kentucky, New Orleans, or Miami . . . They also have a system of . . . sending out the race results within a few minutes after a race . . . will telephone the results . . . to Maryland where they then send it over the entire country.[2]

The Organized Crime Control Act of 1970 prohibits illegal gambling businesses on the theory that it "involves

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[1] New York Times, May 13, 1970, p.45, col.1.

[2] Hearings, Senate, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, 90th Cong., 1st sess., April 19, 1967, p.510.

widespread use of, and has an effect upon, interstate commerce."[1]

Narcotics and Organized Crime

Narcotics interests appear to be closely related to those of gambling. Profits in narcotics, as in gambling, are said to be enormous--$350 of raw material can assume a value of $500,000 by the time it is sold at retail. The illegal sale and distribution by organized crime of narcotics and dangerous drugs moves through six levels of personnel, at each of which the drug is diluted and adulterated:[2]

1. Importers of multi-kilo lots--the top level.
2. Kilo men who buy from the importer-supplier and obtain delivery through a courier. At least one kilogram of heroin is handled at a time.
3. Quarter-kilo men.
4. Ounce men.
5. Deck men.
6. Street dealers who sell in five-grain packets, known as bags, packs, or balloons.

Eavesdrop orders under Title III appear to have been directed at narcotics traffickers at various levels, but the Report to Congress does not indicate the status of the target. It is estimated that about half of the entire number of narcotics addicts in the United States are located in New York City. Some fix the number in the City at 50,000; others say it may be as high as 250,000. About 98% of

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[1]Public Law 91-452, 91st Cong., S.30, October 15, 1970, Title VIII, Sec. 801-803.

[2]See Cressey, Theft of the Nation, pp.93-94.

these are said to be heroin users.[1] All heroin comes from abroad, but the narcotics problem has traditionally been a matter of local concern.[2]

There is much dispute as to who controls the illegal narcotics industry in the United States. Experts disagree as to whether the "Mafia" or "La Cosa Nostra" has withdrawn from heroin traffic. One crime expert claims the "Mafia" decided to retire from narcotics at the end of 1958 and that Spanish-speaking criminals have moved in--Spaniards, Cubans, Puerto Ricans, and South Americans.[3] However, the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs say that the old leaders continue to run the industry from "on high."[4] Competition between these two Federal agencies complicated the problem of dealing with narcotics violations, but it is reported that in July 1970 they entered into a written agreement to pool resources and "stop fighting each other."[5]

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[1] Forbes, April 1, 1970, p.19.

[2] The New York State Commission of Investigation carried on a year-long investigation into narcotic law enforcement in the New York area. At the opening of a public hearing, the chief counsel of the Commission testified that the Police Department had had "no appreciable effect on the flow of heroin in New York City"; that its fight against heroin was a failure and waste of time, manpower, and money, and that one reason for this failure was police corruption. New York Times, April 6, 1971, p.1, col.7; April 7, 1971, p.29, col.1. The problem of police corruption is being investigated by the Knapp Commission, organized in May 1970 by Mayor Lindsay and authorized by the City Council.

[3] Cook, A Two-Dollar Bet Means Murder, p.327.

[4] Forbes, April 1, 1970, p.19.

[5] New York Times, July 30, 1970, p.14, col.3.

Legitimate Business and Organized Crime

There are some striking similarities between organized crime and legitimate business enterprises. Both seek to establish and maintain monopolies, to maximize profits, and to control or influence elected and appointed government officials.[1] Organized crime, like big business, is a bureaucracy; no member is indispensable and the jailing of an individual, whether low or high echelon, may disrupt the organization temporarily while he is being replaced, but leaves it structurally intact.[2] A list of the structural characteristics of organized crime would fit those of the large modern corporation:

1. Hierarchy of authority.
2. Complex division of labor, including lawyers, accountants, and other experts.
3. Departmental specialization.
4. Impersonality.
5. Profit motive.
6. Desire for continuity and survival.
7. Effort to control the market and eliminate competition.[3]

The difference most frequently cited between organized crime and the ordinary large legitimate corporate enterprise is that the former is ready to use a fist, club, or gun to sell its services and maintain its monopolies, while the latter is usually limited to sharp and unfair

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[1] Cressey, Theft of the Nation, p.7; Fred J. Cook, The Secret Rulers--Criminal Syndicates and How They Control the United States Underworld (New York: Meredith Press, 1966), p.163.

[2] Cressey, Theft of the Nation, p.291.

[3] Hills, "Combating Organized Crime in America," Federal Probation, at p.23.

business practices.[1] However, a perceptive observer of the relation between organized crime and the business community notes:

> It is evident from the history of business abuses in the 19th and 20th centuries that "unfair competition" of a drastic sort, including violence, has not been confined to the underworld.[2]

The similarity between the code of ethics of members of organized crime and the ordinary American businessman was deplored by the President's Commission on Law Enforcement and Administration of Justice:

> The leaders of Cosa Nostra and their racketeering allies . . . preach a sermon that all too many Americans heed: the government is for sale; lawlessness is the road to wealth, honesty is a pitfall and morality a trap for suckers.[3]

Members of organized crime expressed a similar view of the philosophy of Americans, but in more colorful language:

> Yeah, if you're a real honest guy, you wind up hunchback and with headaches.[4]

Criminal activity of legitimate business firms, such as conspiracy in restraint of trade, tax evasion, illegal labor practices, or the marketing of dangerous drugs, are dealt with by regulatory agencies. It has been suggested that perhaps the same approach is necessary in dealing with

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[1] Cressey, Theft of the Nation, p.7. See also Salerno and Tompkins, The Crime Confederation, pp.203-204.

[2] Thomas C. Schelling, "Economic Analysis and Organized Crime," Appendix D, Task Force Report: Organized Crime, 1967, p.116.

[3] Challenge of Crime in a Free Society, p.209.

[4] From tape recordings of the F.B.I. placed on record of United States District Court in Newark, N.J., quoted in Newsweek, June 23, 1969, Vol.73, p.37.

"black-market" crimes such as gambling and narcotics. These are "crimes" only because a choice has been made to legislate against the commodity or service that they provide.[1] They are "consensual" crimes supplying goods and services that people want. Where the demand is great, "law enforcement cannot prevail."[2]

One respect in which organized crime clearly differs from legitimate business is in its attitude toward communication. No letters are written by organized criminals. Few, if any, records are kept. Conversations over the telephone are guarded, cryptic, and often untranslatable and unintelligible. References to specific individuals are purposely vague to make identification difficult. Nicknames are commonly used, and real names may never be revealed. Conversation is often conducted in code, and top echelon members are insulated from direct participation in crime. The practical difficulties that these modes of communication present in using eavesdropping evidence effectively are highlighted in the test case under Title III discussed on page 322 et seq.

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[1]Schelling, Task Force Report: Organized Crime, Appendix D, p.116.

[2]Clark, Crime in America, pp. 68-69.

Infiltration of Legitimate Business by Organized Crime

Organized crime is reported to have monopoly control over certain types of business enterprises such as garbage collection, jukeboxes, and vending machine distribution. The lever for "muscling in" on these enterprises has been loan-sharking. If an owner falls behind on payments to a loan-shark, his business may simply be confiscated. An individual who borrows from a loan shark may be forced to place a member of organized crime on the payroll at a high salary, and eventually the company may be taken over by hoodlums. Other methods have been identified by which organized crime obtains control of a wide variety of legitimate businesses:

1. Investment of profits from illegal enterprises, such as gambling and narcotics.
2. Acquisition of business interests in settlement of gambling debts.
3. Foreclosure of mortgages securing usurious loans.
4. Extortion by strong-arm methods or more sophisticated techniques.[1]

All of these methods have been used in recent years to infiltrate banks, Wall Street brokerage houses, real estate syndicates, finance companies, and large public

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[1]See Congressional Record, Senate, 90th Cong., 1st sess., June 29, 1967, Vol.113, No.104, p.2.

service corporations.[1] Conservative Senators like Roman L. Hruska, Republican of Nebraska, see the infiltration of legitimate business by organized crime as a major threat to the American economic system.

> The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. When organized crime moves into a business, it brings all the techniques of violence and intimidation which it used in its illegal businesses . . . Its effect is even more unwholesome than other monopolies because its position does not rest on economic superiority.[2]

According to the President's Crime Commission, however, "too little is known about the effects on the economy of organized crime entry into the business world." A special study made for the Commission noted that the greatest gambling enterprise in the United States had not been significantly touched by organized crime--that is, the stock

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[1]For investigations by the United States Department of Justice of alleged connections between organized crime and North American Chemical Corporation, manufacturers of laundry detergents seized as dangerous, toxic, and hazardous, see New York Times, March 9, 1971, p.23, col.1. A plan for investigation by the Senate Commerce Committee of infiltration of American business by organized crime was announced by Senator Warren G. Magnuson, Democrat of Washington. New York Times, February 7, 1971, p.33, col.1. In New York State, the Joint Legislative Committee on Crime is examining "the infiltration of organized crime into business, politics, and officialdom." New York Times, January 29, 1971, p.25, col.1.

[2]Congressional Record, Senate, 90th Cong., 1st sess., June 29, 1967, Vol.113, No.104, p.3. It is, of course, questionable whether "other monopolies . . . rest on economic superiority."

market.[1] Underworld characters have manipulated some listed stocks on major exchanges, and the method used has been described in detail: a brokerage house is penetrated by placing a customer's man with criminal ties. The new man attracts "customers" with substantial funds for investment. Extensive, controlled purchases are negotiated of stocks in target companies. The selling price of the affected stock is run up, rumors are circulated of potential earnings or product development; mergers and acquisitions are promoted or pretended. When the stock price reaches a high enough level, the underworld manipulators take their profits, leaving management, creditors, and stockholders "holding the bag."[2] This is a familiar technique for manipulating a listed stock and is believed to have been used by so-called respectable members of the business community.

Legislation designed to prevent infiltration of legitimate business by organized crime has been enacted. In 1967 Senator Hruska introduced a bill making the use of intentionally and deliberately unreported income derived from one line of business in another enterprise a violation of the anti-trust law (S.2048). Another bill (S.2049) prohibited investment in legitimate business enterprises of

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[1]Thomas C. Schelling, "Economic Analysis and Organized Crime," Appendix D, annexed to Task Force Report: Organized Crime, 1967, p.123.

[2]Congressional Record, Senate, 90th Cong.,1st sess., June 29, 1967, Vol.113, No.104, p.2. Senator Hruska called it a "proven" technique.

income derived from specified criminal activities, such as gambling, bribery, narcotics, and extortion. Companion bills were introduced in the House of Representatives by Congressman Richard Poff, Republican of Virginia. These proposals are reflected in Title IX of the Organized Crime Control Act of 1970 prohibiting persons who received income from a "pattern of racketeering activity" or through collection of an unlawful debt, to invest it in any enterprise affecting interstate or foreign commerce.[1] The 1970 law has not yet been tested either as to effectiveness or constitutionality.

Top level members of organized crime are reputed to be multi-millionaires like legitimate business tycoons. They live quietly in the best residential sections, wear Ivy League suits, send their children to select colleges, and sometimes hire public relations firms to bolster their image. They have aptly been called the "robber barons of the mid-20th century," the living proof that "crime does pay in America."[2] Whether Title III of the Omnibus Act of 1968 has been or can be useful in dealing with them is a question to be weighed in Part V. The 1970 Crime Control

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[1]Public Law 91-452, 91st Cong., S.30, October 15, 1970; United States Code, Title 18, Chap.96, Sec.1962.

[2]Congressional Record, Senate, 90th Cong., 1st sess., June 29, 1967, Vol.113, No.104, p.8.

Act providing law enforcement officers with additional tools would seem to indicate that Congress believes court-ordered eavesdropping was in itself inadequate in combating organized crime.

F.B.I. and Organized Crime

The Director of the Federal Bureau of Investigation (F.B.I.), J. Edgar Hoover, has presided for almost half a century over a disciplined, highly trained body of investigating agents. The F.B.I. has 7,000 special agents and 16,000 employees.[1] Until the Apalachin meeting of Mafia chieftains in 1957 was revealed through eavesdropping, Hoover denounced wiretapping as a lazy man's tool and an obstacle to the "development of ethical, scientific, and sound investigative techniques," and denied that organized crime existed.[2]

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[1] New York Times, December 28, 1969, p.14, col.1.

[2] Tom Wicker, "What Have They Done Since They Shot Dillinger?" New York Times Magazine, December 28, 1969, p.3. The meeting in Apalachin, New York, of about 75 alleged leaders of the "Mafia" who came from all parts of the country, precipitated investigations of organized crime by Federal and State agencies. It convinced many law enforcement officials that a confederation did actually exist, that information of its activities and structure was inadequate, and that additional tools of law enforcement would be needed to deal with organized crime. The nature of the "conspiracy" involved in the meeting was never proved. It is generally believed that the meeting had been called to settle a problem created by the murder of a "chieftain," Albert Anastasia. See Donald R.Cressey, "The Functions and Structure of Criminal Syndicates," Appendix A, annexed to Task Force Report: Organized Crime, 1967, pp. 32-33.

In 1939, Hoover said:

> While I concede that the telephone tap is from time to time of limited value in the criminal investigation, I frankly believe that if a statute of this kind were enacted, the abuses arising therefrom would far outweigh the value which might accrue to law enforcement as a whole.[1]

In the 1950's, F.B.I. attention was directed toward Communists, not organized crime. After Apalachin, Hoover changed his mind:

> The battle is joined. We have taken up the gauntlet flung down by organized crime. Let us unite in a devastating assault to annihilate this mortal enemy.[2]

In 1960, the F.B.I. began to provide the Justice Department's Organized Crime and Racketeering Section with intelligence reports on organized crime.[3] Congress gave the F.B.I. jurisdiction to investigate activities of organized crime in the Fall of 1961 under the Travel Act which outlawed interstate shipment of gambling material and made it a Federal crime to travel in interstate commerce for racketeering purposes.[4] From 1961 to 1965, the F.B.I.

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[1] From 86 Cong. Rec. App.1472, March 18, 1940, quoted in Hearings of Subcommittee on Administrative Practice and Procedure, on Right of Privacy Act of 1967," testimony of A.C.L.U. presented by Prof. Herman Schwartz, p. 406.

[2] Quoted in Ramparts, January 25, 1969, pp.47-51.

[3] Cressey, Theft of the Nation, p.22.

[4] "Interstate and Foreign Travel and Transportation in Aid of Racketeering Enterprises," U.S. Code Title 18, Sec.1952, Pub.L. 87-27, Sec.1-A, effective September 13, 1961, as amended by Public Law 89-68, effective July 7, 1965.

secretly installed microphones in homes of alleged Mafia chieftains, in offices where they worked, and in bars and restaurants that they frequented, to collect long-term intelligence about organized crime. Transcripts of the surveillance covered thousands of pages, but none of the conversations intercepted could be used as evidence, for the eavesdropping was illegal.[1]

The entire transcript of the recordings made by the F.B.I. was filed in the United States District Court in New Jersey in June 1969, in an action against Samuel Rizzo (Sam the Plumber), DeCavalcante, and others, charged with extorting money from gamblers.[2] The attorney for DeCavalcante made a motion to require disclosure of the recorded conversations, apparently in the belief that the Government would rather withdraw the case than release the illegally acquired information. He knew that it had been the policy of the Department of Justice to oppose eavesdropping disclosures. However, between the time the motion

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[1]See New York Times, June 14, 1969, p.1, col.6. The F.B.I. has records of bugging in New York, Philadelphia, Buffalo, Pittsburgh, and elsewhere. New York Times, January 11, 1970, p.68, col.2.

The F.B.I. sought to justify electronic surveillance of organized crime by claiming that it fell under the rubric of "national security." This interpretation of national security led to the dispute between J. Edgar Hoover and Robert F. Kennedy over whether the surveillance had been authorized. See Ramsey Clark, Crime in America (New York: Simon and Schuster, 1970), p. 296.

[2]Excerpts of the recordings appeared in New York Times, June 11, 1969, p.1, col.6. See also New York Times, June 22, 1969, Part IV, Sec.E, article by Barnard L.Collier, "Why the F.B.I. Bugs the Mafia," p.16, col.4.

was made and June 12, 1969, the United States Supreme Court had handed down a decision in Alderman v. United States requiring the prosecution to disclose illegal wiretap or bugging evidence to defense counsel, and the Justice Department had changed its policy.[1]

Defendant's counsel failed to ask for a restrictive order making the transcript available only to him and not to the press and public. The United States Attorney, Frederick B. Lacey, Jr., thereupon filed the entire transcript of conversations. It exposed intrigues, executions, labor racketeering, extortion, and infiltration of legitimate business by organized crime. The tapes also disclosed wrangling between "families" over jurisdiction in recruiting members and in gambling rackets, and mistrust between partners in the numbers game.[2] Recorded conversations included much "name dropping," implicating high Government officials. DeCavalcante boasted on the tapes that he had someone working in the office of Governor Richard J. Hughes, and the Mayor of Elizabeth, New Jersey, Thomas G. Dunn, was heard accepting campaign contributions from DeCavalcante in 1964 and welcoming his support in the coming election.[3]

When the illegal eavesdropping was revealed by

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[1]394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). For a discussion of the Alderman case, see page 66.

[2]New York Times, June 17, 1969, p.34, col.1.

[3]Ibid., June 15, 1969, p.52, col.1.

publication of the DeCavalcante recordings, the American Civil Liberties Union of New Jersey asked United States Attorney Lacey to get criminal indictments against F.B.I. agents and officials who had ordered the eavesdropping between 1961 and 1965. No such action was instituted.[1]

The role of the Federal Bureau of Investigation in the drive against organized crime has been severely criticized. Some people consider J. Edgar Hoover a threat to civil liberties.[2] A former agent who served for a year in the F.B.I. claims that the agency is a ruthless autocracy that intimidates even Senators and Congressmen and taps any telephone at will; that the right of the individual to privacy is regularly flouted in the F.B.I.'s preoccupation with building up a record of convictions, and that F.B.I. agents are indoctrinated with radical right-wing propaganda.[3]

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[1]A 15-year Federal prison sentence on a conviction of DeCavalcante for conspiring to extort $12,000 from operators of an illegal dice game, was reversed by the United States Court of Appeals for the Third Circuit. Before this reversal, DeCavalcante had pleaded guilty to supervising and controlling an interstate gambling syndicate, in secret Federal proceedings on January 15, 1971, apparently in the belief that he would get a suspended sentence. A United States District Court judge refused to permit DeCavalcante to change his plea to not guilty, a ruling that will probably be appealed to the United States Court of Appeals for the Third Circuit. See New York Times, March 16, 1971, p.28, col.3.

[2]Salerno and Tompkins, The Crime Confederation, p.329; Fred J. Cook, The F.B.I. Nobody Knows (New York: The Macmillan Company, 1964); The Christian Century, July 9, 1969, Vol.LXXXVI, No.28, p.917. See also New York Times, July 14, 1970, p.7, col.2.

[3]Cook, The F.B.I. Nobody Knows, p.24.

In training classes, he said, "derogatory and obscene remarks were frequently made attacking the motives and integrity of the Supreme Court.[1]

It is charged that the F.B.I. is overly concerned with statistical success and with matters that attract wide public interest, and that it is prejudiced against certain minority groups.[2] The F.B.I. has been a chief target of picketing by the Italian-American Civil Rights League; members of the League claim that J. Edgar Hoover as Director of the F.B.I. is harassing them.[3]

The F.B.I. continues to devote at least some of its energies and resources to "organized crime." The number of agents working on organized crime has been increased from 400 to 800.[4] The F.B.I. annual report for the fiscal year 1970 contained a separate section on organized crime. J. Edgar Hoover said that the drive against organized crime during the year saw the two largest gambling raids in the

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[1]Cook, The F.B.I. Nobody Knows, p. 5.

[2]Suit was filed in the United States District Court by the Fifth Avenue Peace Parade Committee against the Federal Bureau of Investigation, charging that it used confidential bank records to get information about opponents of the war in Indochina. See New York Times, July 14, 1970, p.7, col.2.

[3]Joseph Colombo, Jr., 23 years old, son of a reputed Mafia "chief," was arrested by F.B.I. agents in Brooklyn, charged with conspiracy to melt silver coins said to have been extorted from a coin dealer and to sell silver ingots. New York Times, June 9, 1970, p.1, col.6; June 10, 1970, p.35, col.1.

[4]New York Times, January 4, 1970, p.1, col.4.

history of the F.B.I.: (1) in December 1969, claimed to have netted the head of the Elizabeth, New Jersey, "Cosa Nostra family," one of his top lieutenants, and more than fifty other members of a widespread numbers ring; and (2) in May 1970 in the Detroit area, leading to arrest of sixty-six individuals, including one "Cosa Nostra" member described as the largest numbers operator in Michigan. The F.B.I. Director stated that both raids were based on information obtained from court-approved electronic surveillance installations. On February 6, 1971, F.B.I. agents arrested 56 persons in seven States and the District of Columbia in raids characterized by Attorney General Mitchell as "a major crackdown on organized interstate gambling activities.[1] Despite these arrests, numbers operations continue to thrive. Gambling flourishes even if a few large operators find themselves temporarily in jail.

Former Attorney General Ramsey Clark calls the current interest of the F.B.I. in organized crime its "new crusade":

> Today, La Cosa Nostra is the F.B.I.'s new thing.[2]

Clark denigrates F.B.I. commitment to the control of organized crime:

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[1] New York Times, February 7, 1971, Sec.L, p.28, col.1.

[2] Crime in America (New York: Simon and Schuster, 1970), p. 81.

> The F.B.I. has so coveted personal credit that it will sacrifice even effective crime control before it will share the glory of its exploits. This has been a petty and costly characteristic caused by the excessive domination of a single person, J. Edgar Hoover, and his self-centered concern for his reputation and that of the F.B.I.[1]

A group called "Citizens Commission to Investigate the F.B.I." has charged that files lifted from the office of the F.B.I. in Media, Pennsylvania, show pervasive, illegal surveillance of individuals without evidence of wrongdoing.[2] Senator George S. McGovern, Democrat of South Dakota, urging an investigation of the F.B.I., has raised the question:

> Has the F.B.I. outgrown its gang-busting image and preoccupation with spy-thriller intrigues of Communists sufficient to focus attention on real problems of crime regardless of politics?[3]

Senator McGovern has asked the Senate Subcommittee on Administrative Practice and Procedure to initiate an investigation of charges against F.B.I. Director J. Edgar Hoover for a vindictive act of personal retribution against a former agent of the F.B.I. who had voiced some

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[1] Crime in America (New York: Simon and Schuster, 1970), pp. 81-82.

[2] New York Times, March 28, 1971, Sec.E, p.9, col.1; March 24, 1971, p.24, col.3; April 13, 1971, p.23, col.1.

[3] Ibid., March 19, 1971, p.37, col.1.

criticism of Mr. Hoover's administration.[1] Hale Boggs of Louisiana, House Democratic leader, charges that the telephones of Senators and Congressmen have been tapped by the F.B.I. and has demanded the resignation of Mr. Hoover. Congressman Boggs is certain that the Federal Bureau of Investigation has had him under surveillance.[2]

Public Attitude Toward Organized Crime

Law enforcement officers, prosecutors, and Congressional investigators have been trying for years to convince the public that organized crime exists on a national scale and that it is a grave social problem threatening American society. Public apathy and indifference have been blamed for the inability of law enforcement to deal effectively

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[1] Congressional Record, Senate, February 1, 1971, S.599. Suit was filed in New York by the American Civil Liberties Union against Mr. Hoover in behalf of the agent, John F. Shaw. Shaw was one of the group of F.B.I. special agents in the John Jay College of Criminal Justice. A letter written to one of his professors articulating his own opinions on the strengths and shortcomings of the F.B.I. resulted in the termination of his employment and inability to get another job.

[2] New York Times, April 6, 1971, p.1, col.1; April 7, 1971, p.21, col.1. J. Edgar Hoover has denied that there has ever been a wiretap of the phone of any Senator or member of Congress since he became Director of the F.B.I. in 1924, or that any member of the House or Senate has been under surveillance.

with organized crime.[1] The public has been interested in the problem only intermittently, after each sensational disclosure of the activities of organized crime and the political corruption that supports it. Public pressure for corrective action is exerted for a short while, and soon ceases as interest wanes. The public wants the services that organized crime provides, and few can see the connection between gambling and organized crime. People who want to gamble are not dissuaded by the argument that "a $2 bet means murder."

In 1967 it was reported that the public was just beginning to confront organized crime. Most Americans did not feel immediately threatened by it, although they had "a discomforting awareness of street crime, consumer frauds, and white collar crime."[2] A study of the politics of vice and corruption in a real town, fictitiously called "Wincanton, U.S.A." was made for the President's Commission.

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[1]Statement of Senator Hruska, Congressional Record, Senate, June 29, 1967, 90th Cong., 1st sess., Vol.113, No. 104, p.1. See also Tyler, Organized Crime in America, p.7; Long, The Intruders, p.60. But others have questioned the good faith of those who blame organized crime on the apathy of private citizens. King, Gambling and Organized Crime, p.117.

[2]Testimony of John B. Martin, Chairman of the Michigan Commission on Crime, Delinquency and Criminal Administration, before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Hearings, 90th Cong., 1st sess., on S.928, "Right of Privacy Act of 1967," p.526. See also Task Force Report: Crime and Its Impact, The President's Commission on Law Enforcement and Administration of Justice (1967), p.94.

A survey of public attitudes toward gambling and prostitution in the town revealed a general awareness of the existence of these illegal activities, but little perception of payoffs to the police. Information available to the public as to corruption depended on the extent of newspaper coverage. Specific knowledge that a particular official received a kickback to approve a contract became known only after legislative hearings. Residents of the community were tolerant of gambling and intolerant of corruption, but few believed that one produced the other. Warnings of the connection between the two were repeated so often that they made no impact. Only when Federal investigations began to attract national attention did the public respond by voting the ruling party in Wincanton out of office and cleaning up the town. The report concluded that Wincanton would soon fall back into its old ways unless the voters realized that illegal activities produce corruption.[1]

Today, after much sensational publicity in the press about "Mafia" chieftains and their connection with official corruption, and a best-seller whose hero becomes a leader of "La Cosa Nostra," organized crime has become a household word.[2] There is, however, no evidence that this

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[1]John A. Gardiner, "Wincanton: The Politics of Corruption," Appendix B, annexed to Task Force Report: Organized Crime, 1967, p.61.

[2]Mario Puzo, The Godfather (New York: G. B. Putnam's Sons, 1969).

has had any effect whatsoever on the demand for the services that organized crime provides or on the realization by the public that they are both supporters and victims of organized crime.

STATE STATUTES AUTHORIZING COURT-ORDERED EAVESDROPPING

When Title III was enacted, only five States permitted eavesdropping by law enforcement officers under court order--Massachusetts, Maryland, New York, Nevada, and Oregon. Most States had laws prohibiting wiretapping, including Pennsylvania, Illinois, and California, the statutes of which specifically barred wiretapping by law enforcement officials.[1] Louisiana permitted law enforcement officers to wiretap without a court order. Title III does not appear to preempt the field of eavesdropping for the Federal Government.[2] It permits State law enforcement officers to engage in wiretapping and electronic surveillance under conditions at least as restrictive as the Federal law, provided that:

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[1] Wiretapping was regulated in some way by thirty-seven States. Most prohibitions were directed toward protection of property. See Greenawalt, op.cit., 68 Columbia Law Review, at p.189 . In California interception of telegraph communications was outlawed as early as 1862. In Illinois, electronic eavesdropping is prohibited, and attempts to pass legislation permitting the police to eavesdrop under court order have failed. See 64 North Western Law Review 277, July/August 1969, p.296.

[2] See Vernon, Syracuse Law Review, Spring 1969, Vol. 20, p.601, at p.614,615. It would appear, however, that under Title III, Federal officers could use court-ordered eavesdropping even in a State that prohibits wiretapping and electronic surveillance, such as Illinois, Pennsylvania, and California. See colloquy between Bernard Fensterwald,Jr., Chief Counsel, Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, and G. Robert Blakey, at Hearings, "Right of Privacy Act of 1967," 90th Cong., 1st sess., S.928, April 21, 1967, pp.437-438.

1. The State enacts a statute for that purpose, and
2. The State statute conforms to the requirements of Title III.[1]

The States have been slow to take advantage of this encouragement to eavesdrop for a variety of reasons--concern over invasion of privacy, influence of powerful organized crime figures and State officials, or possibly mere apathy. Some of the State laws now permitting court-ordered eavesdropping merely amended existing statutes. A few States enacted completely new laws to conform to Title III, including Florida, Minnesota, Nebraska, New Jersey, Rhode Island, and South Dakota. New York, which has had court-ordered eavesdropping for over thirty years,enacted a new law in 1969 to replace a 1968 law that preceded Title III by two weeks. A District of Columbia eavesdropping law was enacted in 1970. These new State laws follow the Federal statute in a general way, but they differ from Title III and from one another in various details, notably with respect to who may apply for a court order, covered offenses, and time period for an eavesdrop order. A few States allow emergency wiretapping without a court order (for example New Jersey and District of Columbia), some require a "return" to be made (Massachusetts and Minnesota), and a few provide for reports to State officials (Massachusetts, New York, Minnesota, New Jersey). Several States attempt to deal with "national security" cases (Colorado, Georgia). Outstanding features

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[1]Sec. 2516(2).

of State eavesdropping statutes (enacted pursuant to Title III) are indicated in the summaries on page176 et seq., presented in alphabetical order. Some of these seem to be more restrictive than the Federal law. Florida specifically limits orders in gambling cases to those of an organized nature or involving conspiracy. Georgia sets a maximum period of ten days for eavesdrop orders. Physical destruction of evidence or information obtained is mandatory if the eavesdropping does not produce evidence of the specific crime set forth in the warrant. Massachusetts directs the law pointedly against organized crime and places reports in the public domain. Minnesota, like Georgia, limits orders to a period of ten days, and makes recording on wire or tape mandatory. New Jersey's "emergency" clause offers added protection against misuse.

The changes made in 1969 in New York State to conform to Federal Law, as listed on page197 et seq., highlight the safeguards now deemed essential. However, two 1969 changes make the New York law somewhat less restrictive than it was in 1968; the time period for an order has been increased from twenty to thirty days, and a "return" summarizing conversations intercepted is no longer required. The return requirement was eliminated from the New York statute because the Federal law does not include it, but failure of Title III to require a return has been cited as a constitutional deficiency.

ARIZONA

Criminal Code Art. 15, Sec. 13-1051 to 13-1059, added by Laws of 1968, Chapter 126, Sec.1. Arizona Revised Stat.Ann. (Supp.1968), signed March 19,1968,effective June 19,1968.[1]

This is a short, loosely drawn and incomplete statute that makes little, if any, attempt to follow the wording of Title III. It permits applications for eavesdrop orders to be made by a wide variety of law enforcement officers, including:

1. Any county attorney.
2. The Attorney General.
3. An officer above the rank of a sergeant of any Police Department of the State or any political subdivision thereof.
4. The sheriff of any county.

The period for which orders may be obtained is indicated as "one month" (not thirty days as Title III provides). The applicant must file with the judge an affidavit setting forth information obtained under the wiretap order, to be retained in the possession of the judge. The statute says nothing about recording of conversations overheard on tapes.

Arizona makes it a misdemeanor to obtain information from a telephone or telegraph company or to obtain access to premises by trick, false representation, or impersonation. Failure of a telephone or telegraph company, its officers or employees, to report unlawful eavesdropping is a misdemeanor, punishable by fine not to exceed $300.

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[1] For a legislative and constitutional analysis, see Arizona Law Review, Spring 1968, Vol. 9, p. 452.

COLORADO

Chapter 114, Laws 1969, effective July 1, 1969, amended Colorado Revised Statutes 1963 (1967) by adding and amending Sec.40-4-26 to 40-4-33. Sec. 40-4-30 covers ex parte orders for wiretapping and eavesdropping in conformity with Title III.

The offenses listed in the Colorado statute include murder, kidnap, extortion, armed or aggravated robbery, rape, arson, burglary, mayhem, or an organized crime conspiracy to commit any of the aforementioned. . . or a crime endangering the national security . . . or if evidence is necessary to save human life, or the communication is itself an element of the specified crime.

The old Colorado eavesdropping law permitted an order for a sixty-day period. The amended law limits it to thirty days.

DISTRICT OF COLUMBIA

Subchapter III, Sec. 23-541 to Sec. 23-556 of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Public Law 91-358, effective July 29, 1970.

Crime in the District of Columbia was a central point of attack in the "law and order" election campaign of 1968. As a candidate for the Presidency, Mr. Nixon said that under his administration, the Federal city would be"a model of law observance and enforcement."[1] Shortly before taking office President Nixon recommended major revision of the criminal justice system in the District of Columbia. A bill, highly publicized as a "law and order" measure, was submitted to Congress by the Department of Justice on July 11, 1969, with the following comment from the Attorney General:

> This model anti-crime program will point the way for the entire nation at a time when crime and fear of crime are forcing us, a free people, to alter the pattern of our lives.[2]

The bill met with much opposition in Congress and was interpreted as a statement of national crime policy. Leading critic, Senator Sam J. Ervin, Jr., denounced it in scathing words:

> This . . . is as full of unconstitutional, unjust, and unwise provisions as a mangy hound dog is full of fleas . . . a garbage pail of some of the most repressive, nearsighted, intolerant, unfair, and vindictive legislation that the Senate has ever been presented . .

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[1] Congressional Quarterly, Weekly Report, June 5, 1970, p. 1497.

[2] Congressional Record, House of Representatives, January 2, 1971, page H 12693.

> . . an affront to constitutional principles and to the intelligence of the people of the United States . . . a blue print for a police state.[1]

Senator Ervin was opposed particularly to the "no-knock" and "pre-trial or preventive detention" provisions, but he also expressed disapproval of the broad eavesdropping powers given to law enforcement officers in the District of Columbia in a wide variety of offenses.[2] In the House of Representatives, dissenting members of the District Committee warned:

> The wiretap provisions falsely assume that crime will be reduced by wiretaps, yet it will in fact result in more police officers being taken off the streets and put on phone taps and will thus likely lead to continuation in the rising crime rate.[3]

The bill as passed by Congress became Public Law 91-358. The press reported that members of the Senate and the House of Representatives up for election in November 1970 would not go on record against a "law and order" proposal.[4]

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[1] Congressional Quarterly, Weekly Report, June 5, 1970, pp. 1497-1498.

[2] Ibid, p.1498. The "no-knock" clause permitted police in a variety of circumstances to enter homes or other places without knocking or announcing themselves. The "preventive detention" provision authorized judges to consider the danger of a defendant in setting pre-trial release conditions, and to detain certain dangerous defendants up to sixty days prior to trial. Legislation to permit "preventive detention" in the entire Federal court system was introduced in the House of Representatives July 14, 1969 as HR 12806 and hearings were held, but no further action was taken.

[3] New York Times, July 23, 1970, p.14, col.2, July 24, 1970, p.1, col.8.

[4] Ibid.

Applications for an eavesdrop order may be made by any investigative or law enforcement officer on written authorization by the United States Attorney for the District of Columbia. Judges who may sign orders include judges of the Superior Court of the District of Columbia, the District of Columbia Court of Appeals, the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit.

Offenses covered by the District of Columbia Act are unusually broad in scope; they include: arson, blackmail, bribery, burglary, destruction of property valued at more than $200, gambling, grand larceny, kidnapping, murder, obstruction of justice, receiving stolen property valued at more than $100, robbery, extortion, offenses involving dealing in narcotic drugs, marihuana, and other dangerous drugs.

A special provision that seeks to safeguard privileged communications appears in Section 23-547(d). If the facilities from which a wire communication is to be intercepted are used for habitation by a husband and wife, by a licensed physician, licensed attorney, or practicing clergyman, the court must determine that the place is used or about to be used in connection with "conspiratorial activities characteristic of organized crime."

Section 23-547(f) requires that if an applicant requests it, the order must direct "a communication common carrier, landlord, custodian or other person" to furnish necessary information and assistance to effect the interception unobtrusively; compensation for such services must

be made by the applicant "at the prevailing rates."

Section 23-548 authorizes wiretapping in emergencies without court order, but the provision differs from that contained in Title III. The District of Columbia Act requires that application for an order be initiated within twelve hours of the emergency and be completed within seventy-two hours.

Reports must be made to the chief judge of the District of Columbia Court of Appeals within thirty days after expiration of an order or extension, or denial of an order of approval, by the court issuing the order. An annual report by the United States Attorney for the District of Columbia to Congress and the chief judge of the District of Columbia Court of Appeals is also required; in addition to the contents required under Title III, the annual report must make a "general assessment of the importance of the interceptions" (Sec. 23-555).

FLORIDA

Laws of 1969, Chapter 69-17, effective September 1, 1969.

The Florida eavesdropping law follows the wording of Title III closely, except for slight changes necessitated by the fact that it is a State rather than Federal law. It contains no 48-hour emergency clause, nor does it provide immunity to witnesses in cases or proceedings involving violations of the eavesdropping law or the offenses listed.

Offenses covered in the Florida law include murder, kidnapping, gambling (when the same is of an organized nature or carried on as a conspiracy in violation of Florida laws); also robbery, burglary, grand larceny, prostitution, criminal usury, abortion, bribery, extortion, or dealing in narcotic drugs or other dangerous drugs, or any conspiracy to commit violations of Florida laws relating to the specified crimes.

The Florida law contains no provision for the making of reports.

GEORGIA

Criminal Code of Georgia, Chapter 26-30, Section 26-3001 to 26-3010. Acts 1968, pp. 1249, 1327-8, 1334.

Georgia prohibits eavesdropping and surveillance by private individuals and makes it unlawful to possess, sell, or distribute eavesdropping devices. Law enforcement officers, however, may use such devices by following a prescribed procedure "when there is probable cause to believe that a person has committed or is committing an act which endangers the national security of the United States or the security of Georgia, or is committing or has committed any of the following offenses:[1]

> Treason, rebellion, espionage, sabotage, or any felony involving bodily harm, or
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> Any crime under the laws of Georgia, or the United States involving kidnapping, narcotics, dangerous drugs, prostitution, blackmail, extortion, bribery, gambling, or any felony involving alcoholic beverage laws.

Written application must be made by the solicitor general of the circuit where the device is to be placed, or by the Attorney General, to a judge of the superior court of the said circuit. The judge must be satisfied that the application sets forth facts overcoming the need for giving notice of the surveillance. The order (called an "investigation warrant") is valid for a maximum of ten days, with renewal for an additional 10-day period. A return must be made by the executing officer to the judge setting forth what

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[1]For a critical examination of Georgia Code, Ann. Sec. 20-2001-2011 (Supp.1967), see George Law Review, Vol.2, No. 4, Summer 1968, p.594.

was obtained, and with particularity the law enforcement officer or agent who actually employed the device.

If no evidence of the specific crime set forth in the warrant has been obtained through the use of the device, the applicant must physically destroy all evidence or information obtained by surveillance and so certify in writing under oath to the judge. The applicant for the warrant must report back to the judge within thirty days of issuance.

On return of an indictment or filing an accusation based on such evidence or information, in whole or in part, the solicitor general must notify the accused of the existence and substance of the evidence or information; if it has been reduced to a permanent form, he must make it available to the accused for inspection and copying.

MARYLAND

Maryland Code (1967 Replacement Volume) Article 27, Section 125A.

The Maryland statute makes it unlawful for any person to use an electronic device or other device or equipment "to overhear or record any part of the conversation or words spoken to or by any person in private conversation without the knowledge or consent, expressed or implied, of that other person." However, a public law enforcement officer may submit to the State's attorney of the county or of Baltimore City evidence that an ex parte order authorizing use of an electronic device is necessary to prevent a crime or apprehend a person who has committed a crime. The State's attorney then applies for an order to a judge of the circuit court of the county or of the Supreme Bench of Baltimore City. An order may be effective for not more than thirty days unless extended or renewed.

A copy of the order and accompanying "exhibits" must be sealed and filed with the clerk of the court. The order is available to persons in interest after arrest, on order of the court.

Provisions as to wiretapping appear in Section 585 of Article 27 and in Section 92 to 99 inclusive of Article 35 of the Maryland Code (1959, Ch. 706).

Section 125 of Article 27 requires registration of eavesdropping or wiretapping devices by possessors, manufacturers, and sellers.

MASSACHUSETTS

Massachusetts Annotated Laws, Chapter 272, Section 99 (Supp. 1964) as amended July 20, 1968, effective 90 days thereafter by Laws of 1968, Chapter 738.

The 1968 amendment rewrote Section 99. It provides a detailed procedure under which clandestine interception of wire and oral communications may be made and the information introduced in evidence. The preamble to Section 99 makes it clear that the law is directed against organized crime. It states that increasing activities of organized crime constitute a grave danger to the public welfare and safety, that it consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services; that organized crime commits unlawful acts and employs brutal and violent tactics. Further:

> Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living . . . because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it.

The statute recognizes the grave dangers of modern electronic surveillance on the privacy of all citizens; this is why the use of electronic devices is limited to the investigation of organized crime.

A wide variety of offenses is covered by the Massachusetts statute: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, unlawful gambling, intimidation of a witness or juror,

kidnapping, larceny, unlawful lending, mayhem, murder, possession or sale of narcotics or harmful drugs, perjury, prostitution, robbery, subornation of perjury.

Application for an eavesdrop order may be made by the Attorney General or by a District Attorney. Editing of tape recordings in a judicial proceeding is specifically prohibited.

An eavesdrop order may be in effect for thirty days, but interception of communications is limited to a period not exceeding fifteen days, with 15-day renewals. If secret entry upon a private place or premises is necessary to install an intercepting device, the order must expressly authorize such entry to execute the warrant. A copy of the order must be retained by the issuing judge, to be transported to the chief justice.

The Massachusetts statute provides for service of the warrant for the eavesdropping on the person whose communications are to be intercepted, and on the owner, lessee, or occupant of the premises where the device is to be installed. On showing of need for secrecy the judge may postpone such service until thirty days after expiration of the warrant; on showing of important special facts, service may be postponed up to three years from expiration of the warrant.

Returns to the judge must be made within seven days after termination of the warrant, with the original recording of the intercepted communications and a sworn statement of what was overheard to the best of his recollection by each person who heard the communications.

The Massachusetts statute specifically provides for making duplicate recordings and for transmission of the documents to the chief justice. A defendant in a criminal trial where the interceptions are to be offered in evidence must be served with a copy of the documents; he must also be furnished a copy of the recordings at least thirty days before trial.

The Attorney General and each District Attorney must file an annual report on the second Friday of January with the General Court of Massachusetts. This report is a public document to be made available to the public at the offices of the Attorney General and District Attorneys, and any person may compel compliance by an action of mandamus.

MINNESOTA

Laws of 1969, Chapter 953, effective July 1, 1969;
Minnesota Stat. 1967, Section 626 A.01 - 626 A.23.

The Minnesota eavesdropping law follows the wording of the Federal law in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, but in several respects the Minnesota law is more restrictive than Title III. Following are the chief differences:

1. Nature of offenses--The Minnesota statute includes: murder, manslaughter, aggravated assault, aggravated robbery, kidnapping, aggravated rape, prostitution, bribery, perjury, theft, receiving stolen property, embezzlement, burglary, forgery, aggravated forgery, gambling, offenses relating to narcotic drugs, or attempt or conspiracy to commit such offenses. The Minnesota law does not include extortion.

2. Execution of order--The order must specify the name of the officer authorized to intercept, and the officer mentioned in the warrant must be present and act in its execution.

3. Time period--The maximum period allowed is ten days.

4. Denial or extension--A written order is required if an application is denied or extended.

5. Return--The officer mentioned in the warrant must file a return. (No such return is required by Title III).

6. Recording--Recording on tape or wire is mandatory in Minnesota.(Under Federal law it is required only "if possible")

7. Motion to suppress--If the motion is denied, the order or denial may be reviewed on appeal even if the conviction is predicated on a guilty plea.

8. Telephone Company--The Telephone Company is specifically required to aid in detection of unlawful eavesdropping.

9. Reports--Each county attorney must file a report by January 15th of each year with the administrative assistant of the supreme court containing detailed information with respect to each application for an eavesdrop order.

10. Civil remedies--Persons whose wire or oral communications are intercepted, disclosed, or used in violation of the law may bring civil action; in addition, they are entitled to an injunction prohibiting further interception, use, or divulgence, treble damages of not less than $1,000, punitive damages as awarded by court or jury, and a reasonable attorney's fee and litigation costs.

NEBRASKA

Revised Statutes, Supp. 1969, Section 86-701 to 86-707 inclusive, approved September 19, 1969.

The Nebraska eavesdropping statute follows the language of Title III in some respects, but contains some unusual variations. Offenses covered are listed as follows: murder, kidnapping, robbery, bribery, extortion, dealing in narcotic or other dangerous drugs, or any conspiracy to commit any of the foregoing offenses. Gambling is not included.

Application is made by the Attorney General or any county attorney to the district court.

Penalty for violation of the Nebraska law is relatively light; not less than $25 and not more than $500, or imprisonment for not less than one year nor more than three years. (Note that under Title III, the fine is up to $10,000, imprisonment up to five years, or both). No provision is made in the Nebraska statute for civil damages.

Nebraska does not require giving notice within ninety days after termination of the order or extension (as provided by Title III). It does, however, require notice to be given within ten days before trial, similar to the notice required by Title III, Section 2518(9).

NEW HAMPSHIRE

Revised Statutes Annotated, Chapter 57-A, Wiretapping and Eavesdropping. Laws of 1969, 403:1, effective August 31,1969.

The wording of this statute follows Title III in a general way, but there are some differences. The New Hampshire law attempts to define "organized crime."

> Organized crime means the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to homicide, gambling, prostitution, narcotics, marijuana or other dangerous drugs, bribery, extortion, blackmail, and other unlawful activities of members of such organizations.

The consent of all parties to the communication is required by New Hampshire in order to exempt interception from court order requirements; under the Federal law, consent of one of the parties to the communication is sufficient.

Applications for orders in New Hampshire may be made by the Attorney General, Deputy Attorney General, or any county attorney on the written approval of the Attorney General or Deputy Attorney General. Orders may be obtained if interception may provide evidence of the commission of organized crime, or homicide, kidnaping, gambling, bribery, extortion, blackmail, or dealing in narcotic drugs, marihuana or other dangerous drugs, or any conspiracy to commit any of the foregoing offenses.

The procedure outlined in the New Hampshire law for obtaining an eavesdrop order follows closely the wording of Title III, but the period of time for which an order may be

obtained in New Hampshire is limited to ten days; an extension is also limited to ten days. As in the Federal law, progress reports to the State judge are discretionary, not mandatory. Provisions as to recording intercepted conversations, guarding against alteration, provision for custody and sealing are similar to those of Title III. Each county attorney is required to file a report with the Attorney General of New Hampshire who, in turn, must file an annual report with the Administrative Office of the United States Courts.

On or before December 1st preceding each biennial session of the General Court in New Hampshire, the Attorney General must include in the report required of him a report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications, and the number of orders and extensions granted or denied during the preceding two years.

Civil damages recoverable in New Hampshire for violations of the law are the same as those provided by Title III.

NEW JERSEY

Chapter 156A, added by Laws of 1968, Chapter 409, known as "New Jersey Wiretapping and Electronic Surveillance Control Act." New Jersey Stat. Ann. 2A:156-A, 1-26 (Supp. 1969).[1]

The New Jersey Act went into effect January 1, 1969, and is to remain in effect until December 31, 1974. It was adopted without a dissenting vote in the wake of charges that New Jersey was one of the most corrupt states in the United States and a "stronghold of organized crime."[2]

Application for an eavesdrop order may be made by the Attorney General, a county prosecutor, or the Chairman of the State Commission of Investigation when authorized by a majority of the members of that commission. Judges of the Superior Court must be specially designated to receive applications by the Chief Justice of the Supreme Court of the State.

Offenses listed in the New Jersey statute include murder, kidnapping, gambling, robbery, bribery, extortion, loan sharking, dealing in narcotic drugs, marijuana or other dangerous drugs, arson, burglary, embezzlement, forgery, receiving stolen property, escape, alteration of motor vehicle identification numbers or larceny punishable by imprisonment for more than one year, or any conspiracy to commit these

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[1] See Notes: "Wiretapping and Electronic Surveillance--Title III of the Crime Control Act of 1968," Rutgers Law Review, Vol.23, No.2, Winter 1969, pp.319-388, at p.323, footnote 7.

[2] New York Times, May 8, 1970, p.20, col.2. See also New York Times, July 2, 1970, p.71,col.2; May 7, 1970, p.45, col.1; April 2,1970, p.31, col.1; December 21,1969, p.1,col.1; Sunday Sec. E, p.6, col.1, January 18, 1970; Fred J. Cook, "The People v. The Mob; Or, Who Rules New Jersey," New York Times, Magazine Section, February 1, 1970, pp.9-36.

offenses or which may provide evidence aiding in the apprehension of the perpetrator of the listed offenses.

If the facilities from which the communication is to be intercepted are public, the court must determine special need to intercept. Special need must also be shown if the facilities are used by a physician, attorney, or clergyman, or if it is primarily a habitation of husband and wife.

The New Jersey law contains a 48-hour emergency provision that differs from that of the Federal law. In New Jersey, informal application is made to a judge who may grant verbal approval without an order, to be followed within forty-eight hours by application for an order. It must relate to investigation of conspiratorial activities of organized crime. If no application is made or if the application is denied, the tape must be delivered to the court and sealed. Failure to do so is punishable as contempt of court.

In addition to the reports required by Title III, judges authorized to issue eavesdrop orders must make an annual report to the Administrative Director of the Courts as to the number of applications made, number of orders issued, effective period of each order, number and duration of renewals, crimes for which conversations were sought, names of applicants, and other particulars as required by the Administrative Director. In addition, the Chief Justice of the New Jersey Supreme Court must report annually to the Governor of New Jersey and the legislature on the operation of the law, with recommendations as to legislative changes or improvements to effectuate the purposes of the law and

to assure and protect individual rights.[1]

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[1] Various amendments to the New Jersey statute have been proposed, among them a provision to limit the emergency power to the Attorney General; to require county prosecutors to obtain written authorization from the Attorney General before an application is made; to require that the annual report to the governor and legislature include a statement as to effectiveness and value of activities conducted under the New Jersey law in combating organized crime.

NEW YORK

New York Code of Criminal Procedure, Chapter 1147

Since 1938, the Constitution of the State of New York (Article 1, Section 12) has permitted interception of wire communications under court order. Ex parte orders were obtainable pursuant to a procedure outlined in the New York Code of Criminal Procedure. The United States Supreme Court declared the procedure unconstitutional on its face in Berger v. New York (1967).[1] In 1968 the Governor signed Chapter 546 (Title III of Part VI of the Code of Criminal Procedure, Section 814 et seq.) establishing a new procedure for issuing eavesdropping warrants to conform to the requirements of the Supreme Court. Two weeks later Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, Title III of which covered wiretapping and electronic surveillance. The 1968 New York statute was in some respects more stringent than the Federal law, in others less restrictive.

In 1969 New York repealed its 1968 law and enacted a new law to eliminate the differences between State and Federal law, to reduce the "potential for confusion among law enforcement officials and the likelihood of non-substantive litigation arising out of unnecessary differences between the two laws." In addition, a new Title II-D was added to the Code of Criminal Procedure providing for a motion to suppress evidence obtained by unlawful eavesdropping. A proposal for

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[1] 388 U.S. 41, 87 S. Ct. 1873, 18 L.Ed.2d 1040.

48-hour emergency eavesdropping without court order was omitted before passage of the 1969 law. Following are the principal 1969 changes in the New York law:

1. Offenses--The old law permitted an eavesdrop order on evidence of commission of a "particular crime." The 1969 law contains a long and detailed list of specific offenses for which an order may be obtained, including assault in the first and second degree, promoting a suicide attempt, criminally negligent homicide, manslaughter in the first and second degree, murder, abortion in the first and second degree, rape and sodomy in the first, second, and third degree, sexual abuse, unlawful imprisonment, kidnapping, custodial interference, coercion, burglary, criminal mischief and tampering, arson, grand larceny robbery, unlawful use of secret scientific material, criminal possession of stolen property, forgery, falsifying business records, tampering with public records, offering a false instrument for filing, issuing a false certificate, escape, promoting prison contraband, hindering prosecution, crimes relating to dangerous drugs, gambling, criminal usury, bribery, promoting prostitution, riot.

2. Applications--Under the 1969 law only the Attorney General or a District Attorney may apply for an eavesdrop order. New York State is divided into sixty-two counties, each of which elects its District Attorney. The old law contained a wider list of permissible applicants.

3. Probable cause--The new Section 816 of the Code of Criminal Procedure adds the requirement of probable cause to believe that "a particularly described person is committing . . . a particular designated offense," and that "the facilities from which . . . the communications are to be intercepted are being used . . . in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

4. Time period--The new law permits eavesdrop orders for a period up to thirty days with 30-day renewals. The old law fixed a maximum of twenty days.

5. Execution of order--The 1969 law requires that the warrant be executed "by a law enforcement officer who is a member of the law enforcement agency authorized . . . to intercept the communication." The old law permitted execution by the applicant personally or by someone designated by him for that purpose.

6. Return--The 1969 law eliminates the requirement for filing a return summarizing the conversations overheard or recorded. It substitutes a provision, similar to the Federal law, requiring that custody of tape or wire recordings be given to the judge who signed the order and allowing him to require periodic progress reports.

7. Notice and disclosure-- The 1969 law provides that the judge may disclose to the person to whom notice has been given, or to his counsel, portions of the intercepted communications in the interest of justice.

8. Motion to suppress evidence--This is provided for in a new section, 813-j of the Code of Criminal Procedure. Grounds for motion to suppress are the same as those provided by the Federal Government in Title III.

RHODE ISLAND

Public Laws of Rhode Island, 1969, pp.154-173, approved May 2, 1969, added Chapter 5.1 to Section 1, Title 12 of the General Laws entitled "Criminal Procedure."

Section 12-5.1-2 provides that applications for eavesdrop orders may be made by the attorney general or by an assistant "specially designated by the attorney general." The application must be presented to the presiding justice of the Superior Court of competent jurisdiction. An order may be executed anywhere in the State.

Duplicate recordings may be made of intercepted communications, and an annual report must be made by the attorney general to the General Assembly on the second Friday of January of each year. The Rhode Island statute contains an unusual provision to insure conformity to the law of the United States:

> 12-5.1-15. Notwithstanding any provision of this chapter any court to which an application is made in accordance with this chapter may take any evidence, make any denial, or issue any order required to conform the proceedings or the issuance of any order of authorization or approval as provided in this chapter to the provisions of the Constitution of the United States or of any law of the United States.

Penalties are provided for alteration or tampering with tapes, transcriptions, or recordings (Section 11-35-22).

SOUTH DAKOTA

Chapter 23-13A-1 to 23-13A-11, added by S.L.1969, Chapter 158, Section 7.

This is a very short statute that states specifically that "it is the intent . . . to conform to requirements of all interceptions of wire and oral communications conducted by investigative or law enforcement officers in this state to the provisions of Chapter 119 of the United States Code." The South Dakota law does not outline the procedure to be followed in order to obtain an eavesdrop order, but simply requires that:

> The Attorney General, or a state's attorney, in applying for such orders, and any judge in granting such orders, shall comply with all procedural requirements of Sec. 2518 of Chapter 119 of the United States Code.

Offenses covered by the South Dakota statute include murder, kidnapping, gambling, robbery, bribery, extortion, dealing in narcotic drugs, marijuana or other dangerous drugs, and rape.

Application for eavesdrop orders may be made by the Attorney General and any State's attorney of any county to a judge of the circuit court of the State of South Dakota.

The Attorney General and the State's attorney of each county are specifically required to comply with the reporting requirements of Section 2519(2) of Title III, but the South Dakota law does not contain any provision requiring filing of reports by judges as specified in Section 2519(1) of Title III.

WISCONSIN

Laws of 1969, Chapter 427, creating Chapter 968 of the Statutes of Wisconsin, to prohibit electronic surveillance by persons other than law enforcement officers (repealing 885.36 and amending 885.365(1)).

The Wisconsin eavesdropping law follows closely the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Applications for orders may be made by the Attorney General of Wisconsin and by District Attorneys of any county in the State to the circuit court where the interception is to take place. In counties with more than one branch of the circuit court, application may be made only "to the lowest numbered branch having criminal jurisdiction."

Offenses covered by the Wisconsin statute are more limited than those in Title III. Only the following are listed in the State statute: "murder, kidnapping, commercial gambling, bribery, extortion and dealing in narcotics or dangerous drugs or any conspiracy to commit any of the foregoing offenses."

A novel provision of the Wisconsin statute relates to postponement by the judge of service of an "inventory" within ninety days after termination of the order or extension or after filing an application that is denied. The judge must "review such postponement at the end of sixty days and good cause shall be shown prior to further postponement."

PART IV. PRACTICE AND PROCEDURE UNDER TITLE III AND STATE STATUTES

METHOD OF GATHERING EMPIRICAL DATA--STATE AND FEDERAL

Most information on practice and procedure in eavesdropping is revealed with initial reluctance. The surreptitious nature of wiretapping and electronic surveillance makes law enforcement officers wary and secretive. Continued criticism of Title III has also produced great sensitivity and defensiveness in officials charged with administering the law. They must be convinced that objective discussion is possible, and that frank disclosure of day-to-day problems presented by court-ordered eavesdropping is necessary to enlist public support and preserve the life of Title III.[1]

Once the hurdle of suspicion has been leaped, the interviewer is amazed at the eagerness with which law enforcement officials discuss the work of preparing applications, getting orders signed by judges, monitoring recordings, sealing documents and tapes, filing reports, sending out notices, and prosecuting suspects. They are aware, in varying degrees, of the many problems presented by court-ordered eavesdropping and are groping for solutions. In the States where District Attorneys and Attorneys General have considerable independence, the only barrier to full exposure of current practice is, in most instances, the need to protect continuing investigations and pending cases. Even at the Federal level where control is centralized in the Department of Justice under the United States Attorney General, questions are answered as candidly as directives and regulations permit.

Law enforcement officers can, of course, present only one side of the picture. For an overall view of Title III in operation one must probe the difficult practical and constitutional problems that court-ordered eavesdropping poses for judges and their law clerks, defendants and their attorneys, appellate counsel for both sides in litigation, and officials of telephone companies who are caught between their obligation to subscribers and a duty to refrain from obstructing, if not to cooperate, with the law.

The findings presented here are drawn from answers to questions in personal interviews with regard to the practical operation of Title III. Procedure in the States and at the Federal level are discussed separately and then compared. No rigid or uniform questionnaire was used; on the contrary an air of informality was deliberately cultivated to encourage open-ended discussion. Answers differed in some details, but a pattern of procedure could generally be discerned after a series of interviews. Where discrepancies appeared, the various replies are indicated. The questionnaires reproduced in the Appendix were prepared in advance and used merely as a reminder of items to be covered, if possible, and to be broached whenever the discussion strayed too far afield. Statements indicated as quotations and answers in Question and Answer form are verbatim replies taken down in shorthand with the permission of the person interviewed. Unobtrusive note-taking was generally acceptable. Occasionally where an extensive interview had been granted

by a Chief Assistant in charge of organized crime and action under Title III, the interview with the District Attorney himself was conducted informally without note-taking.

An effort was made to interview law enforcement officers of various persuasions--those who favored eavesdropping strongly and used it extensively; those who disliked it and employed it moderately and reluctantly; and those who felt that Title III was so restrictive that it was hardly serviceable. In one County a District Attorney was interviewed who opposed eavesdropping while his Chief Assistant favored it. Judges and others consulted also differed in their attitudes toward eavesdropping and Title III.

Not all state law enforcement officers appeared to be equally well-informed with respect to the requirements of Title III and the practices considered acceptable under Federal and State law. In some offices a division of labor has been established so that some assistants are more familiar with constitutional questions raised by eavesdropping while others are more concerned with the practical problems of investigation leading to successful prosecution. Their account of procedures followed sometimes conflicted, one stressing what <u>should be</u> done, another emphasizing what <u>is</u> done. Awareness of safeguards in Title III sometimes interfered with accuracy in describing actual practice. If a statement was unconvincing, a corrected version of procedure could generally be elicited by dropping the subject for the

moment and coming back to it later with a different approach. Any doubt as to accuracy of information given is indicated in the comment below, with reasons for not accepting an explanation at face value.

Some District Attorneys leave much of the practical work relating to eavesdrop orders in the hands of a Chief Assistant and devote themselves largely to administrative matters and public relations. A District Attorney is often an elected officer who has been in office a relatively short time. He must depend on an experienced staff to carry on the day-to-day conduct of investigations involving court-ordered eavesdropping. Interviews were held with both District Attorneys and their assistants. In a few cases, several visits were made to the same county to consult individuals familiar with different aspects of eavesdropping.

Most of the interviews on State practice and procedure were conducted in various counties of New York State. This was done not only for reasons of accessibility but also because New York has had the widest experience with court-ordered eavesdropping and serves as a model for other states. New York obtained about 71% of all orders signed during 1969 and the percentage may be higher for 1970. At the Federal level interviews were conducted in Washington, D.C. and with Federal officers in New York City.

An interview of from two to four hours was common. Telephone or other interruptions seemed to stimulate rather than discourage the desire to continue the discussion, and

assistants were often called upon to fill in gaps of information or to check on procedures. Anonymity as to particular statements was, in general, desired and promised.

STATE PRACTICE AND PROCEDURE

1. Application for Eavesdrop Orders

Who decides whether or not to apply for an order in a particular case? Congress intended to narrow the number of individuals who may apply so as to prevent abuse through indiscriminate eavesdropping. For the States, it placed responsibility on:

> . . . the principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if . . . authorized by a statute of that State. . . [1]

In a small State like Georgia, applications are made by the Attorney General of the State. However, in a large State with many political subdivisions, such as New York, dozens of persons are empowered to present applications. New York State has sixty-two counties, each with its own District Attorney. Any one of these may apply for a court order to authorize wiretapping or electronic surveillance.

How does a District Attorney (or other principal State prosecuting attorney) decide when an application should be made? He must rely on the many investigating agents attached to or cooperating with his office. An order originates

1. Sec. 2516(2).

from an investigation carried on by members of the District Attorney's staff or by employees of outside agencies.[1] Local police departments and other law enforcement bureaus assign agents to work with the local District Attorney. Each District Attorney's office is set up differently. For example, in Suffolk County in the State of New York, half of the seventy-five detectives in the District Attorney's office come from the Suffolk County Police Department; the rest are employees who have passed a special qualifying test. In Westchester County the District Attorney has a staff of thirteen investigators and works with agents from the Sheriff's office and from forty different police agencies. In Dutchess County the District Attorney deals essentially with five agencies: the City of Poughkeepsie police, the City of Beacon police, the Dutchess County Sheriff's office, the Town of Poughkeepsie police, and the State police. The Nassau County District Attorney has fourteen officers assigned from the Police Department and five of his own investigators who are former policemen. Any one of these investigating agents may come to the District Attorney and recommend that application for an eavesdrop order be made. If the District Attorney can be convinced that the agent has sufficient facts on which an application for an order can be based and that the case warrants the cost, the papers are prepared

1. An application may start through one of the District Attorney's own grand jury investigations. An investigation may continue for a period of several weeks or even several months before application is made for an eavesdrop order.

by an Assistant District Attorney in charge of the case and presented to a "judge of competent jurisdiction." Some agents are sufficiently experienced to draft their own affidavits to accompany the application.

In a carefully prepared eavesdrop application, documents presented to a judge would normally consist of the following:

1. A detailed statement by the investigating agent setting forth all the facts on which "probable cause" is based.

2. An affidavit of the District Attorney, which may merely be a summary of what the police officer told him and his belief that an eavesdrop order is necessary. An assistant District Attorney may also submit a statement supplementing the facts presented by the agent.

3. A form of order authorizing the wiretap or electronic surveillance.

District Attorneys questioned as to the documents presented to the judge invariably said that an affidavit of the investigating agent was included, as well as that of an Assistant District Attorney. The investigating agent, they explained, was in a position to give first-hand information; the Assistant District Attorney could only set forth the facts told to him by the agent and his belief as to their accuracy. However, some of the applications examined personally were accompanied only by the sworn affidavit of an Assistant District Attorney outlining the course of the investigation; no affidavit of the investigating officer was attached. This questionable procedure opens the door to attack on the sufficiency of the facts on which the eavesdrop order is based.

Since Title III (Sec.2518(2)) provides that the judge may require an applicant to furnish additional testimony or documentary evidence in support of the application, it is a common practice to have the agent appear in person before the judge, and he may be accompanied by the assistant District Attorney in charge of the case. Some District Attorneys believe that a personal appearance before the judge by the investigating agent is mandatory under Title III, but the language of Section 2518(2) is ambiguous. District Attorneys claimed that the police officer always appears before the judge so that he can be questioned under oath. Judges, too, emphasized the fact that they require police officers to appear before them before signing an eavesdrop order. This is probably true as a general rule, but at least one judge's law clerk admitted that sometimes the police officer came in personally and sometimes not. "It's not always convenient," he said.

Appointments are often made in advance with the judge to whom an application is to be presented, and statements accompanying the application may be signed and sworn to in the presence of the judge. The oral testimony of an agent may be recorded on tape or taken down by a stenographer. Some judges insist on this to protect themselves against subsequent criticism that the order was issued without adequate proof of "probable cause" and need for eavesdropping.

The agent may be questioned by the judge as to accuracy and sufficiency of the facts, and as to the existence and

reliability of the agent's informant. Eavesdrop orders, like much of law enforcement, depend on the informant. He may be an undercover agent, but more often he is an individual who has been granted immunity from prosecution or more lenient treatment after arrest in return for divulgence of information against other suspects. Informants usually come out of the jails and their reliability is always open to doubt. Every eavesdrop order is subject to attack as to the reliability of the informant. Reliability may be established by showing:

1. Record of past reliability.
2. Arrests and convictions that have resulted from information previously furnished.

It may be necessary to check the accuracy of an informant's statements by physical surveillance and independent investigation before application for an eavesdrop order is made. A District Attorney offered the following example of a typical narcotics case in which eavesdropping is being considered:

> An informant may say that he has been in the target's apartment, has purchased narcotics from him freely; that he uses the telephone regularly to make purchases; that the target makes phone calls to other states to his wholesaler to obtain additional narcotics. To check his reliability, the District Attorney has one of the Sheriff's undercover men introduced to the target as a user of narcotics, and the undercover agent will make purchases from him to make sure he is in the narcotics business.

An informant does not appear before the judge as a rule, and most judges do not even want to know his name. If a judge insists on disclosure of identity, the name may be

"whispered in his ear." One young Assistant District Attorney stated that he sometimes writes the informant's name on the inside of the flap of the folder containing the eavesdrop documents, but this seems to be unusual; his superior, who was present at the interview when the statement was made, was visibly annoyed that the practice had been revealed. The usefulness of an informant may be destroyed if he becomes known to more than one or two persons. Some District Attorneys would rather drop a case than disclose the name of the informant.[1]

While it is not the usual practice, an informant may be brought personally before the judge to establish his existence. This dispels any suspicion on the part of the judge that an alleged informant may be fictitious and that the information presented may have been obtained by illegal wiretapping. The procedure was described by a particularly cautious, careful, and conscientious District Attorney who made a practice of chamber conferences:

> I bring the informant in before the Judge. I don't tell his name, but merely say: "We would like you to meet Mr. X, a person who has given us useful information and is known to the police. I would like the record to say that we produced the informant and that he is here to swear whether the allegations are true." The proceedings are recorded by a stenographer. If the judge asks for his name, we say there is no need to disclose his name. . . what difference does it make what label the man gives himself?

1. Some District Attorneys may be willing to disclose the identity of an informant if it is necessary to show "probable cause." See page 216.

The record of the chamber conference may be used to disprove a contention, on motion to suppress the eavesdrop evidence, that the informant was fictitious.

Since secrecy is of the essence in eavesdropping, the number of copies made of the application and accompanying affidavits should be limited. Most offices prepare an original and three copies and if additional copies are needed they are xeroxed later. Section 2518(8)(b) of Title III requires that applications and orders be sealed by the judge and that custody "shall be wherever the judge directs." The manner of sealing is not indicated in Title III and the usual practice is simply to put the documents in a folder, bind it with adhesive tape, and have the judge put his signature across the tape. No formal seal was used in any office visited. As to custody, most judges are content to leave the original documents with the District Attorney and keep one copy in a confidential file in the judge's inner office.

Some District Attorneys who use court-ordered wiretapping extensively have printed up forms of eavesdrop orders to save time in preparation. One busy office has even set up a form of affidavit that can be adapted to a particular case![1] Practically every District Attorney keeps a checklist of the items that must be covered in the supporting documents to comply with Title III and with State requirements.

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1. This practice is disdained by most law enforcement officials who claim that each set of facts in an affidavit is different.

Showing of Probable Cause

Title III requirements that the facts submitted by the applicant for an eavesdrop order must show "probable cause" have been discussed on page 97 . In a practical sense, probable cause means something that would satisfy a reasonable man; it is 51% probability that tapping a particular telephone will produce the particular type of conversation sought, relating to the particular offense. How is the applicant to satisfy this rigid yet elusive requirement? Several law enforcement officials voiced objection to the "probable cause" provision and claimed it imposed a burden of proof that was impossible to discharge. One suggested that the requirement to show "probable cause" should be altered in the case of organized crime--an extreme view that would probably raise constitutional and practical problems:

> We may have to take a more liberal view of the requirement for probable cause in organized crime activity. If underworld figures are known to be consorting with other criminals, and spend no time on any legitimate pursuit that would be a source of income, that should be sufficient to raise the presumption that they are engaged in organized criminal conspiracy, and eavesdrop orders should be issued without requiring the specificity of facts now required to establish probable cause.

Probable cause must be shown within the four corners of the affidavit, or in a personal appearance before the judge, under oath. It is not enough for the investigating agent or police officer to say that an informant told him thus and so; he must show why it is reasonable to believe the informant, and he must set forth the sources of the informant's knowledge. Reliability of the informant is a factor in

establishing probable cause. A District Attorney may even be willing to disclose his identity if necessary. One affidavit of a District Attorney stated:

> The identity of the confidential informant cannot be disclosed in this application without endangering his life. However, if required, his identity will be disclosed orally to the Court. (Subject) told the confidential informant that he is using a telephone instrument bearing number . . . . . The confidential informant telephoned (subject) in my presence to discuss the price of heroin. The informant has in the past purchased narcotics from (subject).

Every District Attorney interviewed claimed that all the facts were always stated in detail in the affidavits accompanying the application for an order, to show probable cause. Careful drafting of supporting affidavits is to the District Attorney's best interests:

> I am more zealous in setting forth all the required facts and details than perhaps even a judge. He does not want to be reversed as a matter of pride. I do not want to be reversed because I may have to try the case over again. I am the one who is going to have trouble if an eavesdrop order is not right.

Some of the affidavits submitted for examination were indeed models of skilled draftsmanship, covering many pages detailing actual encounters and transactions with the target of the order and facts supporting ground for belief in the statements of the informant. Others were more sketchy. It was apparent from the documents available for inspection that affidavits are drawn up with considerable unevenness, even in the same office,and that some District Attorneys are more experienced than others. An interviewer without subpoena power cannot hope to see every application and must be grateful for the few that are released for perusal. Senator

McClellan's special subcommittee (discussed on page 8) may have had a wider opportunity to sample the eavesdrop documents. The head of this subcommittee agreed that not all the affidavits met the highest standards. "Some of the papers I saw,"he said, "I would reject if I were a judge. The States are not living up to the Federal standards."

On an application for extension of an eavesdrop order, new probable cause must be shown.[1] This is done by setting forth what has occurred since obtaining the order, enumerating the conversations overheard, to show that the wiretap order is producing results. Some District Attorneys attach a copy of the transcript of some portion of the intercepted conversations as proof that useful information is coming across the wires. It is doubtful whether this is wise practice. One District Attorney who attached a copy of the log to his affidavit in applying for an extension in one case said he would never do it again; on a motion to suppress evidence the suspect and his counsel would automatically see the log as part of the application and order. For a shortcut method used to present facts to the judge for an extension, see page 223.

Inadequacy of Normal Investigative Procedures

Affidavits accompanying an application for an eavesdrop order must show that normal investigative procedures have been tried and found inadequate, or that they would be

1.See page 100.

too dangerous.[1] Mere assertion of this fact is not sufficient; it is necessary to set forth the circumstances in full. Usually, the detailed affidavit of the investigating agent recites what has been done up to the time of application and the improbability of obtaining further evidence without a wiretap order. This is corroborated in the affidavit of the prosecuting official.

Some District Attorneys complain that the requirement with respect to "normal investigative procedures" is unrealistic and unnecessary; that it is almost impossible to show that wiretapping is being sought as a last resort, and that it limits the effectiveness of the eavesdropping technique. "If normal procedures were adequate," said a District Attorney, we would not be asking for a wiretap order. The usual techniques of investigation consist of physical surveillance and use of undercover agents and informants. It is claimed that the chronological order in which various investigative measures should take place cannot be determined in advance and they should be permitted to be used simultaneously.

> While you are trying other means and holding off on the wiretapping, the evidence may go down the drain . . . it may be too late, or it may be used less advantageously.

One District Attorney characterized the requirement as meaningless. "It makes us sound foolish." It is obvious,

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1. See page 103.

he said, that when one is dealing with "bookies" there is no way of getting information about particular betting transactions except through wiretapping.

Not all District Attorneys are opposed to the "normal investigative procedure" requirement. Many feel that it is possible to set forth reasons justifying a wiretap order, depending on the type of the case. A reason frequently offered in affidavits is that it is dangerous to follow a particular individual in a moving vehicle.

> (Subject) is extremely tail-conscious and drives in a reckless and dangerous manner, jumping red lights and dashing over crossings. He stops suddenly to see if he is being followed. (Informant) says that (subject) does business only over the telephone and rarely meets his contacts, that his associates are constantly looking about, checking each person passing in the area on foot and in automobiles.

Some affidavits are even more specific about the driving habits of suspects dodging investigators:

> He will slow down to five miles an hour as he approaches a red light, and then jump the light at 50 miles an hour. He will dive down the wrong way on a one-way street, and if you follow him he will know he is being tailed. He stops suddenly, gets on a thruway, gets off at an exit and then dashes right back.

In the case of narcotics dealers, affidavits state that five or six different automobiles may be used before heroin is brought to a "factory" to be diluted and packaged, making it impossible to follow the suspects. Physical surveillance by car or foot is claimed to be completely ineffective in certain areasy lookouts are posted, a stranger is spotted instantly, and a signal may be broadcast by a simple gesture like removing a hat or lighting a cigarette.

An affidavit directed against a Cuban gambling operation stated that the individuals conspiring to promote gambling dealt only with Cuban nationals; that they would not even deal with Puerto Ricans except at the lower echelon; that they knew each other by face, although sometimes they did not even know one another's name; that an attempt to use undercover police officers for surveillance would be fruitless.

A typical reason offered to justify wiretapping is the danger to which an undercover agent is being exposed by normal investigative techniques. A District Attorney's office had a police officer infiltrating an organized crime operation. The affidavit stated that his identity was unknown and he was in a position to give information as to what he had observed. But the more the District Attorney made him disclose, the more exposed the undercover agent was to detection by members of the organized crime group and to possible physical harm. The agent could continue his observations, but it was important to hear the conversations of other participants while he was not present; otherwise the District Attorney would have to expose the agent in building up a case.

Some affidavits on which orders have been obtained set forth the facts showing inadequacy of normal techniques in a very general way:

> Since the subjects are wary of police interest in their activities, a physical surveillance of the subject would reasonably appear to be unlikely of success. Other investigative techniques have been employed but they have failed to establish affirmatively any links

> between . . . and other co-conspirators, their source of supply, the people to whom they ordinarily sell narcotics, the present location of narcotics, particularly cocaine, marijuana, and heroin, and their distribution outlets.

This would seem to state conclusions rather than persuasive facts, but it was accepted by the judge to whom the application was presented. So far as could be ascertained, no judge ever turned down an application for an eavesdrop order on the ground that it did not show that normal investigative techniques had been tried and found wanting or that they would be dangerous. The judge is not an investigator; he must rely on the experts as to what various methods can or cannot accomplish. But even the experts admit that the need to show that normal investigative techniques are inadequate may prevent a hasty conclusion that wiretapping is necessary.

The Time Period

The constitutional and policy problems raised by permitting eavesdrop orders to remain in effect for as long a period as thirty days, with an unlimited number of thirty-day extensions, have been discussed on pages 106 et seq. Most District Attorneys feel that the period is not too long. One thought it was not enough; even fifty days did not seem excessive to him. Another who used the full thirty-day time in most cases said he would not be averse to limiting it to ten days:

> If you can't get it (the conversation sought) in ten days, your sources are not so great. Sometimes you will get it in two or three days. You can always reapply for an order if you think some conversations are forthcoming.

According to the Report to Congress, the time period of wiretaps seems to be getting longer. Table 6 of the Report[1] shows that the average length of interception in 1969 was twenty-six days; in 1968 it was twenty. District Attorneys interviewed indicated that for 1970 the average time period had not decreased. Most District Attorneys are aware that a wiretap should be terminated as soon as the conversations sought have been obtained and they insist that despite temptations there is not much abuse of the time period allowed by Title III:

> By and large the time period is not abused, for District Attorneys know that if it is, the wiretap may be held invalid. If an arrest is made before the time period has expired, the wiretap is terminated, although sometimes it is tempting to try to get additional incriminating information. If the wiretap continues, the conviction may be upset.

It is also claimed that there is little abuse as to the number of hours during which wires are tapped in the course of a 24-hour period.

> It must be shown in the affidavits that the telephone is used at all hours, otherwise wiretapping may be done only during the hours fixed. If an affidavit sets forth facts showing that a bookmaker is only on the phone during daylight hours and does not use the telephone at night, the order would provide for tapping only during the day.

In over 70% of cases in 1969, extensions of orders were granted, with interception continuing under the extension for an average of twenty-two days. District Attorneys admitted, without any sense of wrongdoing, that extensions were often requested not only because continuation of the

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1. See page 459.

wiretap appeared necessary to intercept relevant communications, but in order to delay giving the required notice to a suspect in the face of a continuing investigation. In order to obtain an extension of an eavesdrop order, new probable cause must be shown, as previously indicated. Preparation of affidavits is a time-consuming job and some District Attorneys have been avoiding it by having the police officer appear personally before the judge who signed the original eavesdrop order. One District Attorney described the "conference procedure" established to cut down on paperwork involved in obtaining an extension:

> We go to the judge who signed the eavesdrop order with the stuff that is coming off the wires and say: "Here is what the subject is saying." A stenographer takes down our comments. We indicate that we would like the record to state that the detective was here at the conference with the tape. We ask him: "Do you swear that this is the tape covered by the eavesdrop order entered ... ., 19.. ? Do you recognize the voice on the tape as the voice of (subject)? Will you play the record for the Judge?

The judge indicates that he is ready to listen to the playback. The stenographer notes that the judge heard the tape and indicated that probable cause exists for the order of extension. The District Attorney and the detective swear to the truth of their allegations, and then the judge says:

> Let the record show that I am now signing an extension of the eavesdrop order of ... ., 19.., and that I am giving the original extension order to District Attorney . . . ."

The record of the conversations before the judge is sealed, and the sealed record is kept in the possession of the court stenographer.

Did Title III contemplate any such short cut procedure for obtaining an extension of an eavesdrop order? It seems unlikely. What judge could give the matter of extension his most careful consideration under such circumstances and resist the pressure to grant the extension? Section 2518(5) provides that extensions may be granted but only on application in accordance with subsection (1), the same procedure by written application as is provided for the original order. It may be of some significance that out of all the extensions applied for in 1969 only two were denied. If judges are not rubber-stamping extension applications, they are relying heavily on the applicant's assertion that the extension is needed. The experience with eavesdrop orders may prove to be the same as in the case of the ordinary search warrant.

> With crowded court calendars, the notion that most judges have the time to weigh carefully the merits of a request for a warrant is naive.[1]

2. Role of Judges in Court-Ordered Eavesdropping

The concept of a detached, impartial magistrate protecting privacy is the basis of the Fourth Amendment of the Constitution, to which eavesdropping has been declared subject. Privacy must ultimately depend on the judge. Competent, alert, and aggressive judges are the key to maintaining the safeguards provided by Title III. Judicial control is interposed at various stages of the eavesdrop proceeding--in signing orders and extensions, fixing custody

1. Kent Greenawalt, "Privacy in Home, Person," New York Law Journal, June 15, 1970, Vol. 163, No. 14, p. 4, col. 2.

of documents and recordings, deciding who shall be notified and what interceptions shall be revealed. The judge to whom an application for an order is presented must be satisfied that "probable cause" is shown in the affidavits and that normal investigative procedures would be inadequate. If District Attorneys can shop around for a compliant and undemanding judge, the dangers of abuse of privacy through eavesdropping may be greatly increased. Wide latitude is offered by Title III in defining a judge who may sign an eavesdrop order. For State applications, a "judge of competent jurisdiction" is:

> A judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications.[1]

In counties of metropolitan New York, some District Attorneys said that they were required to present applications to whichever judge was sitting in a special "Part." It is customary to rotate assignments to this Part on a monthly basis. Outside of metropolitan New York, an application could be presented to any qualified judge. After some probing, there was ample reason to conclude that an unwilling judge, hostile to eavesdropping, could always be avoided. At the worst, one could postpone presenting an application and wait until another judge was assigned to the special "Part." The question was put bluntly to one judge and answered unequivocally:

1. Section 2510(9)(b).

Question: Is it possible to avoid presenting an application to a judge who is believed to oppose wiretapping on philosophical or other grounds?

Answer: Yes, it is possible. The District Attorney can wait until some other judge is assigned to the special Part.

District Attorneys and their assistants can and do go to judges who know them. "A judge relies on us," one District Attorney explained. "He knows we won't give him papers that are inadequate and may embarrass him later." Another said:

> We go to the judges who have had experience with court-ordered eavesdropping. Those who are unfamiliar with the law are reluctant to sign orders, not so much because they are against wiretapping but because they do not want to get involved in matters with which they are not familiar.

A judge's law clerk gave the following revealing explanation of why a particular judge may be selected:

Question: How do you account for the fact that so many applications for eavesdrop orders have been presented to Judge X?

Answer: He is popular because he is around the office at late hours. We are here at 4 P.M. and 5 P.M. when the applications are presented. Besides he has the most criminal experience.

Question: Doesn't an application have to be presented to the judge sitting in a special Part?

Answer: No. It doesn't have to be brought to any special Part. . . . The District Attorney has confidence in Judge X. The Judge knows the Assistant District Attorneys. They do not like to bring applications to a new judge . . . they would have to explain. . . It is a matter of convenience.

This account was corroborated by an Assistant District Attorney with much experience in presenting applications under

Title III. He stated frankly that he presents his papers to a judge who knows him, who has confidence in the accuracy and sufficiency of his information, and who is willing to have papers presented to him at any hour, even at his home--one who does not insist on their being left on his desk where they may be seen by prying eyes.

A few State court judges have acquired a reputation for opposing wiretapping and electronic surveillance. The late Judge Samuel Hofstadter of New York made no secret of the fact that he would sign no eavesdrop orders. Some judges, it is reported, simply say: "Don't bother me." Others are known to believe that gambling and other so-called "moral" offenses that are frequent targets of eavesdrop orders should not be classified with serious crimes. One State judge who had signed a few eavesdrop orders but was reputed to be cool to the idea of wiretapping and electronic surveillance discussed the problem of the unwilling judge freely in an interview:

> Question: Is it possible that word has been spread that you do not favor wiretap orders and that this may account for the fact that so few applications have been presented to you?
>
> Answer: It is very possible. I have expressed myself as being opposed in general to wiretapping.

Pressed as to the basis for his opposition to eavesdropping, this judge offered the following combination of philosophical and practical grounds:

> Some of it (opposition) is based on liberal thinking ... protection of rights of individuals against invasion of privacy. Some of it is based on experience.

> I was a lawyer in East Harlem. I actually saw police beat up people in the police station. A policeman does not change his character when he suggests a wiretap order. Suppose a young policeman makes an arrest because an individual has a policy slip in his possession . . . the case is thrown out for insufficient evidence . . . after the eighth time he comes into court with insufficient evidence he learns what that evidence should be. . . if he can't get it he manufactures it. It is the same with wiretap orders. You learn what facts are needed to make a showing of probable cause.

The question of "probable cause" was a very important one, in the opinion of this judge, and he said that he had refused to sign orders several times when he felt that the facts set forth in the affidavits were insufficient. Despite his aversion to wiretapping he conceded that there were certain types of crimes where wiretapping might be indispensable--if a crime is serious as in a homicide case. The judge was candid in discussing his suspicion that police officers were wiretapping illegally to get leads prior to making an application for a court order:

> Question: Do you interrogate the police officer who makes the affidavit personally?
>
> Answer: Yes, the officer is questioned by me very closely. I read the affidavit . . . then ask a few questions. All I see is an affidavit and an officer who tries to justify the fact that he has some information that could lead to an arrest. The officer is under oath. Sometimes I ask him: "How long have you been wiretapping before this (illegally)? The answer always is: "Not at all."
>
> Question: What do you say to him then?
>
> Answer: I sometimes say, "You are full of baloney."

Question: Do you refuse to sign an order where you feel the police officer may have been tapping illegally before making the application?

Answer: I have no way of proving that he did so. If the wiretap is needed in this case and would have been needed whether he tapped beforehand or not, I would grant the order.

In none of the cases in which a wiretap order had been signed by this judge had an extension been granted. When asked to explain this in view of the fact that so many extensions had been granted on orders signed by other judges, he said: "I give them a hard time on extensions."

A study of the background and experience of judges who have signed many eavesdrop orders may throw some light on why some favor eavesdropping while others oppose it. No biographical analysis in depth is attempted in this article, but an occasional inquiry produced some interesting facts. Several of the judges to whom applications were frequently presented were former District Attorneys. Others reputed to be hostile to eavesdropping spent their earlier years as counsel for defendants in criminal cases. This may prove nothing more than the fact that judges are human beings influenced by their past experience, but it does seem to indicate that attitudes toward eavesdropping may have deep psychological and emotional roots and do not change with time.[1] Several years ago, before Title III was enacted, a

1. An inquiry regarding a district attorney who did not favor eavesdropping, although he used it as a tool in law enforcement, elicited the interesting fact that he had spent almost two decades as counsel for defendants in criminal cases.

critic of court-ordered eavesdropping under a State law noted:

> Judges, being human, vary in their responses to requests for wiretap orders. Some grant them readily, without much regard for the victim's privacy, others are hard-nosed about it. It may be safely assumed that police officers, also being human, keep track of judges' attitudes and rely most on the easygoing ones.[1]

Judges do not have a large office staff and most of them are not inclined to keep detailed records. Some State judges, however, have signed so many wiretap orders that they have been forced to devise a system for following up expiration dates, extensions, and the filing of reports. A record book for wiretap orders, suggested to a judge in New York by a District Attorney, contained the following information:[2]

Date signed	Asst. D.A.	Starts	Expires	Ren.	Ren.	Ren.	Tapes Sealed	Report (State)	Report to Wash. D.C.

A judge signing many orders is also faced with the problem of storing the documents in a safe place. When an eavesdrop order is signed, a complete set of the papers including the affidavits, conformed to the original, is left with the judge who keeps them in a confidential file. Judges

1. Myron Brenton, The Privacy Invaders (New York; Coward McCann, Inc., 1964), pp. 159-160.
2. Note that provision is made in the record for three extensions!

say that the files are kept under lock and key, and for the most part this is probably so. One judge's law clerk complained that the papers were piling up so high that soon there would not be enough room in the judge's safe.

Recordings are required to be sealed and placed in custody "wherever the judge orders" and kept for ten years (Sec.2518(8)(a)). The original tapes are generally placed in a box, tied up and fastened with adhesive tape. The judge puts his initials across the tape and usually orders that the tapes be held in the custody of the District Attorney or of the police or investigating agency involved in the case. As a practical matter judges do not want to keep tapes in their own custody. A copy of the transcript may, however, be placed in the judge's file containing the application and eavesdrop order.

One of the serious weaknesses of State practice under Title III is the failure of judges to require progress reports. Section 2518(6) unfortunately leaves the requirement of such reports to the discretion of the judge and does not make it mandatory. The importance of these reports was underscored at the hearings on the eavesdropping bill before the Senate Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary by Senator McClellan.

> I want to keep it under absolute control of the court. I am willing to go further to strengthen the bill to see to it that they make interim reports to the court and permit the court to require them to make notes of the progress being made . . .[1]

1. Hearings, 90th Congress, 1st sess., July 12, 1967, p.1118.

Frank Hogan, District Attorney of New York County, and one of the strongest proponents of court-ordered eavesdropping agreed that progress reports were essential:

> I think there should be reporting requirements to the court. The court, in effect, should be a monitor, as well as the instrument that authorizes the interception.[1]

State judges have not exercised their right under Title III to require progress reports on eavesdropping because it adds to their burden, but some judges are kept advised informally as to developments under a wiretap order, and a report may be made to the judge on termination of the wiretap.

Judges have also found it burdensome to prepare the Report required to be filed with the Administrative Office of the United States Courts within thirty days after expiration of an order or extension (Sec.2519(1)). In many cases the judge's report is prepared by the District Attorney's office, presented to him for signature, and then mailed to Washington, D.C. by the judge's law clerk. "Making the report," a judge complained, "is a nuisance." One District Attorney prepares the judge's Report in triplicate, and sends it up to the judge's office with an addressed envelope. The judge's law clerk checks off the Report to make sure the details are correct, has the judge sign it, mails it out to Washington,

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1. In some states, a Report is also required to be filed with a State judicial officer. A third copy of the Report is kept in the judge's files.

D.C. and then notes the date of mailing in his record book. Since the Report contains no identifying name of the person whose wire is being tapped and no telephone number, it can be identified only by the date indicated for signing the order.

The Annual Report of prosecuting officials is checked against judges' reports on particular eavesdrop orders by the Administrative Office of the United States Courts in Washington, D.C. The purpose of this dual reporting system would appear to be frustrated, to some extent at least, by the practice of having District Attorneys fill out judges' forms and merely present them to magistrates for perfunctory signing.

The requirement of reports by State judges to the Administrative Office of the United States Courts was criticized as unconstitutional at the Senate hearings on the eavesdropping bill:

> Such a provision establishes an administrative relationship between the Federal and State judicial establishments which is inconsistent with the spirit and rationale of the Supreme Court's holding in Stefanelli v. Minardi (342 U.S.117) and incompatible with the constitutional scheme which constitutes the State judiciary a coordinate judicial apparatus of equal standing and dignity . . . such a procedure . . . establishes a status of administrative accountability between the State and Federal judicial systems.[1]

The report by State judges is, however, merely statistical

1. Hearings, Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, 90th Cong., 1st Sess., April 20, 1967, pp.597-598.

in character, and no attempt has been made by the Administrative Office of the United States Courts to exercise any control over the State judiciary or hold it to account.

A more serious practical problem of jurisdiction is presented by the requirement of Title III that an eavesdrop order may authorize interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting." (Sec.2518(3)). Had the drafters of Title III foreseen how this provision would work out in actual practice, the statute might have been worded differently. Under present practice, a matter may originate in New York County but the District Attorney in that County may have to apply to a judge in Bronx County for an order to tap a Bronx telephone. District Attorneys claim that a security problem may arise if they have to go to a judge in another county simply because the installation is to be made in that other county. New York's eavesdropping statute does permit a judge of the Appellate Division to sign an eavesdrop order covering phones or premises in his department, and this department may include more than one county. But District Attorneys have presented few applications to Appellate Division judges.[1] It has been suggested that the judges of the Appellate Division may have made it clear that they do not want to be burdened with applications.

1.In 1969, three orders were signed by the late Judge George Beldock of the Appellate Division, Second Dept.

The risks involved in going into another county for evidence under an eavesdrop order were elaborated by the Appeals Bureau of a District Attorney's office:

> Suppose a narcotics case starts in X County but it is necessary to go into another county for a wiretap order. The execution of the order is left to the police, and the police in the other jurisdiction may be less supervised. X County has a large narcotics staff and a good rackets squad; it has a police contingent trained for narcotics investigation, and execution of the eavesdrop order in X County would be supervised by an Assistant District Attorney who gets daily reports from trained detectives. Other counties may not be as well equipped.

A jurisdictional question involving several counties was presented in an actual case, and no answer could be found in Title III.

> There was probable cause to believe that a criminal conversation would occur in an automobile and that this conversation would occur within a certain period, that it was very imminent. However, from past experience it appeared that this car would travel within various counties. The question arose: Would an order issued in one county be valid in another county across a bridge where the car was likely to go?

Would the District Attorney of one county be obliged to apply to a judge in the county where the conversation actually took place?[1]

According to the Report to Congress, no applications for eavesdrop orders were denied by State judges in 1968, and only two applications were rejected in 1969. This does not necessarily mean that judges have been in-

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1. In doubtful cases such as this, a District Attorney would forego applying for an order, rather than risk a subsequent ruling that the order was invalid on jurisdictional grounds.

discriminate in signing orders. If a judge feels that supporting affidavits presented and personal testimony adduced are inadequate, additional facts may be obtained and the papers resubmitted to the judge. State judges know that their orders may be attacked on motions to suppress eavesdrop evidence and in the appellate courts. The most disquieting aspect of the reliance placed by Title III on the judicial process is the low opinion that some law enforcement officials expressed of the judiciary. A knowledgeable and experienced Assistant District Attorney volunteered the following harsh judgment:

> The caliber of State judges is uneven and leaves much to be desired. Federal judges are generally considered to be of higher caliber than their equivalent in the State system. The prospects for selection of better State judges are not particularly bright.

3. Role of the Telephone Company in Wiretapping

Title III was amended in 1970 to provide that if an applicant requests it, an order authorizing interception must direct a "communication common carrier" or other person to furnish necessary information and assistance.[1] Prior to the amendment, the cooperation of the telephone company was not specifically required. The mandate to communication carriers and others was the result, in part at least, of the refusal of a telephone company in Nevada to render aid in executing an order. An applica-

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[1] Pub.L.91-358, Title II, Sec.211(b),July 29, 1970, 84 Stat. 654.

tion was made in Las Vegas, Nevada, to the United States District Court asking for authority to make telephone interceptions on lines of two suspects and requesting the Court to direct the Central Telephone Company, an independent company in the State of Nevada, to render the necessary assistance in making the interceptions. The telephone company refused to cooperate on the ground that it would be subject to civil liability if Title III were held to be unconstitutional.[1] The judge of the District Court ruled that he had no power under Title III to compel a telephone company to render aid in interceptions. The United States Department of Justice made a secret appeal to the United States Court of Appeals in the Ninth Circuit, and the appeal was heard in chambers. The American Telephone and Telegraph Company was present in the role of amicus. The Court of Appeals in the Ninth Circuit held against the Government; it found no basis in Title III for issuance of an order against the telephone company. The judgment of the court was placed under a protective order pending the decision of the Government as to whether or not to petition the United States Supreme Court for a writ of certiorari. The Government decided not to appeal to the Supreme Court.

1. In re Application of the United States for Relief. Underlying the position of the Central Telephone Company in Nevada was the fact that the company had provided information and facilities in the Fred Black and Bobby Baker cases to the F.B.I., leading to a lawsuit against it in February, 1964 for $6,000,000 by Las Vegas Casino Operators. See Ramparts, January 25, 1969, p.51.

The aid of the telephone company in installing a wiretap is not needed in every case. Police and investigating agents often have sufficient expertise to do it without outside help. An official of the Telephone Company stated the position of the Bell System frankly:

> We try to minimize our role to the greatest extent. The less we know the better, from the standpoint of law enforcement. The primary interest of the Bell System is the preservation of secrecy of communications to the maximum extent compatible with the public interest. Whether or now law enforcement officers should wiretap is a question for Congress to determine on a balancing of interests. Since Congress has passed Title III authorizing court-ordered eavesdropping, the Telephone Company accepts the law and assumes that it is constitutional.

The Bell System claims that it has always believed it to be to the best interests of the Company to cooperate in order to avoid irreparable damage that may be done to telephone company property. Law enforcement officers have a right to enter under the order to make the installation and if they do not have the right information they may "come on the grounds and thrash around." The Telephone Company considers itself the watchdob. "We police our facilities as well as we can."

A routine has been established by the Bell System for handling eavesdrop orders. The Telephone Company requires that an order be served on it before it will release any information as to cable and pair numbers. Asked whether the Telephone Company is always served with a copy of the order, an official said:

> We do not always get a copy of the order. Agents may have sufficient expertise to instal a wiretap without Telephone Company aid. In New York City many police and investigative agents have considerable experience and don't need to come to the Telephone Company.

Law enforcement agents need to know the cable and pair numbers in order to instal a tap on a particular telephone line--the cable in which the suspect's telephone is located and the particular pair in the cable. In a polythelene cable, the pairs are color-coded and a pair may have a number and a color. Once the agent has the cable and pair information, he can usually proceed without further assistance from the Telephone Company.

The Telephone Company does not know what proportion of wiretaps are installed without their aid, and claims not to know how many are brought to their attention through orders. The Company does not keep track of wiretapping in general, other than accepting the orders served and keeping them for ten years.

Before Title III was enacted, some District Attorneys could get cable and pair information from the Telephone Company over the phone. Today they know that if they need information a copy of the order will have to be served. District Attorneys do not complain about this requirement, for the Telephone Company furnishes the needed information promptly. A District Attorney in a county outside the New York City area described the procedure that he follows:

> I telephone an investigator in the Security Supervisor's office of the New York Telephone Company . . . and tell him an order has been signed. I give him the number and the name of the subscriber. Then I send an investigator . . . down to his office with the order. On the phone I ask him to have the information ready. When the order is delivered, the data is released at once.

In some cases information other than cable and pair numbers may be needed about a subscriber. According to an official of the Bell System, State law enforcement officers in at least three States sought background information about a subscriber from the Company's business records to check on identity. A subpoena was served on the Telephone Company compelling it to disclose its records, and the Company complied.

The procedure established in one office for handling eavesdrop orders served on the Telephone Company was described as follows:

> Each order served is reviewed by the proper person in our organization to determine whether it is valid on its face. We see only the order, not the accompanying affidavits. We check to see whether the provisions of Sec.2516 (authorization for interception) and Sec.2518 (procedure for interception) have been complied with. We keep a checklist of: (1) offenses covered by Title III; (2) territorial jurisdiction of the Court issuing the order and the judge who signed it; (3) persons who may apply for an eavesdrop order; and (4) findings required to be set forth in the order.

The order is served on a person in the Telephone Company designated for that purpose, either a security marshal or an attorney. Only certain people are authorized to receive the order, and law enforcement officials know who they are. The Telephone Company has close contact with law

enforcement officers generally, and will inform a District Attorney upon inquiry as to whom to call when he expects to serve an eavesdrop order so that the information needed will be ready. In the Bell System in New York City, either the Legal Department or the Security Department will get an eavesdrop order. The Security Department is set up primarily to preserve the secrecy of communications.

An official of the Bell System stressed the fact that the Telephone Company is accustomed to handle investigative matters, and that only the appropriate employee sees the order authorizing the eavesdrop. Each company in the Bell System has its Security Department. The Security Department calls certain personnel for the information needed as to cable and pair numbers. This information could be sought for a dozen of routine reasons, and the employee furnishing the information may not even know the reason for handing it out.

Question: Is it not possible for Telephone Company employees to hand out information without authorization?

Answer: Former employees can, of course, trade information, and there are always a few bad apples in the lot. As to current employees, we try to prevent widespread dissemination of information. The Security Department calls only certain key members of lower management.

Police investigators and District Attorneys have always preferred to by-pass the Telephone Company, if possible, in order to eliminate the possibility of "leaks" through

Telephone Company employees.[1]

Unwarranted intrusions on customers' telephone conversations by Telephone Company employees were revealed in the hearings on invasion of privacy held in 1967 by the Senate Subcommittee on Administrative Practice and Procedure. A vice-president of the American Telephone and Telegraph Company at that time testified that the Bell System favored a ban on all eavesdropping except in national security cases:

> Privacy of communications is a basic concept in our business. We believe the public has an inherent right to feel that they can use the telephone with confidence, just as they talk face to face. Any undermining of this confidence would seriously impair the usefulness and value of telephone communications.[2]

Employees of the Telephone Company, it was claimed, were trained and supervised to minimize intrusions, and were subject to discharge for violation of rules of secrecy of communications and records. However, service observing and random monitoring by the Telephone Company in the name of efficiency offered wide opportunity for invasion of privacy,

1. Samuel Dash, Richard F. Schwartz, and Robert E. Knowlton, The Eavesdroppers (New Brunswick: Rutgers University Press, 1959), p.73.

2. Hearings, Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 90th Congress, 1st sess., Part 2, on "Right of Privacy Act of 1967," S.928, p.576, Testimony of Hubert L. Kertz, Vice-President, Operations.

and Title III sought to close this loophole.[1] Section 2511(2)(a) of the 1968 Act exempts from the prohibition against eavesdropping employees or agents of communication common carriers in the normal course of employment, but such carriers are forbidden to use service observing or random monitoring except for service quality control checks. The effectiveness of this interdiction depends on the vigilance of the Telephone Company. Executives of the Bell System claim every effort is being made to protect the privacy of subscribers.

4. Automatic Recording or Live Monitoring

The investigating agency that initiates an eavesdrop order usually attends to the details of installing the equipment and listening to the intercepted communications. If agents or police officers do not have sufficient experience to tap wires or set up electronic devices, they enlist the aid of experts. The eavesdrop order authorizes entry into such portion of the premises or telephone lines as will permit interception. A receiving station is then set up at some other place, either a central office of the agency or

1. Ibid., p.470. Transcript of committee hearings in San Francisco showed that the Pacific Telephone and Telegraph Company had leased lines into a hospital and other establishments on the pretext of "service observations." The hearings also disclosed that the Internal Revenue Service purchased used trucks from the Bell Telephone Company, repainted and equipped them, and disguised their agents as Bell Telephone Company employees who then climbed poles to tap lines. Testimony of Sen. Gruening of Alaska, Hearings, p.470. Before the summer of 1966, the telephone companies practiced random service observing, sometimes monitoring entire conversations between subscribers.

a rented location where the intercepted conversations are recorded on tape. Most of the wiretapping and recording equipment used in eavesdropping appears to be owned by the investigating agencies.

A difference of opinion exists among law enforcement officials and others concerned with eavesdropping as to whether Title III requires live monitoring and proscribes automatic recording. In live monitoring (also called "manual recording") police officers or agents sit continuously at the receiving station, listening to the recordings and making notes of relevant conversations on a typewriter or in longhand. The recording can be shut off when irrelevant conversations are going on. In automatic recording, the conversations are recorded on tapes without listeners and are later played back at intervals, the frequency depending on the circumstances and on the practice established in a particular office. The automatic device records all conversations.

Live monitoring for a 24-hour period each day requires at least six men, two for each 8-hour shift, a costly expenditure of manpower. One man remains at the receiving set; the other may have to go out and act on some significant information that comes across the wires. These men report periodically to the Assistant District Attorney in charge of the case, either at the end of each day or more frequently if the wiretap is producing good results. Several extra men may be needed to cover absences for sickness, days off, vacations, and other assignments.

Before enactment of Title III it was common practice to use automatic monitoring, with playing back at 24-hour intervals. Title III requires that the wiretapping cease when the conversation sought has been obtained, and that it be conducted in such a way as to minimize interception of communications not covered by the order. If automatic monitoring is used, interception may continue beyond the point authorized by the order. The Chief of the Appeals Bureau in a District Attorney's office, an expert on the law governing eavesdropping, states emphatically: "There is no excuse for automatic monitoring. It is illegal, unconstitutional. If wiretapping is properly monitored, it is self-limiting." This view is shared by eminent authorities:

> Intelligent monitoring is essential if the surveillance is to be sustained by the courts . . . otherwise the interceptions may be considered an "indiscriminate dragnet."[1]

Each District Attorney interviewed was asked whether he used automatic recording or live monitoring. Those convinced that live monitoring is required by Title III invariably said they always used it. Following is a typical answer of this group:

> We use live monitoring. Legally it is wrong to use automatic recording, for you might have an obligation to pull the wire out immediately after you have obtained the conversation sought. You can't pull it out if it is being monitored automatically.

1.Stephen Linzer, "Federal Procedure for Court-ordered Electronic Surveillance: Does it Meet the Standards of Berger and Katz?" The Journal of Criminal Law, Criminology, and Police Science, 1969, Vol.60, pp.203-214, at p.210.

Those law enforcement officers who were unaware or uncertain of the need for live monitoring under Title III furnished a variety of answers indicating that automatic recording is still used, at least to some extent. For example:

1. We are getting away from automatic monitoring.
2. We no longer have automatic recording with checking at 24-hour intervals. There are, however, occasions when for personnel reasons, or if we do not see the need to sit there all the time, the men may come back every few hours.
3. For the most part we use live monitoring, but on some occasions for lack of manpower, when some emergency arises, we may leave the recorder in a particular location.
4. It depends on the nature of the case, on the circumstances, on the manpower available.
5. Sometimes a man might be left on to monitor it manually, at least for the first two days.
6. Live monitoring has not been the rule. In one or two cases we had it monitored because we had to act on information that minute . . . looking for a fugitive.

Mailed questionnaires which asked whether automatic recording was used produced the answer "sometimes."

A police officer monitoring a recording keeps a "log" of the telephone conversations intercepted.[1] Logs may be handwritten or typed on a sheet that has printed on it various hours of the day. The sheet indicates every phone call that took place. Each number called when the tapped wire is in use is indicated by an electronic device

1.See page 247 for form of log.

called a "pen register" or "penwriter."[1] The log may list a call simply by stating the number called, by whom and to whom the call was made, with a note that the conversation was not relevant (marked n/r). Where a conversation appears to be significant, the police officer notes the gist of the conversation opposite the hour that it occurred. At the end of the day or the following morning the log is brought to the Assistant District Attorney in charge of the case or to the District Attorney himself, and the record is put on a machine so that the significant portion can be played back. A grand jury stenographer may be called in to type out the portion of the conversation verbatim on a steno machine. Sometimes large portions of the tape are transcribed in this way. Eventually a full transcript of the tape recording is typed up. A District Attorney described the reason for this dual process of selective and complete transcription:

> For prosecution purposes, we transcribe selectively the conversations that are relevant, as determined by the Assistant District Attorney in charge. These transcripts are used in the presentation to the grand jury . . . it is easier to organize the material from the transcripts than to play back the record. But ultimately the defendant and his counsel will be entitled to the entire tape and may insist on a transcript, so the whole tape must be transcribed.

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1. On old standard telephones, the pen register indicates the number by dashes. On modern dial phones, an instrument known as a Touch Tone Recorder is used that types out the numbers. When information as to cable and pair numbers is requested from the Telephone Company, the District Attorney's office generally asks whether the phone to be tapped is standard or touchtone.

Form of Log of Intercepted Conversations

Plant #..... Date .....19....

Case #..... Tape #.....

Telephone #..... On.....

Subscriber..... Off.....

Monitored by..... Machine.....

Stop	Time	Call #	In	Out	Number Called	Subjects	SUMMARY

District Attorneys generally insist on listening to the taped recordings and will not rely on transcripts. As one explained almost apologetically:

> I want to hear the voices...Not that I don't trust a detective to make an accurate transcript. But sometimes the interpretation of a word has legal consequences that I can foresee and the detective cannot.

The form of the log indicates the type of machine on which the recording was made, so that it can be played back on the same type of machine. Stops are indicated by number on the machine. Various makes of instruments are used, such as "SONY" or "Voice of Music." The telephone calls intercepted are numbered consecutively on the log, so that when the Annual Report is filed by the District Attorney with the Administrative Office of the United States Courts the total number of telephone calls intercepted is known without adding them up and can be indicated on the Report.

Although Title III requires a minimization of interception of conversations not covered by the order, it does not say how overhearing of innocent or irrelevant conversations is to be avoided. This problem is aggravated by the fact that monitoring is done by agents or police officers whose judgment and integrity cover a wide range. Conscientious District Attorneys are painfully aware of the dilemma.

> We try to have the recording device turned off when a noncriminal conversation is taking place. It is, however, difficult because you are leaving it to policemen to determine whether it is an innocent or a criminal conversation. The District Attorney hopes they are honest, hardworking policemen, but he knows that a policeman may be corrupted, may try to line his own pockets.

What is a non-criminal conversation? What is a relevant conversation? What is "innocent" or non-incriminating? In dealing with organized crime, a conversation coming over the wires may be between the wife of a target and girl friend of a suspected criminal. Is the agent to shut this off because it will probably yield nothing but chit-chat? Some District Attorneys advise the police officers to listen to such conversations:

> They may talk about the people they were out with and where, and about matters that lead to incriminating evidence. Wives talk to one another and sometimes tell where their husbands are going, and why.

Most District Attorneys insist that police officers are not interested in listening to irrelevant conversations, that it is a boring job involving a constant struggle to keep awake. Police stop listening, they claim, when the

conversation is irrelevant. "It is sheer fantasy to believe that detectives listen to irrelevant conversations and that some do it with ulterior motives." Congressman Emanuel Celler, Democrat of New York, a consistent foe of eavesdropping, counters this with a rhetorical question and a pointed answer that seem irrefutable:

> How can police stop listening when the conversation is irrelevant? They don't know whether or not it is irrelevant unless they listen, and it may be irrelevant one moment and relevant the next. They must continue to listen, because the next moment something pertinent may be said. If they shut it off they may miss something they want to hear.[1]

The United States Department of Justice has recognized the fact that good reasons exist for listening to and recording everything that comes over the tapped wire,[2] and transcribing all the intercepted conversations. If the recording is required to be disclosed later, it cannot be claimed that something overheard was withheld. No State law enforcement official interviewed was willing to admit to continuous interception.

Senator McClellan has criticized the fact that a disproportionate number of innocent conversations seem to be overheard; in one case reported to the Administrative Office of the United States Courts four hundred telephone calls were intercepted to get one incriminating conversation.[3]

1. Interview conducted over the telephone, May 9, 1970.
2. Federal Manual discussed on page 277. Note that in the test case under Title III of United States v. Tantillo, discussed on page 330, wiretapping and recording went on continuously 24 hours a day, seven days a week, for 58 days.
3. Congressional Record, Senate, 91st Cong., 1st sess., August 11, 1969, Vol. 115, No. 136.

How is this to be avoided? Even if police officers are instructed not to listen to non-incriminating conversations, no guidelines are available to determine whether a conversation is "criminal" or not. One District Attorney maintains there is no such thing as a non-incriminating conversation:

> You have to spell incrimination out of a conversation. Many telephone calls may be made between conspirators. Some of the conversations may not appear to be incriminating . . . that doesn't mean that in fact they were not incriminating . . . it simply means it gave us no information.

Another pointed out that a wide difference between the total number of intercepts and incriminating calls did not necessarily mean that a great many conversations of innocent people were overheard. It was suggested that what was important was not the number of incriminating intercepts in proportion to the total number, but whether the wiretap resulted in an arrest.

The Report to Congress indicates that about 70% of wiretaps in 1969 were installed in private homes, apartments, and multiple dwellings, as distinguished from offices and business establishments. It would seem that wiretapping places where people live generally involves greater risk of intercepting conversations of innocent persons. This, of course, cannot be the concern of the prosecuting official if organized criminals carry on their enterprises from their homes. According to the Report for 1969 a few wiretap orders covered pay public telephones. This is where there is real danger of overhearing innocent conversations and precautions

can be taken. In one case involving Title III,narcotics agents hid in a packing case near an airport public telephone and signaled to the monitoring agent when the target of the eavesdrop order entered the booth, so that the wiretap could be shut off at all other times.[1]

The police officer manning the electronic device decides when to stop listening to a particular conversation, but the District Attorney determines when the eavesdropping is to terminate. He makes an assessment based on the facts:

> We have to decide whether we are getting the information we want . . . whether we should spend any more time and money on it . . . whether we should try to apprehend the suspect now or delay arrest while we seek additional evidence . . . whether we should turn it over to some other agency who might apprehend a confederate elsewhere.

Some wiretaps are terminated before expiration of the period permitted by the order, but this seems to be the exception. Section 2518(1)(d) provides:

> If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, the application must set forth a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter.

Section 2518(4) requires that each order shall include "a statement as to whether or not the interception shall

1.See United States v. Dudley, Sklaroff et al, pp.323 et seq. A United States Attorney revealed the dangers in this type of operation. Maintenance employees at the airport, unaware of the presence of the agents, tried to move the packing case into a warehouse!

automatically terminate when the communication has been first obtained."

One District Attorney who believes Title III is too restrictive claims it is often difficult to show that termination on first attainment of the authorized objective should not be required. A judge may refuse to dispense with the automatic termination provision. Termination on first attainment of the conversation sought, says this District Attorney, decreases the ability of law enforcement officials to deal with organized crime; initial conversations do not reveal organized crime enterprises. Another District Attorney who can find no fault with Title III believes that prosecuting officials are not obligated to terminate immediately on hearing one conversation of the type specified in the order. "Generally it is a continuing operation."

No criteria are furnished by Title III to aid in determining whether or not a particular conversation intercepted is that specified in the order, and the formulation of guidelines may have to be undertaken by the courts. The difficulty of the problem is most clearly exemplified in a conversation that conforms in part with the subject matter described in the order. It may be so close to the description of the type of conversation in the eavesdrop order that the wiretap must terminate, even if it is not enough to prove the offense. A series of conversations may be needed to spell out the crime, but each particular conversation may be couched in such guarded language that it

is impossible to foresee its significance in advance.[1]

A high quality of recording is essential if intercepted conversations are to be used as evidence. This is one of the reasons why most eavesdrop orders under Title III have been for wiretapping and not electronic surveillance. Wiretapping generally produces clearer recordings, with less difficulty in installation, and at lower cost. In any case use of eavesdrop evidence can open up a Pandora box of troubles even if the equipment was good and the operator capable. There are problems of voice identification, audibility, and intelligibility of conversations.[2]

1.For a discussion of this problem, see Laurens M. Vernon, "Eavesdropping in New York: 1968 Legislation," Syracuse Law Review, Volume 20, No.3, 1969, p.601, at p.620.

2.General case law with respect to voice identification will undoubtedly be applied to eavesdropping under Title III. See 29 Am.Jur.2d Sec.383. Identity may be established by a variety of circumstances either preceding or following the conversation. Ordinarily, identity of the person who is claimed to have talked over the telephone must be satisfactorily established by a party seeking to introduce a telephone conversation in evidence. 29 Am.Jur.2d Sec.381. But there is authority to the effect that in some instances introduction of the evidence of the conversation may, in the discretion of the court, be admitted subject to later identification. 29 Am.Jur.2d Sec.368, citing General Hospital Soc. v. New Haven Rendering Co.,79 Conn.581, 65 A.1065. In prosecutions for crimes in which secrecy, anonymity and concealed identity were resorted to for safety and the conversations are offered as part of the nefarious scheme, identity need only be established somewhere in the development of the case. State v. Strickland, 229 N.C.201, 49 S.E. 2d 469.

As to admissibility of sound recordings, see 58 ALR 2d 1027 Sec.2. The fact that a recording may be indistinct or inaudible in part has usually been held not to require its exclusion. But a recording will be rejected if it is so inaudible and indistinct that the jury has to speculate as to what was said.

Much of the language of organized crime is in code and groups have their own terminology. Narcotics agents may have discovered that tea means marijuana, strawberries are L.S.D., cocaine is Charley, and heroine is Henrietta. They may catch on that a suit is a pound, pants an ounce, and that shirts and ties are not always articles of clothing. But organized criminals are ingenious in developing new language to confound the eavesdropper and to make it difficult for law enforcement officers to use intercepted communications as proof of crime.[1]

The fact that a wiretap order has been obtained and information gathered does not mean that intercepted communications will be used in evidence at a trial even if there is an arrest and indictment. In one case where seven extensions of a wiretap order were obtained, the District Attorney said that "none of the information in the wiretaps is going to be used in prosecution because we have independent evidence."

Question: Then of what use was the wiretap?

Answer: We did not know at the beginning of the investigation that we would not have to use the wiretap information.

The question of whether Title III permits gathering of "strategic intelligence" as distinct from gathering evidence of a specific offense has been discussed on page 91.. Each District Attorney interviewed was asked point-blank:

1.For an analysis of cases involving use of tape recordings in evidence, see 17 Amer.Jur.POF, Tape Rec.Sec.60 (Supp.). As to the method used in introducing recordings in evidence in the test case of United States v. Tantillo, see page 340. .

> Do you ever seek information under Title III merely for intelligence purposes?

Some District Attorneys answered that they do not; that Title III may not be used to gather strategic intelligence:

> No...it's not permitted...the law provides that you can't do that.

Several of these admitted, however, that one could get leads without seeking them, and that they would not be turned down.

> Answer 1. You try to get evidence of gambling and it may lead you to evidence of some other crime, maybe murder. You would have to amend your wiretap order to include it.
>
> Answer 2. It's not unusual to have a wiretap that results in no incriminating statements but some information is overheard that is useful in obtaining evidence later.

For doubt as to the constitutionality of the provision in Title III permitting amendment to include some other offense discovered by wiretapping, see page 94 . It is claimed that this violates the particularity requirement of Berger and Katz. Applications to amend the order to include another offense have been rare, so far as could be ascertained. The Annual Report by State law enforcement officers to the Administrative Office of the United States Courts does not show these amendments.

A few District Attorneys were frank to say that eavesdropping was more helpful from an investigative standpoint than for actual evidence.

> Suppose in a policy case our man is accepting bets. We want to know whom he is working for. We get the information over the telephone . . . he is discussing layoffs and talking about other people doing the same

> thing. We have no evidence to establish proof against his boss. We may find out who his boss is and yet not be able to prove it. We might find out the number of people involved, the periods when they make reports . . . it is "intelligence" . . . it may have future value.

It is, of course, impossible to ascertain to what extent Title III is being used to gather "strategic intelligence," but it seems to be extensive. In view of the doubt cast on the constitutionality of this practice, the ambiguity in Title III, and the difference of opinion among law enforcement officials, clarification of this point is urgent.

Does Title III permit eavesdropping to <u>apprehend</u> a suspected criminal? There is a difference of opinion among State officers. Some admit that they use court-ordered eavesdropping to apprehend a suspect, and they defend the practice:

> It can be used to gain information as to a crime or information which would disclose the whereabouts of a person. We have used wiretapping here in cases where we were looking for a desperado at large and we had reason to believe that he might telephone a certain person and disclose his location.

Other officials disagree; while it might have been reasonable to cover apprehension of a criminal for serious crimes such as murder or where a vital public interest was involved, Title III has not done so, they maintain. Suppose a suspected murderer calls his mother and says: "Send me money." That is not evidence of a crime as called for by Title III, nor does it relate necessarily to a crime.

5. Notice and Disclosure

Mixed feelings prevail among District Attorneys with respect to the requirement that notice must be given within ninety days after termination of the time period specified in the eavesdrop order. Some of them say they "can live with it." Others object vehemently:

> Suppose in a homicide case there is justification for an order. But the man is not talking on the telephone. You now have to serve notice on him. He will get the order and the affidavits accompanying the application and he will know what evidence you have at that time that can be used against him.

An extreme view is that the notice requirement spells the death-knell of eavesdropping:

> The notice requirement has proved and will continue to prove harmful to the whole purpose of wiretapping. It puts the suspected person on the alert. . . puts him on guard. He then avoids the telephone. I believe this requirement will mean the end of wiretapping as a useful tool in law enforcement.

It has been suggested that notice should be required only if an indictment has been handed down and the subject arrested for the crime which was the subject matter of the wiretap order. Where an investigation is still open, all the notice does is to inform the suspect that he is a target and make him doubly careful. An eavesdrop order is different from a search warrant, it is claimed.

> Where a search warrant is executed, the man knows he has been a target. If he is indicted, arrested, nothing is lost by serving him with notice. When notice is given under an eavesdrop order, the informant is endangered. It becomes possible for the target to identify the informant.

The danger to the informant by the giving of notice was elaborated on by another District Attorney:

> When the papers on which the wiretap order was procured are made available to the attorney, his client can tell from the statement of facts who the informant is by narrowing down the possible informants. If an affidavit states that your confidential reliable informant observed the subject speaking on the telephone and overheard him discussing the future sale of a shipment of narcotics totalling over $35,000 on a particular date at a particular place, the person whose wire is tapped can figure out who that person is. You place your informant's life in danger, and it makes it difficult to get additional informants.

Some District Attorneys have circumvented the effects of the notice requirement, or at least postponed it, by asking for an extension of the eavesdrop order. This can protract the time period of the order over a considerable period since the number of extensions permissible is not restricted by Title III; all that is required is that the applicant show new probable cause as to why the wiretap should be continued and this does not seem to be too difficult to do.

Judges appear to have consistently refused to extend the time for giving the 90-day notice beyond an additional ninety days. Asked whether he would under some circumstances grant a longer extension, a State judge said:

> I might if it was necessary. But if more time was needed the District Attorney would probably apply for an extension before the wiretap was terminated.

The following excerpt from an affidavit of an Assistant District Attorney accompanying an application for postponement of time to give notice illustrates a typical reason offered for requesting additional time:

> This investigation is still continuing. The Hon. . . . signed other eavesdrop orders pertaining to (subject) and many of these orders are presently in effect.
>
> To notify (subject) that he has been under electronic surveillance by this office would alert him and his associates, make them wary of electronic eavesdropping, and thwart this continuing investigation.

An affidavit of the District Attorney accompanying the application corroborated the statements of his assistant:

> That he has read the affidavit of Assistant District Attorney . . .; that based on the affidavit he believes that the disclosure to (subject) of the existence of the eavesdrop order would seriously hamper the investigation into the crimes of promoting gambling and criminal usury and would make successful prosecution of the crimes impossible.
>
> That he believes that there are set forth in the affidavit of . . . sufficient facts to warrant postponing notice to (subject) of the fact that these conversations were the subject of an eavesdrop order.

The order of the judge granting postponement of notice merely stated:

> It appearing from the affidavits that there is sufficient cause to believe that notice to (subject) that he was the subject of the above mentioned eavesdrop order would seriously hinder the investigation of this matter,
>
> It is ordered that such notice to . . . be postponed for a period not to exceed 90 days to . . . . ., 19 . .

The notice requirement has its defenders as well as its critics. A District Attorney with extensive experience in court-ordered eavesdropping said:

> Notice does hurt the investigation . . . but it has a restraining influence on the best of us to know that some day the basis of the order will be analyzed by the subject. If the prosecution is abusing his authority, getting orders on a speculative rather than factual basis, if the judge was not so alert, the public should know about it.

Without the notice, if no arrest resulted from the wiretap order, an abuse of authority or improper order would probably never come to light. Several prosecuting officials agreed that the notice requirement made them extremely careful to have the application and supporting papers conform to statutory requirements in every detail. When a set of documents is drafted, the District Attorney is conscious of the fact that eventually the papers will be examined by someone who is hunting for flaws.

6. Report to the Administrative Office of the U.S.Courts

State law enforcement officials invariably use the standard form supplied by the Administrative Office in Washington, D.C., although a letter or statement is permissible under the regulations of the Administrative Office. Copies are sometimes xeroxed when additional forms are needed. Few, if any, State officials appear to be impressed with the importance of the Annual Report, and some find it irksome. A harried District Attorney complained:

> When I saw the form I was simply annoyed to be forced to fill in so many details . . . just more and more paperwork for which we are understaffed. I now work fourteen hours a day, and it took 1 1/2 hours of my time answering those questions. We object to it because of lack of time.

Lack of space on the form to fill in information requested was another source of irritation. The item on the bottom of the official form, headed "Evaluation," seemed to be particularly objectionable. "It's superfluous," several District Attorneys maintained, since the form also asks whether the wiretap resulted in an arrest

or conviction. Many of the Reports examined personally in the files of the Administrative Office of the United States Courts in Washington, D.C. left the item of "Evaluation" blank. Others disposed of it in a brief sentence:

> Example 1. Arrest of defendant and seizure of dangerous drugs would not be possible without wiretap.
>
> Example 2. Gambling arrests resulting would not be possible without wiretaps, inasmuch as this activity occurs primarily by telephone.

One Report said the wiretap revealed the innocence of the suspects, not guilt:

> Example 3. State police, acting under my direction, became fully satisfied by reason of the intercepted communications that the two suspects were not involved in the homicide under investigation. Without the interceptions, the suspects would have remained under police suspicion and would not have been cleared of such suspicion.

Another said the wiretap was not necessary to obtain the conviction that was ultimately effected:

> Example 4. Subject of wiretap subsequently arrested and indicted for narcotics violations. However, conversations which may have served as basis for arrest or search warrant not necessary to obtain conviction.

District Attorneys could not be convinced that the Annual Report to the Administrative Office serves an important function as a research tool in evaluation of court-ordered eavesdropping under Title III. One tart comment illustrates the generally unfavorable view of the Report:

> I don't see what they can prove since the items required to be reported are largely ambiguous. Some of them are meaningless.

Pressed to identify the items lacking in clarity, the following were enumerated:

1. Average frequency of intercept.--How is this to be computed? Should one take the total number of days of interception and the total number of interceptions and average them up? Suppose in one day there is one interception; on another day there are twenty-three interceptions. Would the average frequency of interceptions for the two days be twelve? Suppose during a 30-day period no interceptions occurred except on the last day when there were thirty interceptions. Is the average frequency one?

2. Number of persons whose communications were intercepted.--Does this mean the number of individuals named in the order, the number of people involved in the offense designated, or the number of people using that particular phone whether or not their conversations were relevant?

3. Number of communications intercepted.--Does this mean the number of completed calls? Does it include attempted calls that were not completed, incoming or outgoing? Suppose calls are made but nobody picks up the telephone, as often happens. Is the telephone number called not to be counted as an interception?

4. Number of incriminating conversations intercepted.--What is an "incriminating" conversation? A telephones B and says: "I will meet you in ten minutes." Is this incriminating? It takes an expert to interpret

telephone conversations. If you want to reinforce the statute, show that many incriminating statements are overheard, prove that court-ordered eavesdropping is effective, you can include many calls in the category of "incriminating." Someone else may find that these conversations were not incriminating but innocent, and demonstrate that the wiretap was not very productive.

5. Description of the intercept.--Is the nature of the offense disclosed by the telephone call to be stated here, or is something more intended? There is not much space provided--just about enough room to fill in the nature of the offense, which has already been stated.

6. Cost.--As revised in 1969, the Annual Report of prosecuting officials must include a separate estimate of: (a) manpower, and (b) other resources. How is cost of manpower to be computed? If you use a senior investigator on a case who is paid much more than a regular agent, do you include the exact amount paid to him? Is cost calculated on the basis of average wage or exact amount paid to each man involved in the wiretap? What is meant by "other resources"? Does this include cost of the equipment? Is the receiving plant considered an element of cost? Suppose that in order to avoid detection or for some other reason it is necessary to set up a "cheese

box"[1] and monitor the calls in the District Attorney's office, what location expenses could be considered part of cost?

Several District Attorneys interviewed could see no point whatsoever in including the item of Cost in the Report of Prosecuting Officials, and some actually leave the item blank in protest.

> Is a wiretap to be evaluated in dollars and cents? Does it make any difference whether a wiretap costs $100 or $1,000? A prosecuting officer is open to criticism if he measures the cost of bringing a criminal to justice. Cost doesn't mean anything. What is important is effectiveness of the eavesdrop . . . that is what the Administrative Office should want to know.

The only District Attorney who conceded the importance of knowing how much it costs to wiretap was one who was not enthusiastic about eavesdropping under Title III. He said:

> Suppose we spend hundreds of thousands of dollars in wiretapping and get one conviction for a misdemeanor. That shows it isn't productive enough for the manpower spent.

Manpower is obviously the chief item of cost in eavesdropping and, properly conducted with live monitoring, it can be a drain on personnel. Some "plants" have as many as twelve men listening to recordings at the same time. The

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1.A "cheese box" is an electronic device for relaying intercepted communications to another wire in some other location so that the telephone call cannot be traced. It is sometimes called "back stopping." The cheese box has been used extensively in large-scale illegal gambling. For a detailed description of how the instrument operates, see Hearings, Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, 90th Cong.,1st sess.,April 20,1967,p. 628.

salary of these men is generally paid by the police agency carrying on the investigation, but the District Attorney must decide whether the services of agents assigned to him would be most effectively employed in wiretap monitoring or some other form of investigation. District Attorneys who are strong supporters of eavesdropping are less troubled than others by the necessity of making a choice. "It takes manpower to get evidence regardless of the technique used."

Since no guidelines are furnished, the method of computing manpower cost to be reported annually is not uniform; some estimates are rougher than others. In one office an estimate is made of the number of men on the job and whether they had any other assignments or spent full time on the wiretap. If a tap was conducted for thirty days and the police officer earns $1,500 a month, then $1,500 of his salary is charged to the cost of the wiretap. A more accurate computation may be made:

> We take the total number of detectives on the wire and estimate the total number of hours they spend on the wire and the time it takes them to transcribe the recording. Multiply this by the amount they get paid, computed on an hourly basis. This gives us the cost of manpower. Manpower cost on an hourly basis may be $10 an hour.

As to "other resources" as an element of cost, prosecuting officials generally agreed that it was insignificant. "It doesn't amount to much and doesn't mean much." It may include:

1. Cost of the tapes, at most $100 or $200, depending on how long the wiretap runs.

2. Cost of machines, valued at $400 to $700, with a life expectancy of about five years.

3. Rent for setting up the recording and listening device location.

Cost is rarely decisive in determining whether or not to apply for a wiretap order, although it may be taken into account. Some county budgets include provision for eavesdropping expenses, and efforts have been made to get funds for eavesdropping from the Law Enforcement Assistance Administration (LEAA) under Title I of the Omnibus Crime Control and Safe Streets Act of 1968.[1] The Annual Report to Congress by the Administrative Office, based on the reports of prosecuting officials and judges, comments on "Cost of Intercepts" for the year 1969 as follows:

> The total cost of an intercept (in terms of manpower, equipment and other costs) ranged from a low of $20 for one intercept to a high of $45,554 for another. Of the 262 intercepts where cost information was reported, 127 cost less than $1,000; 45 cost $1,000 to $2,000; 54 cost $2,000 to $5,000; 24 cost $5,000 to $10,000, and 12 cost over $10,000.

The average cost per wiretap by reporting jurisdiction is also listed in the Report to Congress.[2] There would seem to be some justification for the criticism of prosecuting officials that no evaluative purpose can be served by statistics indicating that some intercepts cost $20 and others over $45,000, without relating cost to the results of the intercepts.

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1. See page 315 for a discussion of the role of LEAA.
2. See Table 4, page 460.

7. Number of convictions.--The Report indicates whether a conviction has been obtained in a case subject to a wiretap order, but this does not mean that the conviction resulted from the wiretap order. Sometimes the wiretap has nothing to do with the evidence presented, and the conviction results from other evidence secured through normal investigative techniques. In this respect, the Report may be misleading.

The American Civil Liberties Union in Washington, D.C. claims that the reporting provisions of Title III are incomplete and characterizes them as a fraud. It would not concede that the Annual Report to the Administrative Office by State law enforcement officials may serve as a subtle deterrent to excessive use of wiretapping and misuse of this investigative technique.

The Administrative Office of the United States Courts has noted the failure of prosecuting officials to file supplemental reports as required by Section 2519(2)(g) of Title III concerning arrests, indictments and convictions arising out of intercepts previously reported, but has taken no steps to compel them to do so. Failure to submit these supplemental reports makes it extremely difficult to follow up the results of eavesdropping and evaluate its effectiveness.

8. State Eavesdropping to Combat Organized Crime

The offenses covered by an eavesdrop order must be set forth in the report of State prosecuting officials and judges to the Administrative Office of the United States Courts. These are generally listed simply as "Gambling," or "Narcotics," or some other offense without further indication of the seriousness of the charge. A gambling offense may involve the head of a national or international operation, layoff man, bookmaker, or small-time runner. Narcotics offenses may range from smuggling enormous quantities of heroin into the United States to peddling a few marijuana cigarettes on the street. Every prosecuting official interviewed was asked whether eavesdrop orders applied for by him were directed against organized crime, and whether they involved top, middle, or low echelon members. The answers would seem to indicate that State officials pursue whatever suspected criminals they can, regardless of their affiliations or position on the hierarchical ladder. They were surprisingly candid, as the following responses indicate:

1. I would hesitate to use the wiretap technique against the average person. But if the "big money" of organized crime comes from gambling, then the bookmaker is bad and should be the target of a wiretap even if he is not high echelon. We have to assume that he is involved with the Mafia. But my nightmare is: suppose I wake up some day and find there is no Mafia!

2. We get what we can. We don't always get to the top, but we know that if we get to lower echelon, it is a harassment for the top men and it has a salutary effect.

3. It is true that eavesdropping orders may be directed to lower echelon members of organized crime--bookies, runners--but this is useful because it makes organized crime expensive. . . the lower echelon pay tribute to the higher-ups . . . criminal prosecutions are an expense of operation.

4. We have used it in gambling cases which are linked to organized crime . . . local gambling operations. Bookies lay off bets here with people in other counties, and ultimately the money goes to organized crime. We are unlikely to get a high echelon member. Even if you get captains--you will never get the top men. The lieutenants would rather die than testify against them.

5. Generally we know something about the subjects of the eavesdrop order. Their names are known and we believe they are at the upper level, but they may not be top men.

6. The majority of criminal cases that come to the attention of the District Attorney deals with lower echelon. It is difficult even in narcotics to get to the top. For that you need a lucky break. Someone will have to call up a person in the upper echelon. Their code is: "Don't use the telephone." But eventually they must use the telephone if only to warn somebody.

7. We would like to get to the upper echelon, but we have to start further down. In a policy racket we may begin by keeping the "controller" under observation. In gambling we may start out with a bookmaker who calls a consolidated wire room which we know is connected with another big operation with which the top men may communicate.

One District Attorney who found Title III so restrictive that he used it very sparingly said:

> Others may obtain wiretaps on any type of gambling activity. We will only make an eavesdrop on gambling if we have reasonable grounds to believe that it is operated by organized crime and if it is a large enough operation.

Some law enforcement officials expressed doubt that Title III was intended only for organized crime or serious

crime.[1] One pointed out that under the new 1969 New York law enacted to conform to Title III, even "misdemeanor gambling" was a covered offense. Another claimed his office was "selective"--it went only after members of organized crime--"Cubans, Italians, people who are carried on the records of the Police Department Special Investigation Bureau as major violators and on records of the Federal Bureau of Narcotics and Dangerous Drugs."

There is much current interest in narcotics cases, and some law enforcement officials use wiretapping almost exclusively for this offense. They admit that middle and upper level members of organized crime do not touch narcotics, and that Negroes and Spanish-speaking people predominate in lower echelons. Nevertheless, they say, the drive against narcotics violators is an attack on organized crime.

In one county with many "factories" where people are employed to mix heroin with sugar and place the diluted powder in glassine bags for retail sale, wiretapping is used to reach these factory workers even if they merely handle narcotics as wage laborers. In other counties where there are very few who "mix" and dilute, wiretapping is reported to be used only against those who participate in smuggling loads and half loads into the United States for

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1. For a discussion of Congressional intent as to use of Title III against organized crime, see page 137.

storing in a plant in the county; those who merely handle "decks" of heroin are not the targets of eavesdrop orders.

Few law enforcement officials will admit that concentration on narcotics cases may have political implications and reflect the ease with which a record of arrests can be established in this area, but their comments seem to indicate that this is at least part of the reason for the present emphasis on narcotics eavesdropping:

> The District Attorney can be more effective in this area. In narcotics cases you can get the most information . . . a junkie seller has to make a buy somewhere, and most victims tell where they got it. Penalties for possession or sale to minors may be severe, so the man on narcotics or in the business of selling narcotics will talk to lower the penalties. A core of informers can be developed--the best source of information on narcotics.

District Attorneys were asked: "Why not conduct a drive against loan-sharking, the offense that generates violence and may even result in murder?" The answer is, of course, obvious. "In the usury area you don't get the information. The man who lends you money is doing something for you; he is a friend in need, and the borrower is not likely to squeal on him."

9. Cooperation and Conflict Among State and Federal Agencies

Each State official interviewed was asked: "Do you get cooperation from other State law enforcement agencies and from Federal agencies? Has cooperation increased or decreased since enactment of Title III? Is there competition?" One District Attorney replied without hesitation:

> There is competition. Everybody wants to get a big narcotics ring for political purposes. The District Attorney runs for office.

It was generally agreed that cooperation has not increased under Title III. Some claimed that law enforcement was more competitive now than it was before Title III was enacted. One official who found the current spurt of interest in crime, "law and order," and law enforcement unsettling explained how State and Federal agencies come into conflict:

> If I find the F.B.I. talking to the same witnesses that I am talking to, the same informants, I ask: "Why? Are they here to make a shot in the dark, a big splash? If our County Police Department is working on a case, and the State Police have an interest in the same matter, and the Governor comes down with his super-police, and we also have a State Crime Commission, then law enforcement is competitive.

Nevertheless he insisted that he was in constant touch with F.B.I. agents, State police, and County police, and that they were in and out of his office. "You have to get along personally with people," he said.

As a matter of security, if for no better reason, not all information can be shared. Cooperation among State officials takes place where some personal relation has previously been established. The National Association of District Attorneys has been a strong force in promoting contacts and developing trust among its members. Reasons for conflict and conditions for cooperation were summed up by one official as follows:

> There is a natural reluctance of any agency to give information to another agency. This reluctance is dissipated only by building up confidence and

> trust. There is not going to be free and open disclosure, but there can be cooperation. It depends on personalities . . . how well they know one another. If a District Attorney whom I know well telephones me for information I give it to him; if I don't know him well, I don't.

Some law enforcement officials admitted frankly that they worked at "winning friends":

> You can get help from a friend. I do not think that Title III has done it. We simply have developed a healthy relationship with other local and Federal people through personal contact. The cooperation is there when we need it.

Cooperation is necessitated sometimes by jurisdictional limitations. A wiretap order in a gambling case may be obtained in one jurisdiction and an arrest made in another, making it necessary to turn over the evidence obtained. In inter-county crimes, law enforcement officials have often worked together.[1]

As to cooperation with Federal agencies, State officials complained that Federal agencies did not share information readily, particularly the F.B.I. "Federal agencies do not trust local prosecutors," was the common observation. Few State officials had had any contact with the new Strike Forces of the United States Department of Justice scattered throughout the country and designed to promote cooperation among various agencies in order to move more effectively against organized crime.[2]

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1. See page 234 for jurisdictional problems under Title III.

2. For a discussion of the Strike Forces, see page 295 .

FEDERAL PRACTICE AND PROCEDURE IN EAVESDROPPING

1. Centralized Control and Uniformity--Manual

A high degree of centralization of authority under the Attorney General characterizes eavesdropping at the national level. Uniformity of Federal procedures and control of applications contrast sharply with the varied practice and dispersed authority prevailing in the States. Power to authorize an application to a Federal judge is limited by Section 2516(1) to:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General.

Attorney General John N. Mitchell has designated Will R. Wilson as the Assistant Attorney General who may authorize applications. A hierarchical line of command has been established in the Department of Justice to determine policy on wiretapping and electronic surveillance and to exercise the powers provided by Title III. In descending order, authority moves essentially through five levels:

1. Attorney General John N. Mitchell.
2. Assistant Attorney General, Criminal Division, Department of Justice, Will R. Wilson.
3. Deputy Assistant Attorney General, Henry E. Peterson.
4. Chief of Organized Crime and Racketeering Section, Department of Justice, William S. Lynch.

5. Deputy Chiefs of Organized Crime and Racketeering Bureau, in charge of various sections of the United States.

Application for an order under Title III is initiated by the investigative agency having jurisdiction of the offense, such as the Federal Bureau of Investigation, the Bureau of Narcotics and Dangerous Drugs, or the Bureau of Customs. A preliminary review of the application is made either by Strike Force attorneys in the field[1] or by a United States Attorney aiding the investigating agency in preparation of the application, affidavits and order. The documents are then sent to Washington, D.C. to the Organized Crime and Racketeering Bureau, a section of the Department of Justice. A staff of attorneys in this Bureau reviews the form and substance of applications "with particular emphasis on assuring strict adherence to the required statutory standards.[2] When the papers have been approved by this staff, they are submitted for review to the Deputy Chief, then to the Chief of the Organized Crime and Racketeering Bureau, and finally to the Attorney General himself.

On approval of an application in writing by the Attorney General, a letter signed by the Assistant Attorney General specially designated under Title III (currently Will R. Wilson) empowers the attorney named in the request

1.For a discussion of Strike Forces, see page 295.

2.Letter of Henry E.Peterson,Deputy Assistant Attorney General, to Senator John L. McClellan, July 13, 1970. Congressional Record, Senate, July 31, 1970, S 12549.

for authorization to apply to a Federal court for an eavesdrop order.

To insure uniformity of procedure, the Department of Justice has prepared a "Manual for Conduct of Electronic Surveillance" under Title III. This is a set of guidelines for Federal agents, attorneys and other Federal officials involved in court-ordered eavesdropping, reflecting the policy of the Department of Justice. It was completed in the summer of 1969. Before that time, applications under Title III were controlled by early drafts of the guidelines. Revisions were made as work progressed on the first few surveillances. The final draft in current use contains the basic outlines of Federal policy and practice, but details are still subject to change.

Much secrecy surrounds the Manual, and its circulation has been limited. The Department of Justice claims that it does not come within the requirements of public disclosure under the Freedom of Information Act,[1] that the Manual merely gives advice to government agents and attorneys for reasons outside the technical requirements of Title III.[2] The United States Attorney largely responsible for preparation of the Manual offered the following explanation:

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1 U.S.C.A.,Title 5, Sec. 301, Pub.L.89-554, September 6, 1966; 80 Stat.379.

2 This view was bitterly disputed by Jack Landau, former Director of Public Information in the Justice Department. Mr.Landau resigned as a result of policy disagreements.

> Until we get Title III up to the Supreme Court where it will ultimately go, we do not want our internal policies made any more public then they have been made already . . . We do not want to walk into Court and have someone say: "This is the Department's policy--A, B, and C--but they did not do B." We would have to justify our standards which are stricter than the statute's standards. We do not want the Department of Justice charged with acting like "Big Brother" and using the statute indiscriminately.

Another United States Attorney interviewed in Washington,D.C. said:

> Maybe it was a wrong decision to keep it secret. But a defense attorney might pick up the Manual and say: "You did not comply with your own Manual." Or the Manual may spell out a certain procedure when we could have formulated a better procedure. We might want to make changes.

Despite the fact that the Manual has not been made available to the public, much of its contents has been disclosed. The Manual is divided into twelve sections. Step by step, the procedure for court-ordered eavesdropping outlined in Title III is discussed, with warnings of weaknesses in the law and how best to overcome them. Eavesdropping <u>without</u> court order is not covered. The Manual states that the Attorney General has reserved to himself the right to make ultimate decision as to use of 48-hour emergency eavesdropping, and that "national security" cases are not dealt with in the Manual. An official who called the Manual "probably the most closely held document in the Department of Justice" nevertheless summarized it in surprising detail:

> The Manual begins by describing the scope of the statute--what situations require a court order and what do not. It tries to analyze the legislative history, together with the statute, which is <u>extremely confused</u>, <u>badly drafted</u> (italics ours). Part of our effort was to straighten out those areas which seemed

> unclear and to put restrictions on that part which looked troublesome.

The opening section is followed by procedural matters--to whom requests for applications are to be made, who is to clear them, who has final authority to approve or disapprove an application. The Manual indicates who is to make the application in the field, the relationship between the investigative agency and the attorney who is supervising the application, what information must be supplied to the Department of Justice to make a judgment as to whether the application should be approved, and the kind of situations in which approval will be granted.

> It includes a discussion of the contents of the application, the admonishment that every effort should be made to include as much information as possible (not to follow the time-honored search warrant procedure of putting in an affidavit just as little as is needed). . . to make sure the application meets the requirements of probable cause. We are doing this in the light of U.S. v. Spinelli . . . our standards are more strict than they would be without Spinelli.[1]

To show why normal investigative procedures are inadequate and unlikely to succeed, the Manual advises setting forth all the investigations that have been conducted previously. The Manual outlines the form of the order, line by line, indicates that it is to be presented to a United States District Court judge, and tells how to make presentation and

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1. 393 U.S. 410, 89 S.Ct.584, 21 L.Ed.2d 637 (1969). Justice Harlan, expressing the views of five justices of the Supreme Court, stated that probable cause was not shown for issuance of a search warrant where the affidavit failed to show that the informant was reliable or to state sufficiently the circumstances supporting a conclusion that defendant was engaged in bookmaking.

ask for sealing of the documents. It states that a provision should be included in the order requiring periodic progress reports to the judge.[1] The conduct of the interception is discussed--what kind of agents ought to be assigned to it, the need for skilled personnel to monitor interceptions,[2] make transcripts of tapes, when live monitoring should be used, what to do if a tape recorder breaks down, how to protect oneself by memorandum. if the interception is fouled up, whether to get off the line under certain circumstances. The Manual tells what to do with the tapes and with the transcripts when they are completed.[3] Also:

> . . .how to handle the problem of disclosure of information among the various investigative agencies. Congress intended that there should be cooperation among the agencies. We point out situations where disclosure may or may not be made. There are controls for dissemination of all the information picked up.

The Manual advises its agents and attorneys to lay a foundation in advance for dealing with the Telephone Company by ascertaining the name of the Company's chief security officer, the Telephone Company's requirements, and the official

1.See page 231 discussing the lack of progress reports in State eavesdropping.

2.For monitoring, the Manual urges use of intelligent agents who can exercise judgment, since the law requires that the wiretap terminate immediately upon obtaining the conversation sought.

3.According to a United States Attorney in New York, the Manual states that the tapes should be kept by the particular investigating agency that initiated the order and conducted the monitoring.

who must be informed of entry of an order. It discusses what to do when conversations are overheard that appear to be privileged communications, as for example between husband and wife, or lawyer and client. When the Manual was first issued in 1969, it contained instructions to cut the recording off when a privileged communication began. This has been changed; it was found that sometimes incriminating statements were made in what at first appeared to be a privileged communication, such as a lawyer purchasing narcotics from the client whose wire was being tapped. The current practice, as set forth in the Manual, is to make duplicate tape recordings. One of the tapes records everything, including privileged communications. The other does not, and privileged communications are not transcribed.

The Department of Justice has not made its Manual for the Conduct of Electronic Surveillance available to State officials, although Federal experts are aware that inadequate State applications imperil all of Title III. A Justice Department attorney said:

> I have seen some papers in the State of . . . If I were a judge I would throw them out. Title III can go down the drain if people do not take enough care as to what they put into applications. Title III papers are drafted for the appellate courts where ultimate controls lie.

One explanation offered for failure of the Federal Government to furnish guidelines for the States is that it does not want to be accused of encroaching on State powers. Another is that the guidelines are subject to change; they are not hard and fast rules and may not be suitable for all

States. Each Federal official interviewed was asked whether cooperation between Federal and State law enforcement officials had increased since enactment of Title III. The following reply reflected the consensus of opinion:

> Title III has not made any difference. The Department of Justice recognizes the need for cooperation and there has been cooperation. It is a sensitive area and one in which there has been a great deal of mutual distrust. At the moment it is a very serious problem. The States scream that the Federal agencies do not give them assistance or information. The LEAA is trying to set up better Federal and State cooperation.

2. Interpretation of "National Security"

The ambiguity and doubtful constitutionality of Section 2511(3) of Title III permitting eavesdropping without court order in "national security" cases have been discussed on page 124 et seq. The dangers to freedom in attempting to dispense with judicial control in a broad and vague category of cases have been compounded by the interpretation of "national security" made by the Attorney General as head of the Department of Justice. "National security," claims the Attorney General, includes threats from domestic groups, as well as from foreign powers.

In a 32-page document filed with the United States District Court on June 13, 1969, in the trial of the "Chicago 7" charged with inciting riots at the Democratic National Convention in August 1968, the Justice Department claimed that no court order was required to eavesdrop on groups that "use unlawful means to attack and subvert the existing structure of government." It admitted having tapped the wires of

anti-war activists. The Government brief stated:

> There can be no doubt that there are today in this country organizations which intend to use force and other illegal means to attack the existing forms of government. Faced with such a state of affairs any President who takes seriously his oath to "preserve, protect and defend the Constitution" will no doubt determine that it is not "unreasonable" to utilize electronic surveillance to gather intelligence . . . concerning those organizations which are committed to the use of illegal methods to bring about changes in our form of government . . .[1]

The Attorney General claims that the question of whether it is proper to use electronic surveillance to gather information concerning the activities and plans of such organizations is "one that properly comes within the competence of the executive and not the judicial branch.[2] This assumption of broad authority to eavesdrop on political dissenters without judicial, Congressional, or constitutional restrictions has been characterized as arrogant, a "frighteningly open-ended formula, an attempt to by-pass constitutional rights, a rejection of the doctrine of judicial review, and in itself a form of subversion and threat to the existing structure of government.[3] The American Civil Liberties Union filed suit in June, 1969 in the United Sates District Court in Washington, D.C. to ban eavesdropping on political dissenters, stating that it was a class action

1.Quoted in New York Times, June 14, 1969, p.1, col.5.

2.Ibid.,p.34, col.1; see also Notes: "Wiretapping and Electronic Surveillance--Title III of the Crime Control Act of 1968," Rutgers Law Review, Vol.23, Number 2, Winter 1969, pp.319-388, at p.387.

3.Sidney E.Zion, "Right over Wiretaps," New York Times, June 22,1969, Sec.E, p.16, col.1;New Republic, July 5, 1969, p.6; New York Times, June 21, 1969, p.26, col. 2.

on behalf of all Americans who hold unpopular views.[1] Many constitutional experts believe that the provision permitting eavesdropping without court order in national security cases is unconstitutional on its face. This view has been reinforced by the interpretation given to "national security" by the Attorney General. One law enforcement official put it bluntly in an interviewL

> You cannot leave the question of whether or not eavesdropping shall take place to a public figure. As the Title III provision now stands it depends entirely on the discretion of the Attorney General, and it is constitutional.

In a letter to Attorney General Mitchell, thirteen law professors reminded him that the writers of the Constitution had understood that no one could be trusted with unchecked powers over the lives of other men and had incorporated protection against such powers into the Fourth Amendment.[2] The Executive Director of the New Jersey Civil Liberties Union warned the Attorney General:

> The threat of eavesdropping as a political tool against individuals whose views are unpopular is a real danger.[3]

Conflicting decisions on the issue of what "national security" means have been handed down by judges in various United States District Courts, and appeals are pending. In the Chicago trial referred to above (United States v. Dellinger

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et al.)

1. New York Times, June 27, 1969, p.1,col.7. For status of this action, see page285,footnote1 .

2. Ibid.,June 22,1969, p.53, col. 2.

3. Ibid., June 15, 1969, p.52, col. 2.

et al) Judge Julius Hoffman ruled in February 1970 that with respect to domestic security eavesdropping, no warrant was required.[1] Two similar rulings were made later in 1970.[2] A contrary conclusion, however, was reached in two cases decided in January 1971, United States v. Smith and United States v. Sinclair, Plamondon, et al[3] warrantless electronic surveillance of members of domestic political organizations was held to be unconstitutional. In the Sinclair, Plamondon case, the United States Court of Appeals for the Sixth Circuit has upheld the United States District Court in Michigan, rejecting the Attorney General's claim that no court order was needed. The thorough and well-reasoned opinions in these two cases merit close attention.

United States v. Smith

During an appeal to the United States Court of Appeals from a conviction for unlawful possession of firearms, the Government disclosed that defendant had participated in conversations monitored by electronic surveillance conducted by the Federal Government to gather intelligence information regarding the "national security." The Court of Appeals thereupon remanded the case to the United States District

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1. Criminal No. CR 180, Northern District of Illinois. Action was brought June 26,1969 by Dellinger et al against the Attorney General for damages, injunctive and declaratory relief, but proceedings were stayed December 2,1969 pending final judgment in the Chicago case. Appeal from order granting stay is pending in the Court of Appeals, District of Columbia, C.A.No.23,931.

2. See page 291 .

3. Central Dist.of California,Crim.No.4277-CD. New York Times January 13,1971,p.21,col.2.

Court, Central District of California, for limited proceedings as required by Alderman v. United States,[1] that is, to determine whether the surveillance was unlawful, and if so to disclose the records to the defendant.

The Government claimed that although a warrant had not been obtained prior to instituting the surveillance, it was constituionally proper because the Attorney General of the United States had expressly authorized the gathering of "intelligence information deemed necessary to protect the nation from attempts of domestic organizations to use unlawful means to attack and subvert the existing structure of the Government." The President, acting through the Attorney General, asserted the Government, has inherent constitutional power: (1) to authorize, without a judicial warrant, electronic surveillance in "national security" cases; and (2) to determine unilaterally whether a given situation is a matter within the concept of national security.

Judge Warren A. Ferguson of the United States District Court rejected the Government's claims. On January 8, 1971 he ruled that this was a purely domestic situation, and that "in wholly domestic situations there is no national security exemption from the warrant requirement of the Fourth Amendment."

1. 394 U.S. 165. The Supreme Court held, in Alderman, that surveillance records as to which any defendant has standing to object should be turned over to him without being screened in camera by the trial judge. 394 U.S. at p. 182. A finding by the United States District Court that surveillance was lawful makes disclosure and further proceedings unnecessary. Giordano v. United States, 394 U.S. 310, 313 (1969).

The opinion made a clear distinction between foreign affairs and domestic political activity:

> Unlike in the area of foreign affairs, in the area of domestic political activity the government can act only in limited ways . . . Brandenburg v. Ohio, 395 U.S. 444 (1969). Due to the various constitutional guaranties protecting political freedom, the government can act only to prevent or punish unlawful acts.

To the Government's argument that it wished to take action only against organizations which intend to use force and other illegal means, and the illegal attacks of such organizations, Judge Ferguson replied:

> (T)he government seems to approach these dissident domestic organizations in the same fashion as it deals with unfriendly foreign powers. The government cannot act in this manner when only domestic political organizations are involved, even if those organizations espouse views which are inconsistent with our present form of government. To do so is to ride roughshod over numerous political freedoms which have long received constitutional protection.

The Government, said Judge Ferguson, could investigate and prosecute criminal violations only if domestic organizations or their individual members stepped over the line of political theory and general advocacy, and committed illegal acts. Since the electronic surveillance conducted without court order was obtained in violation of the Fourth Amendment, the Court ordered the Government to make full disclosure to the defendant of his monitored conversations.

Several peripheral problems of considerable importance under Title III were discussed in Judge Ferguson's opinion.

First, since the defendant was a party to the monitored conversation, he had standing to raise an objection to the warrantless electronic surveillance.

Second, the Court reminded the Government that regardless of the exceptions contained in Title III relieving the President of criminal sanctions in "national security" cases, the President was still subject to the constitutional limitations imposed upon him by the Fourth Amendment.

> Congress expressly recognized this when it stated that evidence resulting from such an electronic surveillance could "be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable." (italics ours)

If the Government's position were accepted, then "reasonableness" would become "solely a value judgment."

Third, the Court questioned presidential delegation of authority to institute warrantless eavesdropping. Since the sole basis for delegation is a confidential memorandum from the President, "what is to prevent him from delegating this power to persons other than the Attorney General?"

Fourth, Judge Ferguson rejected the Government's argument that "precedent" supported its position. The Government claimed that every president since Franklin D. Roosevelt had authorized electronic surveillance without warrant in national security cases. Historical analysis, the judge replied, reveals: (1) that this practice grew out of presidential decisions based upon factors other than the Fourth Amendment, and (2) that the concept of the national security exception has been drastically expanded

since its initiation. Assuming that the Roosevelt directive was constitutionally proper, several characteristics distinguish it from the Smith case: first, Roosevelt conceded that under "normal circumstances wiretapping by Government agents should not be carried on for the very excellent reason that it is almost bound to lead to abuse of civil rights" (italics ours); second, Roosevelt expresly concurred in the Supreme Court's prohibition against use of such wiretap evidence in criminal cases; third, he admonished that investigations so conducted be kept to a minimum and limited, in so far as possible, to aliens.

Since the Court found that the electronic surveillance conducted in this case without a warrant was constitutionally improper, the Government was ordered to disclose fully to the defendant its surveillance record, so that a hearing could be held to determine whether or not the evidence against the defendant was tainted. A 30-day stay was granted, during which the Government filed an appeal in the United States Court of Appeals.

United States v. Sinclair, Plamondon, Forrest[1]

Three members of the White Panthers were charged with conspiracy in the bombing of a Central Intelligence Agency office in Ann Arbor, Michigan. After indictment but before trial defendants moved in the United States District

1. United States District Court, Eastern District of Michigan, Southern Division, Criminal No. 44375. For press comment, see New York Times, January 26, 1971, p.15, col.1; January 28, 1971, p.18, col.2.

Court, Eastern District of Michigan, for an order directing the Government to divulge all logs, records, and memoranda of electronic surveillance directed at any of the defendants or at co-conspirators not indicted. They also asked for a hearing to determine if any of the evidence on which the indictment was based or which the Government intended to introduce at trial was tainted by such surveillance. The Government replied that it had no knowledge of any such electronic surveillance, that a further inquiry was being conducted with the Federal Bureau of Investigation, and that if evidence of electronic monitoring was discovered the Court would be advised.

Subsequently, an affidavit was filed, signed by United States Attorney General John N. Mitchell, stating that he had authorized wiretapping conversations of defendant Plamondon. Sealed records were delivered for review and inspection of the Court, and the Attorney General certified that public disclosure of the facts concerning the surveillance would prejudice the national interest. The Government contended that the electronic monitoring of Plamondon's conversations was lawful, although the surveillance was initiated and conducted without judicial warrant; the Attorney General, as agent of the President, has the constitutional power to authorize electronic surveillance without court warrant in the interest of national security. The Government relied upon several District Court cases:

> United States v. Felix Lindsey O'Neal, Criminal No.KC-CR-1204 (D.C.Kan.,September 1, 1970, a case in which the District Judge made an in-court ruling that surveillance pursuant to the authorization of the Attorney General was lawful. See, also, United States of America v. D(e)llinger, Criminal No. CR 180 (N.D.Ill., February 20, 1970); United States v. Clay, No.783, O.T.(5th Cir.,July 6, 1970).

Judge Damon J. Keith of the United States District Court in Michigan handed down an opinion on January 25, 1971 which ruled: (1) that since Plamondon was a party to a monitored conversation, he had standing to object to the evidence and request disclosure, and (2) that the warrantless surveillance violated defendant's Fourth Amendment rights. Judge Keith noted that the affidavit and issues before him were identical to those before Judge Ferguson in United States v. Smith, and he adopted "the rule and rationale" of the Smith case. He rejected the proposition of the Government that the President, acting through the Attorney General, has inherent constitutional power to authorize, without judicial warrant, electronic surveillance in "national security" cases and to determine unilaterally whether a given situation is within the scope of national security.

> We are a country of laws and not of men . . . the President is . . . still subject to the Constitutional limitations imposed upon him by the Constitution . . . the Constitution is the Supreme Law of the Land (Marbury v. Madison, 1 Cranch (5 U.S.) 137. . . We are . . . dealing not with the rights of one individual defendant, but, rather . . . with the possible infringement of a fundamental freedom (italics ours) guaranteed to all American citizens.

A sharp distinction was made by Judge Keith between

the powers of the President with respect to foreign powers and domestic organizations; in the area of domestic affairs the Government may act only in limited ways.

> An idea which seems to permeate much of the Government argument is that a dissident domestic organization is akin to an unfriendly foreign power that must be dealt with in the same fashion. There is great danger in an argument of this nature, for it strikes at the very constitutional privileges and immunities that are inherent in United States citizenship.

The position of the Attorney General, concluded Judge Keith, is untenable.

> It is supported neither historically, nor by the language of the Omnibus Crime Act. Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today.

The United States District Court in Michigan adopted the holding of Judge Ferguson in the California case:

> . . . in wholly domestic situations there is no national security exemption from the warrant requirement of the Fourth Amendment. Since there is no reason why the Government could not have complied with the requirement by obtaining the impartial judgment of a court before conducting the electronic surveillance . . . it was obtained in violation of the Fourth Amendment.

The Government was directed to make full disclosure to defendant Plamondon of his monitored conversations, and an evidentiary hearing to determine the existence of taint was ordered to be conducted at the conclusion of the trial. The Government appealed to the United States Court of Appeals, Sixth Circuit. On April 8, 1971 the appellate court upheld the decision of Judge Keith and rejected the Government's assertion that it had power to eavesdrop without court order.[1]

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[1]See comment in New York Times, April 9, 1971, p.1, col.5.

Editorial comment in the press on the Plamondon and Smith cases expressed the danger to freedom involved in the Government's claim:

> [T]he implications of unauthorized wiretapping by an excessively political Justice Department are unsavory, especially when combined with the recent revitalization of the department's Internal Security Division, whose excesses in the era of McCarthyism are not easily forgotten. [1]

Attorney General Mitchell has said that he abides by the "ancient common law guide of the reasonable man" and seeks a middle-of-the-road solution.[2] To many conservative public officials, judges, lawyers, and laymen--as well as liberal ones--inclusion of domestic dissent as a threat to "national security" does not seem to reflect a middle course. Perhaps in response to their criticism, the Attorney General has found it necessary to state publicly that political dissent should not only be tolerated but encouraged, and that peaceful exercise of freedom of speech and assembly should be encouraged even though it may create some inconvenience. "Watch what we do, instead of what we say," urges Mr. Mitchell.[3]

Present eavesdropping without court order under the umbrella of Title III appears to some observers to be worse than past illegal wiretapping. A distinguished law professor

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[1] N.Y. Times, February 3, 1971, p.36, col.1.

[2] Address in Vital Speeches, Vol.XXXV, No.22, September 1, 1969, pp.678-681.

[3] Speech before Texas Bar Association, San Antonio, Texas, reported in New York Times, July 3, 1970, p.14, col.1, July 15, 1970, p.16, col.3.

and constitutional expert warns that if such eavesdropping becomes legitimized, it will be "next to impossible to reverse the trend in calmer days." There is a great difference, he says, between quietly tapping in violation of the law and obtaining the imprimateur of the courts.[1]

The Federal Bureau of Investigation is reported to be using listening devices without court order in surveillance of Black Panthers, W.E.B. DuBois Clubs of America, and other political groups.[2] Under current interpretation of "national security" by the Attorney General it would seem that they could also be used without court order against student groups, labor unions, peace movements, civil rights groups, organized crime, and perhaps even the average citizen.

> If the concept of national security legitimizes wiretapping, and thus protects it from judicial or public review, then we may all expect our phones to be tapped.[3]

It may well be, as a New York Times editorial comment has suggested, that the security of all Americans under the Constitution would be better served "if the Justice

1. See Sidney E. Zion, "Right Over Wiretaps," New York Times, June 22, 1969, Sec. E, p.16, col.1, footnote 4.

2. New York Times, March 12, 1969, p.20, col.4; Newsweek, June 23, 1969, vol.73, p.37. The F.B.I. has been eavesdropping in "national security" cases at least since 1940. It admitted eavesdropping on the civil rights leader, Dr. Martin Luther King, Jr., and on Joe Namath, New York Jets quarterback. See The Christian Century, Vol.LXXXVI, No.28, July 9, 1969, p.917; also Tom Wicker, "In The Nation: Namath and the National Security Game," New York Times, June 17, 1969, p.46, col.3.

3. Philip W. Moore, "The Chicago Eight Wire Tap: Disclosed or Leaked?", The Nation, October 27, 1969, Vol.209, No.14, pp.432-434.

Department observed the mandate laid down in[Article]IV and followed the procedures established by the Crime Control Act."[1]

3. Strike Forces Against Organized Crime

A Strike Force may be defined as a combination of key Federal agencies cooperating with State and local law enforcement divisions to combat organized crime in a particular region. The concept of a Strike Force was initiated by former Attorney General Ramsey Clark.[2] A pilot project was set up in Buffalo, New York, in December 1966, and the first Strike Force went into operation in Detroit in February 1968. The Department of Justice now has thirteen Strike Forces operating throughout the United States and plans to create additional units.[3] These Strike Forces in the field handle Title III applications for court orders to authorize wiretapping and electronic surveillance, subject to supervision in Washington, D.C. The Strike Forces are part of the Organized Crime and Racketeering section of the Justice Department.[4] Headquarters are maintained in the

1.Editorial, "Big Brother is Listening", New York Times, June 21,1969, p.26, col.2.

2.Richard Harris,Justice--The Crisis of Law, Order, and Freedom in America (New York: E.P.Dutton & Co. 1970).

3.Three Strike Forces were organized in the first six months of 1970, Los Angeles, St. Louis, and New Orleans.

4.Until June 1970, the Strike Forces were divided into two groups within the Organized Crime and Racketeering Bureau: the Eastern section of the United States, and the Western section beyond the Mississippi. Under a reorganization the Strike Forces are divided into four groups, with a deputy at the head of each group.

following cities:

Boston	Newark
Buffalo	New Orleans
Cleveland	New York (Manhattan)
Detroit	New York (Brooklyn)
Los Angeles	Philadelphia
Miami	St. Louis

The trend is toward coverage of a greater area by a single Strike Force. The Philadelphia Strike Force, for example, has jurisdiction over Southern New Jersey and Camden. The Miami Strike Force covers Atlanta, Georgia. Each Strike Force is headed by an attorney selected in Washington, D.C. to act as Coordinator in furthering co-operation with State and local law enforcement authorities. Some geographic areas are not covered by a Strike Force; they merely have an Area Coordinator. Goals of the Strike Forces have been listed as follows:

1. Identification of target groups to be investigated.
2. Indoctrination of agents and attorneys as to statutes available for prosecution of criminals.
3. Assessment of methods for developing and exploring sources of information.
4. Development of an initial integrated investigative plan and prosecution program.[1]

The composition of each Strike Force varies. The Detroit Strike Force has full-time representatives from eight Federal investigative agencies and three State agencies,

1.Thomas J.McKeon, "The Strike Force," American Bar Association Journal, May 1970, Vol.56, pp.453-454.

as well as a Royal Mounted Police representative.[1] It also has on its staff several United States Attorneys from the Department of Justice. Five attorneys are usually assigned to each Strike Force, but the number may be increased with growth of the workload. The Federal Bureau of Investigation (F.B.I.) does not maintain a full-time representative, but makes available to the Detroit Strike Force its reports on organized crime activities.[2]

In the Southern District of New York, the unit is known as a Joint Strike Force and operates under a written agreement with State and local agencies. It covers New York County, Bronx County, and an area extending north to Albany. The District Attorneys of New York County and Bronx County participate in the Joint Strike Force. Local agencies have representation on various committees of the Force, including a committee on Gambling, Labor Racketeering, Bars and Restaurants, Hijacking, Pornography, and Securities Frauds. Narcotics cases are handled by a separate Narcotics Strike Force consisting of representatives from the United States Bureau of Narcotics and Dangerous Drugs, New York City Police Department Narcotics Division, and State Police. District Attorneys do not participate in the Narcotics Strike Force.

1.Thomas J.McKeon, "The Strike Force," American Bar Association Journal, May 1970, Vol.56, p.453.

2.The reason proffered as to why F.B.I. agents were not assigned to the Strike Force was: "There are administrative problems . . . The F.B.I. agents have other jobs. They also work for the United States Attorney in the area where they are stationed."

In the Eastern District of New York the area of the Strike Force includes Brooklyn, Queens, Staten Island, Suffolk, and Nassau County. This Force, with headquarters in Brooklyn, does not meet with local agencies; it works with representatives of the following Federal Bureaus:[1]

Bureau of Narcotics and Dangerous Drugs
Bureau of Customs
Internal Revenue Service[2]
Secret Service
Department of Labor

Although the Federal Bureau of Investigation does not assign a special agent to the Strike Forces, some co-ordinators work closely with F.B.I. agents investigating organized crime, and see them daily. Both the Southern and Eastern District Strike Forces in New York have an F.B.I. "liaison man" who can be called upon when needed. The Federal Bureau of Investigation has a special department investigating organized crime, and it is reported that an F.B.I. coordinator is assigned to each of the five families of "La Cosa Nostra" in the New York area. The Strike Force Coordinator in Brooklyn explained his connection with the F.B.I.:

> I have a personal relationship with each of these F.B.I. coordinators. They come to me if they want a

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1.There may be some cooperation with local agencies. For example, if the Brooklyn Strike Force carries on a Federal grand jury investigation, local investigators may participate.

2.The Internal Revenue Service has not participated in Title III eavesdropping.

> grand jury investigation, if they want a subpoena, if they are planning an investigation, if they want legal advice.

Emphasis is placed on pooling of criminal intelligence data. Representatives of the agencies working with the Strike Force are charged with the duty of keeping the Force informed as to investigations being conducted by the agency. Justice Department attorneys on the Strike Force Staff have the responsibility to determine whether an offense has been committed that may be the subject of prosecution. Ideally, a continuous dialogue is supposed to take place between agents and attorneys of the Strike Force, and between the Coordinator of the Strike Force and the United States Attorney in the District. For a discussion of the role of the United States Attorney in relation to the Strike Force, see page 307.

Much effort is exerted by the Strike Force to indoctrinate its staff as to the activities of organized crime, the most effective methods for developing evidence--including eavesdropping--and the effect of United States Supreme Court decisions. There is frequent contact and communication among the Coordinators, and between the Coordinators and the Organized Crime and Racketeering Bureau in Washington, D.C. Section meetings are held frequently, and occasionally there is a meeting of the full staff.

The key to success of a Strike Force is <u>cooperation</u>, but as an attorney in the Justice Department admitted ruefully, it is not yet fully achieved.

> In an area where a State District Attorney has been firmly entrenched for years and free of political influence, it is difficult for him to accept any interference from Federal authorities, particularly where his previous experiences with men from Washington have not always been happy ones.

Some of the newer Strike Forces, he said, are just beginning to develop cooperation with State and local authorities. Asked whether any Strike Force cooperated well with State and local authorities, he cited the New England Force operating through Boston, Massachusetts. Cooperation of the various Federal agencies also appears to vary. In answer to the question: "Is it true that the F.B.I. is reluctant to share information with other groups, including the Strike Forces"?, an attorney in the Organized Crime and Racketeering Bureau of the Justice Department answered:

> When the Strike Forces were first organized, the F.B.I. seemed reluctant to share information. It is an old organization, a very professional one, and J. Edgar Hoover as its head is conservative in his approach to new law enforcement techniques. I think he is becoming convinced that the Strike Forces are effective, and cooperation of the F.B.I. is getting better.

As proof of improved cooperation, he said that in one of the largest gambling raids resulting from a Title III eavesdrop order handled by the Detroit Strike Force, the F.B.I. "cooperated fully by pulling in its agents from various regions and raiding fifty locations." The importance of those raids in so far as organized crime is concerned is, however, debatable.[1]

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1. See page 307 .

Competition among Federal agencies and between these agencies and the Strike Forces presents added difficulties. In one instance, it was related, the Bureau of Customs got word that the Strike Force was talking to certain individuals whom the Bureau had been investigating for three years. The Bureau considered this a gross interference with its work. In another case, the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs came into conflict when it was discovered that they were both working on the same investigation of smuggling narcotics into the United States. The Coordinator of the Strike Force is supposed to straighten out such conflicts as part of his job. "How is this done?" a Coordinator was asked.

> I invite the agents to come in and talk the matter over. The Strike Force may have some information that could be helpful to a ruffled agent. The competing agencies may have different information that they can share. I convince them that one agency is not trying to steal information from the other.

The head of a Strike Force has no authority to direct an agency not to pursue a particular investigation. In the event of an impasse between agencies, the matter "would be referred to Washington," said the Coordinator. He claimed that it "never reaches that stage!" Another United States Attorney said:

> We settle the problem quickly, but sometimes by that time the damage has been done to the likelihood of making a case.

The Strike Forces have used wiretap orders under

Title III but not extensively.[1] When pressed for an explanation of why this tool of law enforcement has not been employed more frequently, a Strike Force head explained:

> It has not often been applicable. We have been able to make a case without it and we have had more indictments and convictions than any Strike Force in the country.

Another United States attorney in Washington volunteered the information that Will R. Wilson, the Assistant Attorney General designated to approve applications, was "selling" the idea of wiretaps around the country, visiting the various agencies, and telling the Strike Forces to make more use of Title III eavesdropping.

The Federal "Manual for Conduct of Electronic Surveillance" is followed as a guide by Strike Forces. All applications by a Strike Force for court orders must be submitted to Washington, D.C. The heads of Strike Forces interviewed did not seem to find the strict control from Washington burdensome, nor did they believe that centralization of authority delayed issuance of orders.

> Where it is necessary, the Washington people will put other things aside and give the matter immediate attention. In Washington they are not caught up in the fervor of the particular investigation, so they can consider each case objectively.

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1. The first order under Title III was obtained in the Eastern District of New York. It involved an attempt to bring into the United States about 60 to 80 kilos of heroin in cans of paella. Defendants were indicted in the Southern District of New York. They made a preliminary motion to suppress, but pleaded guilty. No further attempt was made to attack the validity of the electronic surveillance or to press defendants' claims. United States v. Hysohion; United States v. Rimbaud.

One Strike Force Coordinator called it a "systematic, cautious approach, regimented and controlled." He believed it was a good method "if you have competent people to review it." In New York, in both the Southern and Eastern Districts, the procedure for obtaining an order has been streamlined and it is possible to get one through within two days or even less. A Magnafax machine reproduces the application and affidavits and automatically transmits the documents to Washington. Each typewritten sheet is inserted in the machine, and a copy is pulled from a similar machine in Washington.

According to the heads of the Strike Forces, the Justice Department in Washington bends over backwards to see that the facts showing probable cause are spelled out clearly, sometimes to the annoyance of the investigative agencies. Agents are reluctant to divulge information for fear that the identity of an informant may be revealed; they want to limit the facts in an affidavit to the minimum. Sometimes Strike Force attorneys have to compromise and omit details that may pinpoint a particular individual as the informant. The Manual advises that "probable cause" be updated every five days when progress reports are made to the judge. If Strike Force attorneys feel that there is insufficient information on which to base probable cause, they will tell the agent to get additional information. Where authorities in Washington find facts inadequate to show probable cause, the Strike Force accepts that judgment.

Strike Force Coordinators confirmed the fact that Federal applications generally asked for an order terminating in fifteen days, although Title III allows up to thirty days. The following explanation of this practice was offered:

> If you can go to the Court in five days and show that you are getting something on a 15-day order, you strengthen your case on a motion to suppress. If you are not getting anything after the 5-day period, we would consider dropping the wiretap. We ask for 15-day orders; it can always be extended if it is productive...If we are more conservative than the law requires, it places us in a better position to sustain the wiretap.

Progress reports are made to the judge who issued the order about every five days, either orally or in writing. Some judges require detailed reports of what has been overheard; others are satisfied with a summary. Periodic reports of intercepted conversations are also made to the head of the Strike Force, either orally or by typewritten summary, by the agency monitoring the wiretap.

Since control of eavesdropping by an impartial judiciary is crucial to the safeguards sought to be provided by Title III, each Strike Force member interviewed was asked how the judge is selected to whom a Federal application is presented. The reply was:

> Applications are presented to the judge sitting in the Motion Part in the United States District Court . . . whoever happens to be sitting. If we could not get him for some reason, we would go to the Chief Judge.

Federal authorities, like State law enforcement officials, all claimed that they did not shop around for a compliant judge but presented the application to whichever judge

was sitting during that month in a particular "Part" that handles criminal matters on a procedural level.

> At 10:30 every morning and in his chambers in the afternoon, this judge handles arraignments, passes sentences out to defendants who plead guilty, assigns cases out to trial parts, receives ex parte applications. Federal judges all take their turn in handling criminal matters, unlike State judges, some of whom are unfamiliar with the criminal branch of the law.

The head of a Strike Force outlined the office procedure followed. An original and three or four copies of the application and accompanying affidavits are prepared. The original is sealed and filed with the Clerk of the United States District Court. The conformed copies are kept in the Strike Force office in a safe. One copy of the order is served on the Telephone Company.

Monitoring of conversations is handled by the investigative agents. The various agencies use their own equipment; sometimes they share one another's electronic devices. A Strike Force does not have any electronic surveillance equipment of its own. When asked whether automatic or live monitoring was used, the answer was:

> It depends on the form of the order. It is the responsibility of the head of the Strike Force to see that agents do not cross the bounds and record conversations other than those authorized to be intercepted by the order.

In order to protect innocent persons, said the head of a Strike Force, the order will be explicit as to when the wiretap shall go on and off, and when conversations shall not be recorded. For example, if a wiretap is placed on a public telephone, the order may provide that the conversation

shall be recorded only when the person under surveillance is at the particular place where the wiretapped phone is located and only if the voice speaking can be recognized as belonging to the subject of the wiretap. An agent listening to the recording makes a log of the conversation--a summary of conversations that the agent considers relevant. Later, a transcript is made of the conversations recorded. The head of the Strike Force looks at the logs personally, but he does not work directly with the agents once the wire is on. That task is assigned to a staff attorney.

Reports to the Administrative Office of the United States Courts required by Title III are prepared in Washington, D.C. The Strike Force merely sends a letter or memorandum to the Organized Crime and Racketeering Bureau of the Department of Justice indicating what action was taken under each wiretap order.

The heads of Strike Forces interviewed were asked: "Do you use court-ordered eavesdropping under Title III only in cases involving organized crime?" The answer mirrored the uncertainty of all law enforcement officials as to what is or is not organized crime:

> Technically we deal only with organized crime. But organized crime is subject to interpretation. Anything which involves a criminal ring, a syndicate, is considered organized crime, whether it is a ring for importation of narcotics from South America or a gambling ring in the United States. If a case involved one sale of narcotics by a distributor on the street, one not involving a large conspiracy, or if it involved taking orders over a telephone that could result in the arrest of only one individual, the Strike Force would turn it

> over to the United States Attorney in the District. We do try to get to top echelon.

A member of the Organized Crime and Racketeering Bureau in Washington said openly that some eavesdropping by Strike Forces has involved harassment of unimportant and unfortunate individuals rather than action against organized crime.

> The Detroit raid was a small numbers racket. . . A lot of the people involved were homebody people, not breaking heads, just taking bets on the side. We have to decide whether we should proceed against these minor people when we know they are just caught up in this way of life. There are a lot of blacks involved and poor whites, especially in numbers games . . . five and ten cent games. Some of the people involved in gambling are leaders in their community.

He was talking about the gambling raids following eavesdropping under Title III carried on by the Detroit Strike Force in which the F.B.I. "cooperated fully."[1]

4. The Role of the United States Attorneys

The Department of Justice has ninety-three United States Attorneys scattered in various districts throughout the United States. They are political appointees, as a rule, subject to removal when a new Administration comes into office. The development of Strike Forces with their own staff of attorneys has created some practical problems in division of labor between the United States Attorney in a District and a Strike Force in the area. Theoretically, in order to deal effectively with organized crime, the United

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1. See page 300

States Attorney in the District and the head of the Strike Force in the region should cooperate with one another to the fullest extent.

A skilful Coordinator of a Strike Force can establish cordial relations with the United States Attorney in the District provided they are both of the same political party and accept the control of officials in Washington. The conflict between former United States Attorney Robert M. Morgenthau, a holdover Democrat in the Southern District of New York, and the Joint Strike Force was a matter of common knowledge.[1] Since the appointment of Whitney North Seymour, Jr., a Republican, an amicable allocation of functions seems to have been established that should serve as a model for other Strike Forces.

> The United States Attorney for the Southern District is responsible in terms of prosecutions for everything the Joint Strike Force does. He signs their indictments and sees that they are in proper form to be filed. The United States Attorney in the District also agrees to Strike Force applications under Title III in terms of form, but does not follow them up.

The major role of the United States Attorney's office in relation to the Strike Force is "to make an effort to help with manpower." In the Southern District of New York, the United States Attorney has a staff of forty or fifty attorneys in the Criminal Division alone. The Joint Strike Force has only a few attorneys. They work together on investigations

1. It was rumored that the Joint Strike Force was organized in the Southern District of New York for the express purpose of getting rid of Mr. Morgenthau. See Victor S. Navasky, "A Famous Prosecutor Talks About Crime," New York Times Magazine Section, March 29, 1970.

where the Strike Force does not have sufficient manpower. After approving the form of an application for an eavesdrop order, the United States Attorney has nothing further to do with the order unless it results in an indictment. It then becomes his responsibility to get the case ready for trial.

Many Federal agencies work with the United States Attorney, including Immigration and Naturalization Service, Secret Service, Post Office Department, the Internal Revenue Service and its subsidiaries. The bulk of the United States Attorney's contact, however, is with the Federal Bureau of Investigation and the Bureau of Narcotics and Dangerous Drugs. The agencies do not assign specific individuals to the United States Attorney's office; agents are assigned to cases. When an investigation is going on, the agent works with an Assistant United States Attorney in charge of the case. The Attorney may, in the course of the investigation, suggest use of a wiretap, but the matter would be discussed at a meeting of the Strike Force.

Regular meetings of the Strike Force are attended by the United States Attorney, accompanied by members of his staff working on specific cases who are brought up to date on pending matters. A Chief Assistant United States Attorney interviewed expressed satisfaction with the relationship established with the Strike Force, with qualifications:

> We do not have quite the same feeling of . . . interest . . . as we do with our own people.

In the District of Columbia, a special United States

Attorney handles what is known as "Major Crime Unit" matters, that is, cases dealing with organized crime. The procedure followed by him and his assistants in eavesdropping under Title III parallels State practice in a general way, but it is subject to centralized control in the Department of Justice as outlined in the Federal "Manual for Conduct of Electronic Surveillance." An attorney in the "Major Crime Unit" described how the application is initiated and prepared:

> An agent of the F.B.I. might come into my office with information about narcotics traffic. We discuss whether we should tap . . . whether there is any other way to approach the problem . . . is it worthwhile wiretapping. The agent gives me a rough draft of all the information he has and we put it in final form here in the United States Attorney's office. I draw up the application, affidavits and order.

United States Attorneys in the District of Columbia rely heavily on the information furnished to them by agents of the Federal Bureau of Investigation, for they are considered to be of high caliber.

Office procedure in the District of Columbia resembles that of the States. Generally an original and three copies of the papers are drawn, one for the District Court, one for the agency that initiated the application, one for the Organized Crime and Racketeering Bureau of the Department of Justice, and one for the United States Attorney himself. The original documents are placed in a box, sealed by the Court, and left in the custody of the United States Attorney's office.

Interception of conversations is recorded in accordance with the instructions in the Manual. The reason for making two tape recordings was given as follows:

> We feel that this way it meets any claim that the tape has been tampered with . . . One tape plays continuously . . . you can tell the exact time a call was made, since the tape is put on at a certain time and it plays at a certain speed; this is designated as the original and is left intact. The other is the working copy. If one machine malfunctions, the other can take over.

United States Attorneys in the District of Columbia insist that eavesdropping is not used for intelligence gathering by them; that it is employed to get specific evidence of a designated offense. However, where a wiretap for one offense leads to information as to other crimes and additional offenders, a dilemma is presented:

> How far do you go with one wiretap? Suppose you are tapping in a gambling operation. It becomes obvious from what you overhear that you can proceed against another offender. Do you ask for an extension and tap the other phone? Should you apply for an amended order?

The problem of deciding who shall be served with an "inventory" within ninety days after termination of interception troubles the United States Attorneys in the District of Columbia.

> Much is left to the judge's discretion. But the judge really relies on the United States Attorney handling the case. Where the recordings are voluminous, it is impossible for a judge to review all the material in order to decide who shall receive notice of eavesdropping.

The United States Attorney who made this comment cited as an example the case of United States v. Tantillo, a test case in the United States District Court in the District

Court in the District of Columbia, in which about 7,000 phone calls were monitored, producing thirty-five miles of tape![1]

§. Role of Law Enforcement Assistance Administration (LEAA)

Title III makes no mention of the Law Enforcement Assistance Administration, but the LEAA program may have considerable impact on authorized eavesdropping in combating organized crime. The LEAA was established within the Department of Justice by Title I of the Omnibus Crime Control and Safe Streets Act of 1968. Its purpose was to promote improvement in State and local criminal justice systems through Federal grants-in-aid. Funds were made available for planning, action programs, research, and technical assistance. A special section of LEAA deals with organized crime.[2] States may obtain funds from LEAA in two ways: (1) through block grants, and (2) under discretionary grants.

Block grants are based on a policy formula. Each State and territory receives a certain amount after submitting a comprehensive plan to LEAA. The plan under a block grant must relate to the needs of the State criminal justice system, and be approved by LEAA. LEAA may fix a special condition--that the money be used in conformity with State and

1.For a discussion of the Tantillo case, see page 330.

2.For a full statement of the purposes of LEAA, see U.S. Congress, House of Representatives, Hearings of the Subcommittee of the Committee on Appropriations, 91st Cong., 2nd sess., part 1, March 9, 1970, p.866 et seq.

Federal law and constitutional interpretations. This is true whether the funds are to be used to purchase electronic devices for eavesdropping or other equipment.[1]

Discretionary grants are subject to complete control by LEAA. Fifteen percent of the "action money" given out by LEAA is subject to the discretion of its administrators. A State that does not have statutory provision authorizing court-ordered eavesdropping in conformity with Title III will not be permitted by LEAA to use funds to buy electronic devices that could be used only in violation of Federal law. States may, however, purchase equipment to be used in"consent eavesdropping" for which no court order is required under Title III. Proposals for discretionary grants are made by LEAA, and these have been "light on equipment." LEAA is interested primarily in building capability, training people. Where purchase of electronic devices has been funded, it has been in conjunction with a larger project. In a discretionary grant, LEAA knows whether or not any of the funds were used to buy electronic devices for eavesdropping. Reports as to operation must be submitted to LEAA by the States.

1. Operation of LEAA has been criticized for not giving enough funds directly to cities with high crime rates. New York Times, January 9, 1970, p.28, col.4; February 18, 1970, p.16, col.1; March 3, 1970, p.30, col.4; June 19, 1970, p.15, col.2. Some critics suspect that a good deal of the funds will be used for wiretap equipment. See Richard Harris, Justice--The Crisis of Law, Order and Freedom (New York: E.P.Dutton & Co., 1970), p.42.

LEAA has run a number of training programs in reference to organized crime, and these have included sessions on electronic surveillance, the law involved in its use, and live monitoring. The head of the organized crime section of LEAA said:

> We tried to inculcate in law enforcement officials, prosecutors, and judges the understanding that use of this equipment is a tool supporting a lot of hard work, and that they should live within the law. It is a highly sophisticated tool, and the help of a specialist is needed. It requires a well-trained, experienced person, and sufficient control procedures on use of the equipment and personnel.

LEAA is particularly concerned with dissemination of information about acceptable practices and procedures to State and local officials. Its officials are aware of the reasons of the Department of Justice for refusing to distribute copies of its Manual to the States and appreciate the problems, although they do not feel that they are insurmountable. Meanwhile, LEAA is planning preparation of a State and local Manual. It intends to conduct a conference on electronic surveillance and to discuss the interrelation between legal aspects and procedural questions for the benefit of police, the District Attorneys in the various States, and the judges.

So far, LEAA has had three conferences, bringing together approximately 700 law enforcement individuals--police, prosecutors, judges, criminal justice planners. Representatives are invited from various State agencies, and LEAA pays their living expenses during the conference. After the conference LEAA works with individual States. The purpose of

the conferences is to raise issues on the problem of organized crime and to help individual States to develop programs in depth. With respect to electronic surveillance, there are two types of problems:

1. Technical: There can be poor reception, inaudibility. Intercepted conversations may be rejected as evidence because of lack of clarity, unintelligibility, or lack of control procedures. Without experienced operatives, the desired results may not be obtained.

2. Legal: There must be compliance with the law. It is reported that LEAA is planning an intensive program on the law and its interpretation, and that it will try to get more uniformity in procedure in carrying out the law.

LEAA is also concerned with the problem of getting caught doing the eavesdropping. If that happens, a good investigation can go down the drain. Leaks are always possible. Although a court order for eavesdropping is now obtainable, it is still necessary to set up the wiretap and the recording equipment. Entry into a basement may be necessary; the superintendent of the building can go out to get a drink and tell the bartender all about it!

In an interview with an official of LEAA, the question of illegal eavesdropping was raised:

Question: Have any studies been made by LEAA of the possibility of violations of Title III through illegal eavesdropping without court order?

Answer: LEAA has made no such studies, but it has tried to discuss the question of violations. We try to make law enforcement officials understand that if they violate the law they will ruin it for everybody else. When the law enforcement officer takes the stand, defendant's counsel will ask him whether there has been any illegal eavesdropping. He will have to answer honestly or face the possibility of a charge of perjury.

The official was also asked whether LEAA had any contact with the Department of Justice Strike Forces.

> Answer: LEAA has funded some State and local participation in the Joint Strike Force; the only one formally so far is in the Southern District of New York. A discretionary grant of $168,000 was made. Out of its block grant, New York State will give the Joint Strike Force in the Southern District another $200,000.[1]

LEAA has tried to promote cooperation between Federal and State and local law enforcement officials. In an appearance before the House Subcommittee on Appropriations, Attorney General Mitchell stated that cooperation of the States was "mixed," that States were not always receptive to the suggestion that the money paid out by LEAA go into certain categories.[2] When questioned as to cooperation of the States, the chief of the organized crime section of LEAA said:

> There are 40,000 police departments in the States. There are conflicts between Sheriffs and Chiefs of Police. The States should be consolidating police services. There are other State and local law enforcement problems that make cooperation difficult. People on the staff of prosecutors are either Democrats or Republicans. With whom will they cooperate? In Illinois, 55 prosecutors were elected. Most of them had never been prosecutors before; five had not passed the Bar, and one had flunked the Bar examination!

1. A Federal grant of $5.2 million was made to New York State in June, 1970. New York City received a total of $1.6 million, including a $250,000 grant for a statewide Task Force against Organized Crime. New York Times, June 28, 1970, p.64, col.1.

2. U.S. Congress, House of Representatives, Hearings before Subcommittee on Dept. of State, Justice etc., of Committee on Appropriations, 91st Cong., 2nd sess., pt.1, p.218.

A discretionary grant has been made by LEAA to the New England States to create a new organized crime and intelligence system. Information on organized crime will be pooled and computerized. Other so-called "organized crime grants" have been made. One of the largest in 1970 went to West Virginia; the State police set up a state-wide corruption unit to investigate and secure indictments in reference to official corruption. Indictments were obtained against 107 individuals, 75 of them high-ranking officials. A program was also funded in Michigan to assist local prosecutors in their efforts against organized crime. State-wide rackets bureaus have been set up with LEAA funds in Rhode Island and Wisconsin.[1]

LEAA officials were asked whether they planned to evaluate the effectiveness of the law enforcement effort with respect to organized crime, including the use of electronic surveillance. They believed that this would be done by the National Institute of Law Enforcement and Criminal Justice, the research arm of the law enforcement assistance program. Electronic surveillance, in their opinion, was only a small part of the effort against crime, and whether it was successful depended on how one measured effectiveness.

> If all that law enforcement is doing after X dollars have been spent is to arrest three people, and the criminal operation continues, it means electronic surveillance is not very effective.

1. LEAA appropriation for 1970 was $268,000,000. Attorney General Mitchell has talked of doubling that amount for 1971 and obtaining an appropriation of $1 billion in the future. New York Times, January 4, 1970, p.1, col.4; p.46, col.4. The appropriation for 1968-9 was $63 million.

National Institute of Law Enforcement and Criminal Justice

The Institute was created under Title I of the Omnibus Crime Control and Safe Streets Act of 1968 to encourage research and development to improve law enforcement. Currently it is attempting a form of "market research" on various aspects of organized crime, and hopes it will be possible to measure the extent of the activities of organized crime and how they function. The chief of the Institute, a former management consultant, explained why the information on organized crime in the President's Crime Commission Report required supplementation:

> Organized crime does have a monopoly on certain markets, such as gambling. If the Government is to exercise control or engage in a competitive enterprise like off-track betting, we must know more than the fact, as stated in the Commission's Report, that somewhere between $5 billion and $10 billion are bet illegally each year. We have to know how it works. Perhaps we should ask the consumers, not the criminals.

In line with this "consumer" approach, the Institute is funding a pilot survey to determine how many ordinary citizens will answer inquiries on illegal gambling, and whether it is worthwhile to ascertain how much people do gamble. The Institute is also financing a study of the overall impact of organized crime on an inner city urban community--social, political, and economic. Both of these projects will be funded under a formal plan and conducted by outside "contractors." All the pieces of information gathered will be examined in search of a pattern of business activity. Organized crime will be subjected to "operations research" and

examined from a business point of view.[1]

It is believed that the entire set-up of organized crime, if considered as a running business, is unprofitable because of the large number of unproductive people whom organized crime keeps "on welfare." Attention thus far has been focused on the internal structure of organized crime and the hierarchy of boss, "capo," lieutenant, soldiers, and so on. The Institute is redirecting attention to the interaction among citizens within this supposed monolith.

The Institute is also considering the use of anti-trust action against organized crime. What is the difference between the monopoly exercised by organized crime and that of huge organizations like Allis-Chalmers, Westinghouse, and others? Is it merely the method used to enforce their monopolies? Organized crime uses physical coercion, business monopolists use economic coercion, and both use political coercion. General Electric has access to top officials; organized crime corrupts the bottom bureaucracy.

Another study contemplated by the Institute will trace, through inspection of archives, the growth of various organized crime activities, such as the vending machine business and licensing of trash collection. How have these monopolies developed? Are they really monopolies? The Institute is convinced of the need for more data:

1. The dearth of information on economic aspects of organized crime and its business practices was pointed out in the LEAA Summary of Requirements submitted to the Subcommittee of the Committee on Appropriations, 91st Cong., 2nd sess., pt. 1, p.875., Hearings.

> We have been making decisions on too little information. We have been accepting hearsay for so long that we accept statements at face value. It is time we started looking a bit more closely.

So far, no specific projects have been started to study the effectiveness of wiretapping and electronic surveillance in combating crime or its impact on the right of privacy. The Institute has, however, been following with interest the programs of LEAA disseminating information as to dangers of misuse and abuse of eavesdropping as a tool in law enforcement.[1]

6. Limited Role of Federal Communications Commission

The Federal Communications Commission was created in 1934 "for the purpose of regulating interstate and foreign commerce in communication by wire and radio . . . for the purpose of promoting safety to life or property through the use of wire and radio communication. . ."[2] The Commission assumed the functions of the old Federal Radio Commission which, in turn, had taken over the Radio Division of the Department of Commerce. It is an administrative agency. Monitoring responsibilities of the Federal Communications Commission (FCC) are preserved by Title III. Section 2511 (2)(b) permits an officer, employee, or agent of the FCC to intercept wire or oral communications transmitted by

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[1]The need for increased research efforts into possible unauthorized use of electronic eavesdropping and surveillance devices is obvious. The obstacles to detection of illegal eavesdropping are formidable.

[2]June 19, 1934, U.S.C.A. Title 47, Sec.151.

radio and to disclose or use the information obtained, provided it is in the normal course of his employment and in discharge of the monitoring responsibilities of the Commission in enforcement of its responsibilities under U.S.Code, Title 47, Chapter 5.[1] While this appears to give the FCC implicit authority to see that its common carrier licensees comply with statutory requirements, it does not mean that the FCC will take an active part in enforcement of Title III. The FCC has no law enforcement duties or authority under Title III nor did it seek such authority. In 1953 it reached an understanding with the Department of Justice that complaints of violations of Section 605 of the Federal Communications Act were to be referred to the Department of Justice for investigation and action.[2] No change in policy has been announced since amendment of Section 605 by Title III.

The Federal Communications Commission interprets the amendment of Section 605 by Section 803 of Title III and the prohibition against private eavesdropping contained in Section 2511 of Title III as evidencing "a Congressional intent to fix the primary jurisdiction over wiretapping and

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[1]The FCC has jurisdiction over channels of radio transmission, or the generation of electromagnetic energy which interferes with radio transmission. It does not have jurisdiction over mechanical or other similar devices.

[2]Hearings, Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, 90th Cong., 1st sess., pt.2, pp.514,515. Testimony of Lee Loevinger, member of Federal Communications Commission.

eavesdropping activities with the Department of Justice." The FCC proscription against use of low power radio communications devices for eavesdropping purposes (Title 47 CFR 15.11 and 15.220) remain in effect.[1]

7. Test Cases Involving Court-ordered Eavesdropping

The validity of the order authorizing eavesdropping, the manner in which it was carried out, and the constitutionality of Title III as a whole, have been attacked as a matter of routine in a motion to suppress, on receipt of notice of interception of conversations. At the State level, the motions have been denied, defendants have generally pleaded guilty after indictment, and then pressed their claims no further.[2]

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[1]Letter of February 25, 1971 from William Jensen, Chief, Enforcement and Defense Division, Federal Communications Commission.

[2]A motion to suppress does not survive a guilty plea in most jurisdictions. In the Black Panther case in New York, Justice Murtagh denied a motion for disclosure of evidence pertaining to electronic eavesdropping, and to suppress use of such evidence (order of August 31, 1970). The Court had, on January 13, 1970, directed a hearing prior to trial to determine whether there was such electronic eavesdropping. The persons whose telephones were tapped were not defendants, but conversations of certain of the defendants were intercepted. In denying the motion as to conversations of persons other than defendants, Justice Murtagh, relying on Alderman v. U. S., ruled, in effect, that they had no standing to object to presentation of the evidence. As to intercepted conversations of the individual defendant who was a party to the specific conversation, the motion was denied on the ground that the warrant for interception was based on probable cause and issued in conformity with the requirements of Katz and the New York law. (Supreme Court, New York County, The People of the State of New York v. Lamumba Shakur, et al., Index No. 1848-1/2 - 1969).

In Federal eavesdropping one case involving Title III has been decided by the United States Court of Appeals, Fifth Circuit (Dudley, Sklaroff et al v. United States, commonly known as the Sklaroff case). Two other cases have been decided by the United States District Court and are now being appealed to the Court of Appeals: United States v. Essandar et al., Southern District of Florida, and United States v. Tantillo et al, in the District of Columbia. In the Tantillo case, defendants were convicted after trial and the appeal from the conviction will probably reach the United States Supreme Court since both sides have indicated their intention to appeal to the highest court if their claims are not sustained in the lower courts. These cases highlight many of the practical and constitutional problems of wiretapping. They also furnish an empirical basis for testing the contentions of supporters and critics of court-ordered eavesdropping and indicating how the courts will deal with Title III.

The Sklaroff Case

This was the first major case in which interception of conversations under Title III was litigated. The offense charged was illegal gambling. A wiretap order was signed by United States District Court Judge W. O. Mehrtens in Miami, Florida, on June 17, 1969. The Sklaroffs, father and son, were suspected of operating a nation-wide bookmaking network. The order permitted the Federal Bureau of Investigation to listen to conversations over a public telephone used by the

Sklaroffs at an airport for a period of seven days to obtain evidence that they were relaying gambling information. The application was prepared by the Justice Department's Organized Crime Task Force in Miami, Florida. Informants at the Federal Bureau of Investigation were the source of the information set forth in the affidavits on which the order was based. To limit interception to conversations of the suspects, two F.B.I. agents hid in a crate alongside the phone booth, looked through a peephole and signaled to agents at a receiving station when the Sklaroffs entered, so that the wiretap could be put in operation.

During a 6-day period, F.B.I. agents overheard about 200 conversations. Based on these interceptions, search warrants were obtained and records of the Sklaroffs were seized at the airport booth. After notice of intercepted conversations was served as required by Title III, the Sklaroffs petitioned for disclosure of the contents of the telephone conversations intercepted and made a motion to suppress the contents of the communications. The petition and motion were made prior to arrest or indictment. The United States District Court for the Southern District of Florida denied the petition and motion, and the Sklaroffs appealed to the United States Court of Appeals for the Fifth Circuit. The Government moved to dismiss the appeal on the ground that the motion to suppress was prematurely brought prior to indictment, that it was an interlocutory order and non-appealable.

Indictments were subsequently handed down against fifteen defendants, the Sklaroffs in Miami, and gamblers in outlying cities who were telephoning them for information. In the Court of Appeals the Sklaroffs contended that the order of the District Court authorizing interception of wire communications under Title III was invalid, first because of various inaccuracies and second on account of substantive defects. As to inaccuracies:

1. The date on the order read: "this 17th day of .....,19...." The month and year were omitted.

2. The application signed by the Attorney for the Justice Department did not bear a jurat showing that it was sworn to or by whom the oath was administered.

3. Two of the telephone numbers out of the four pay phones tapped were inaccurately designated in the authorization by the Assistant Attorney General to the Justice Department Attorney to apply for the interception order.

4. In the authorization for the application, the Attorney General and the Assistant Attorney General were not mentioned by name.

As to invalidity of the order because of substantive errors:

1. It lacked particularity in describing the conversations to be seized.

2. The application was accompanied by a detailed affidavit of a Justice Department Attorney, but the statement of the F.B.I. special agent was unsworn.

3. The application did not show that normal investigative techniques would have been insufficient.

4. The objective was achieved after two days of interception, but the wiretap continued for another four days.

5. Probable cause for issuance of the order was not established.

6. Title III was unconstitutional under the Fourth and Fifth amendments to the Constitution.

Briefs were filed in March, 1970 and the Court of Appeals handed down its decision on June 18, 1970. It held that the Court of Appeals had no jurisdiction to entertain the appeal and remanded the case to the District Court; the interlocutory order was not appealable. The Court of Appeals declined to make any substantive ruling on the validity of the order or the constitutionality of Title III.[1]

United States v. Escandar et al[2]

This case in the United States District Court, Southern District of Florida, developed from an investigation of the Bureau of Narcotics and Dangerous Drugs (BNDD) to find and apprehend individuals who were supplying defendants with narcotics. Defendants entered pleas of nolo contendere to various charges, reserving the right to move to suppress evidence seized as a result of interceptions made on the home telephone of the defendant Escandar, and on the pay telephone in the lobby of the apartment building where Escandar resided. Two wiretap orders were obtained. The one on the home telephone authorized wiretapping for a period not to exceed twenty days, and an extension for fifteen days was thereafter granted. The second, on the public telephone, also authorized tapping for twenty days, but permitted interception only when surveillance by Special Agents of the BNDD indicated that

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[1]427 F. 2d 1140.

[2]319 F. Supp. 295 (1970).

Escandar was in the building and when by voice recognition it was determined that he was using the public phone. A pen register on the home phone and a touch tone decoder on the pay telephone were also authorized. The objective of finding the sources of supply of drugs sold by Escandar was never attained.

Defendants contended at the hearing on motions to suppress that:

(1) Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was unconstitutional on its face in that it violates the First, Fourth and Fifth Amendments to the Constitution; (2) assuming that the statute satisfies the Constitution, the provisions of Title III were not complied with; and (3) there was no probable cause on which to base orders of interceptions of wire communications on the two telephones. The United States District Court denied the motions to suppress, holding that Title III was constitutional on its face, and that it was constitutional as applied in this case; that the affidavits, orders, and execution of the interceptions were in substantial compliance with Title III; that the interceptions were reasonable under the Fourth Amendment, and that there was probable cause for authorizing the interceptions.

As to the constitutionality of Title III on its face under the First, Fourth, and Fifth Amendments, Judge Mehrtens' opinion stated:

> The Constitutionality of Title III depends primarily on whether it complied with the requirements of the Fourth Amendment to the United States Constitution and the Supreme Court's pronouncements in Berger v. New York . . . Katz v. United States . . . and Osborn v. United States.

Defendants had raised the following Fourth Amendment objections:

1. Title III failed to provide traditional requirements of adequate particularity.
2. Title III ran afoul of restrictions on length of surveillance as discussed by the Supreme Court in Berger.
3. Title III allowed an indiscriminate and overbroad search.
4. Title III permitted an unconstitutional search since both ends of a communication are overheard when a phone is tapped.

All of these objections were rejected. The Court stressed the fact that judicial control "so necessary to any valid scheme under the Fourth Amendment," is amply provided for in Title III. The statute clearly limits the scope and duration of the interception; "only where the criminality is lengthy and continuous may the intercept be lengthy and continuous." If the original warrant is valid and its execution properly carried out, seizure of non-related criminal evidence is permissible.

> Title III . . . does not violate the Constitution simply because communications not otherwise the subject of seizure are overheard during the course of a valid search.

Judge Mehrtens also rejected defendants' claim that Title III operates as an unconstitutional deprivation of free speech as protected by the First Amendment to the United States Constitution; that fear of electronic surveillance

inhibits the exercise of rights guaranteed by the First Amendment.

> Fear of electronic surveillance . . . is not a direct limitation of free speech . . . discriminating law enforcement surveillance under a statute replete with procedural safeguards is far different than indiscriminate law enforcement and private surveillance. Furthermore, it has long been recognized that some restriction on First Amendment rights is necessary in community living . . . the right of privacy must give way when it is not consistent with a particular aspect of society (citing Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456).

The Court considered it significant that neither Berger nor Katz placed any reliance on the First Amendment in its discussion of what is needed to draft a constitutionally satisfactory electronic surveillance statute.

The claim that Title III violates the Fifth Amendment to the Constitution because it seizes incriminating testimonial statements was dismissed summarily:

> (T)he provisions of Title III relate to searches and seizures rather than interrogation. The Supreme Court has never held that statements made to one who is not a law enforcement officer are inherently in violation of the Fifth Amendment . . . in Berger and Katz, the Supreme Court has treated statements seized by virtue of electronic surveillance as a search under the Fourth Amendment . . . Where electronic surveillance is employed, a court need not consider questions of custodial interrogation and the voluntariness of a waiver.

Having upheld the constitutionality of Title III on its face, Judge Mehrtens' opinion turned to the defendants' claim that even if Title III were deemed valid on its face, it was applied and executed in an unconstitutional manner for the following reasons:

1. Agents of BNDD testified that they were "unclear as to the details of the authorized objectives of the interception." Not knowing the specifics, they were unable to terminate interception on attainment of

the authorized objective. The interceptions were unreasonable.

2. The affidavits failed to show that normal investigative procedures were inadequate or would be futile.

3. Probable cause had not been established for the interceptions; reliability of the informant was not shown but stated as a conclusion.

All of these objections were rejected by Judge Mehrtens in his opinion:

> Although it is true that the monitoring agents were not able to relate the specific statutes involved in the orders authorizing the interceptions, they did know that the purpose of the interceptions was to find the sources of supply of drugs sold by Escandar . . . Whatever the transitory vagueness of the monitoring agents' knowledge regarding the specifics of the interception orders, the presence of tight control by the authorizing court more than amply fulfilled the requirements of the statute and reasonableness under the Fourth Amendment.

The Court also found the affidavits sufficient as to "normal investigative technique" requirements. As to "probable cause," the Court looked at the affidavits "as a whole" and found them sufficient to establish reliability of the informant.

The motions to suppress the eavesdrop evidence was denied in all respects.

United States v. Tantillo et al

This narcotics case developed from an investigation by the Bureau of Narcotics and Dangerous Drugs (BNDD).[1] It warrants detailed consideration, for the Government considers it a basic test case under Title III that will reach the

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[1] In the Johnson Administration the Bureau of Narcotics and Dangerous Drugs was shifted from the Treasury Department to the Department of Justice. New York Times, December 28, 1969, p.28.

United States Supreme Court, and has spent a vast amount of money and manpower in its prosecution. Application for an order authorizing wiretapping was prepared by a special Assistant United States District Attorney in charge of "major crime unit" matters in the District of Columbia. It was accompanied by an affidavit executed by an agent of BNDD setting forth facts based on information obtained by overhearing conversations between an informant and one "Lawrence Jackson." A radio transmission device was concealed on the informant, and in these overheard conversations Jackson made two sales of heroin, one a half ounce and the other a full ounce.

The wiretap order was signed by Judge William B. Jones of the United States District Court on July 9, 1969, authorizing the tapping for a 30-day period of telephones allegedly used to conduct an extensive narcotics enterprise.[1] It was the first wiretap under Title III installed in the District of Columbia and was believed to involve one of the largest distributors of heroin and other drugs in the District. The judge required a progress report at specific intervals. On July 15, 1969 Judge Jones formally sealed the application, supporting documents, and the order. The Court was to retain custody during the interception and then transfer the documents to the Clerk of the United States District Court, to be kept for ten years from July 9, 1969. Disclosure of the documents was prohibited to all except those showing

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[1]U.S.D.C., Misc. 71-69 and 72-69.

good cause to Judge Jones, or in his absence, some other judge of competent jurisdiction. In August, 1969, the Government sought antecedent justification for interception of communications at a related telephone. The interception was authorized by Judge Jones and an extension was granted.

Interception of telephone conversations continued for thirty-eight days (thirty under the order, plus an 8-day extension), seven days a week, twenty-four hours a day. Between 6,000 and 7,000 telephone calls were intercepted, a high percentage of which the Government claims was related to the purpose of the wiretap. The agency monitoring the recordings (BNDD) rented an office about a mile away from the tapped telephones for listening to the recordings. On August 21, 1969 Judge Jones received ninety-one reels of tape of conversations intercepted on one telephone and fourteen reels on the other. These were sealed and transmitted to the Clerk of the District Court by order of August 27, 1969, to be kept by him for ten years. The following day Judge Jones entered an order authorizing a deputy clerk to transmit the reels of tape from one of the phones to law enforcement officials to have a duplicate made. Duplicates of the tapes on the other phone had been made contemperaneously with the interceptions. An expert assigned by the Department of Justice transcribed all the intercepted communications, covering a total of over 15,000 pages. Three hundred hours were required to play all the recordings.

As a result of the wiretapping, over fifty defendants were charged in five separate cases with conspiracy for

illegal distribution of narcotics. The first case (United States v. Tantillo et al) involves seven defendants reputed to be "major domos," that is, high echelon members of organized crime. They were indicted on December 12, 1969. Enrico Tantillo and another defendant, Carmine A. Palladino, are said to be members of the Mafia. Federal agents claim that Tantillo is a large-scale wholesaler of heroin and that they found him in possession of a kilogram of cocaine. The second case includes seventeen "lieutenants," persons who perform major functions in a crime syndicate; the third, fourth and fifth cases each have ten lower-echelon defendants charged with buying narcotics from the organization for resale.

The Tantillo case has received a great deal of publicity in the newspapers of Washington, D.C. and elsewhere. After the indictments, Senator McClellan made the following comment:

> When one series of wiretaps can bring to book two members of La Cosa Nostra, a major wholesaler, a crooked policeman and an assorted group of other criminals, never again should anyone doubt that wiretapping is necessary to break the back of organized crime's exploitation of our people.[1]

A defense counsel expressed his indignation at this public pronouncement in an interview, characterizing the Senator's statement as extravagant, premature, and prejudicial; obtaining an indictment in one narcotics case in the District of Columbia is not proof of need for or effectiveness

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[1]Quoted in Reader's Digest, June 1970, pp.81-85.See also Congressional Record, September 3, 1969, S 1020-5.

of court-ordered eavesdropping in "breaking the back of organized crime."

The case of United States v. Tantillo was filed with the Clerk of the United States District Court for the District of Columbia on February 6, 1970.[1] Judge Aubrey Robinson, a Negro, was assigned to hear the case. He issued a protective order on February 10, 1970 removing all papers from the Clerk's office into his chambers and directing that all future documents be filed with the judge. Tape recordings and related materials were unsealed by the Court for the limited purpose of pre-trial preparation. Recordings to be played for the parties were to stay under Court control as the Court deemed necessary. Contents of materials were not to be disclosed to anyone but those connected in good faith with the prosecution or defense of the case.

Pre-trial conferences were held and a schedule set up to handle the difficult and contested procedural problems. A date was fixed for formal filing of the motion to suppress eavesdrop evidence, after giving defendants and their attorneys sixty days in which to listen to the tapes and additional time to read the complete transcripts. The Government had one month in which to respond. Argument on the motion was set for August 3, 1970 and the trial scheduled to begin August 10, 1970. Defendants were represented by various well-known New York and Washington criminal lawyers, some white and some black. The "major crimes unit" assigned four

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[1] U.S.D.C., Criminal Case No. 1912-69.

United States attorneys to devote full time to preparation of the case.

A copy of the entire transcript was furnished to counsel for defendants and all the tapes were played for them. Portions were replayed for further study. In addition to the chronological transcription of the recordings, the Government made available a specific transcription of parts that it believed were particularly relevant to the charges made. A spokesman for the United States Attorneys handling the case said in an interview that the Government had gone out of its way to give defendants every opportunity to prepare their case fully, explaining:

> This is a key case on wiretapping and one in which all of Title III may be at stake.

Defendants' counsel on their part had pressed vigorously to be permitted to hear the recordings and read the transcript in order to prepare for the motion to suppress and the trial.[1] The Government claimed it was doing everything possible to minimize invasion of privacy:

> There is great concern on the part of the United States Government for the rights of the people whose voices are recorded on the tapes, and a tremendous effort is being made to see that they do not suffer any greater invasion of privacy than is absolutely necessary. That is the only way the statute (Title III) can be held constitutional (italics ours). If

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[1] In addition to the motion to suppress, defendants made various other motions: for disclosure and discovery; for bill of particulars; production of grand jury testimony; severance of trial of one of the defendants; sequestration of the jury; for dismissal of indictment or change of venue because of sensational publicity.

> the U.S. Supreme Court finds the Government has been "sloppy" about protecting the privacy of individuals, all of Title III may fall (italics ours).

According to defendants' counsel, the Government had trampled on constitutional rights of privacy. Narcotics agents, said one of the attorneys, listened to the recording with "manic enjoyment" while problems of birth, life, sex, and death passed over the wires indiscriminately.

> If you wiretap for such a long period (thirty-eight days) you get a great number of people who talk on the phone--incoming or outgoing calls. A husband and wife or a guy and his girlfriend may talk for a couple of hours. It exposes the most intimate facts of their lives, often pathetic facts. The Government seems to believe nothing is privileged, that they do not have to select. It thinks that if the people they are listening to are suspected of crime and the phone is believed to be a business phone, they can listen to everything and don't have to stop.

Hearings on the motion to suppress eavesdrop evidence continued before Judge Robinson for six consecutive weeks, with the press excluded during the entire time. Most of the hearings were devoted to the issue of whether or not the statements in the affidavit were, in fact, correct or reasonably thought to be correct. The Judge then deliberated for a week and wrote a draft opinion upholding the wiretap and finding it in all respects constitutionally in conformance with Title III. The opinion denying the motion to suppress was delivered orally from the bench on September 21, 1970.

Several important issues regarding authorized eavesdropping surfaced at this preliminary stage:

1. Should defendants have access to the entire recording and to the entire transcript?

2. Should such access be given before formal motion to suppress is made?

3. If full disclosure is made of tapes and transcripts, how can the privacy of individuals whose conversations are overheard be protected?

In the Tantillo case, after conferences with the Judge, the Government disclosed the entire recording and transcript, and access was permitted in advance of formal motion to suppress. In an attempt to balance the needs of defendants for disclosure and the rights of innocent persons overheard on the tapes, only two copies of the transcripts were made available to seven defendants.

Mechanical problems in presentation of the intercepted conversations were anticipated by both sides. A defense counsel said in an interview before the trial began:

> You would be amazed at how much of it is inaudible and unintelligible. In wiretapping a face may be too close or too far from the phone to get a clear recording. The conversation recorded may take place in a bedroom where a television set or radio is going full blast. The listener sometimes is not sure whether he is hearing the phone conversationalist or the broadcaster. Musical background may interfere with the sound. The equipment itself sometimes breaks down entirely.

Voice identification was also foreseen as presenting difficulties. Substantial disagreement could develop as to who is who on the telephone, particularly in the case of lengthy tapes on which numerous people appear and reappear.

> You have to listen a long time to know the various names they go by. A voice says: "This is Bobby." It does not mean that it is Bobby. Five people call and say it is Bobby. The same voice can change. A speaker can be high, drunk, mad, giddy; he sounds different at 10 A.M., midnight, and 4 A.M., and depending on whether or not he is alone. There is the problem of white people identifying black voices . . . to whites, blacks tend to sound alike.

Serious dispute was expected with respect to "incriminating statements." If selection must be made of portions of the tape to be played in presenting evidence, when is a call "incriminating"?

> A voice says: "Did you meet R. and give her that thing"? What does it mean? In one second a conversation may include what someone may consider an incriminating phrase, and then the parties go on and talk about something personal.

The trial in the Tantillo case began October 14,1970 before a jury of two whites and ten Negroes, a racial proportion not considered extraordinary in Washington, D.C. with a 70% Negro population. The same racial balance appeared among alternate jurors. Women predominated on the jury three to one. The first few days of the trial were taken up with testimony as to installation of the wiretap and monitoring device. The Government then placed on the stand the informant who had furnished the Narcotics Bureau with the facts on which the wiretap order had been based.[1] Defendants had attacked the identity and reliability of the informant in the motion to suppress. Cross-examination of the informant revealed that he had been arrested twice in July 1970 in New York on narcotics charges without advising the Department of Justice, although he had during that time collected payments from the Justice Department for alleged services. He claimed that when he had testified several days before, the arrests had not "come into his mind."

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[1] This is unusual, since an informant's usefulness is ended if his identity becomes known.

The Government now faced the tactical, logistical problem of how to present the wiretap evidence to the jury. Defense counsel had indicated in a pre-trial interview the questions that would have to be met:

> Can they simultaneously present the recording of a telephone call and their explanation of what it means? How long should the Court permit a tape to be played? Will the Judge stop the playing of a tape whenever he thinks the conversation is not incriminating? In the ordinary case, when a witness testifies the Judge can control the questioning and stop it when it is irrelevant.

Government representatives had spent months weighing the alternatives. "A totally new problem is presented every step of the way, and no one knows the right move from the wrong," said one of the United States attorneys. Should there be amplifiers in the courtroom if the recordings are not sufficiently audible? Should the tapes be played to the jury through earphones? Is a reading of the transcript to the jury enough without playing any of the tapes? What is the status of the transcript?

The Government claimed that the law permitted introduction of the transcript as testimony to avoid repetitive replays. It offered the transcript as a guide to the jury. The defense contended that the jury should be barred from viewing the transcript since it was merely the Government's "hypothesis" as to the meaning of the recordings; that the jury should be permitted to listen to the tapes without being influenced by the Government's version of the

conversations.[1] After extensive conferences at the bench and in the Judge's chambers, the Court established the following procedure:

1. The transcript was withheld from the jury. Selected conversations from the tapes were to be replayed to the jury.

2. The Government placed two amplifiers in the courtroom, directly facing the jury.

3. The Government set up a chart, about five by seven feet, showing the meaning of words, phrases, and code terms used in the intercepted conversations, subject to objection by defense counsel.

4. The Judge listened to a tape recording in his chambers, in the presence of counsel on both sides, and ruled as to each conversation--whether it was relevant, incriminating, and admissible in whole or in part. Only admissible conversations or parts were to be replayed.

5. Any juror could ask for a replay of a conversation found inaudible or unintelligible.

Judge Robinson delivered an explanation to the jury:

> With respect to the recording you are about to hear, the Court has already determined their admissibility . . . you are to consider these along with other evidence. . . . on some you will hear a completed telephone call; on other telephone conversations you will hear parts, maybe the first part of the intercept and a later part and maybe not that in between. With respect to every recording . . . any individual member of the jury may indicate if (you) desire it to be repeated . . . It will require your close attention.

He also warned members of the audience that a high degree of

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[1]Some State court decisions indicate that a transcript may be given to the jury while it is listening to tapes, but in these cases the transcript was relatively brief. In the Tantillo case, it was very lengthy, and the transcript was made by the Department of Justice, not by a certified Court Reporter. Various changes were made in the transcript from time to time. Defense counsel claimed there were inaccuracies and omissions in the transcript.

cooperation would be required; that no one would be permitted to enter or leave the courtroom during the playing of any one recording.

A special agent of the Bureau of Narcotics and Dangerous Drugs took the stand and qualified as a voice expert. He testified that he had been assigned to review the tape recordings taken from intercepts in the Tantillo case. For a total of 550 hours over a period of 5 months, between September 1969 and February 1970, he had listened to all the conversations, noted the voices, made transcriptions. In the Spring of 1970 over a period of three months he had listened for an additional 75 hours to the tapes selectively, made notes of parts of conversations, and had done the same subsequently for another 75 hours.

Question by
Government counsel: Are you prepared to play some of the calls from the original tapes?

Answer: Yes.

Question: How did you arrange to play the tapes?

Answer: I will announce the date and time of the call, whether it was incoming or outgoing. My associate, Mr. . . . will play it.

The voice expert then explained the procedures he had used to become familiar with the various voices on the tape. As he played the recordings, he said, he became familiar with voices so that he recognized them. If he could not recognize a voice, he replayed the tape. Two recorders were used to help identify the voices; first one recorder would be played and then the other. The witness

gave the date, time of the first telephone call to be played, an incoming call on telephone number . . ., and the playing of the recordings began.

Question by the Government: How many voices do you recognize?

Answer: Two voices. The first calls himself Bob.

Question: The one who called himself Bob. Are you familiar with that voice?

Answer: Yes.

Question: Are there other conversations with the person "Bob?"

Answer: Yes. Bob and Bobby are different.

The next telephone call was then identified in a similar way as to date and time, an incoming call on a designated phone number, and it was played to the jury.

Question: How many voices do you recognize?

Answer: Two voices. The first person--that was the caller. The other person was "Lawrence."

Question: Will that name appear in the conversations to be played?

Answer: Yes, many times.

The jury continued to listen to the conversations, one after the other. The voice of "Lawrence" was identified in many of them. Not a single juror requested a replay. When Court adjourned after the first day of playing the recordings to the jury, both sides were asked in a private interview whether they believed the jury had understood the conversations. To the press and spectators sitting in the front row, a few feet away from the jury box, the tapes were largely unintelligible. Occasionally a few phrases came through

the amplifiers with reasonable clarity:

> Say, who dat? How be ya? Hey, hello. What's up? I tell ya what. Whozis? OK. G'bye.
>
> Bob, are you asleep? What did ya call for? Did ya call Lawrence? Did he come? Did ya really make it? What ya want me to do? Where d'ya get it? Ya wanna be here? Be here. I say 300. OK. If you can get down. Awright.

Government representatives and defense counsel were sure that the conversations were clear to the jurors sitting directly in front of the two large amplifiers and familiar with Washington "dialect." Selected conversations were played to the jury for more than a week. Other witnesses appeared for the prosecution to corroborate the eavesdrop evidence. The defendants did not take the stand, nor did any witnesses testify in their behalf. Defense counsel rested on the insufficiency and illegality of the evidence submitted by the Government. After a trial that had lasted two months, the jury brought in a verdict of guilty for all seven defendants, three men of Italian descent and four Negroes, one of them a woman.

During the trial the Court permitted various documents in the Tantillo case to be released from the protective order of secrecy and remain on file in the office of the Chief Clerk of the United States District Court, Criminal Division. The reason given was that defendants in later cases resulting from the same wiretap should be allowed to examine the papers on special request in the Chief Clerk's office in preparation for trial. The application, affidavits, and order for the wiretap were not among them. Asked for an

explanation as to why these documents continued to remain secret when their contents was discussed fully in other instruments released, a defense counsel said:

> We are in complete confusion as to what is secret and what is not. We have put the burden on the judge and he is in agony.

The Government had objected to release of any document; secrecy of all records was urged to avoid the charge that the privacy of innocent persons was unduly violated. Memoranda in support of and in opposition to the motion to suppress, examined at length in the Chief Clerk's office in Washington, D.C., offer a convenient starting point in applying the empirical data supplied by the Tantillo case to the issues of practical operation and constitutionality of Title III.

In support of the motion to suppress eavesdrop evidence, defense counsel contended:

1. That eavesdropping is per se a violation of a constitutional right.

2. That even if a statute could be drafted that satisfied constitutional requirements, Title III had failed to do so; that it contravenes the Third, Fourth, Fifth, Sixth, and Ninth Amendments to the Constitution.

3. That the wiretap order and affidavit on which it was based did not comply with the requirements of Title III; that the application was defective, insufficient, false, and erroneous.

4. That the interception was not conducted so as to minimize improper, unauthorized, unwarranted intrusions as required by Section 2518(5).

5. That there were or may have been intercepts of wire or oral communications without judicial sanction in violation of Title III.

As to the first two items listed above, the defense relied heavily on an article in the University of Pennsylvania Law Review of December, 1969.[1] The 30-day period of interception, with an unlimited number of extensions, as permitted by Section 2518(5) was claimed to contravene Berger and Katz. The provision of Section 2518(4) requiring the order to specify the type of communication sought violated the particularity requirement of Supreme Court decisions. Power of the Court to postpone indefinitely the 90-day notice to aggrieved persons under Section 2518(8)(d) was said to be unreasonable.

As to item (3), the affidavit and order were attacked for failure to show probable cause, lack of facts to prove that normal investigative procedures were inadequate, and absence of particularity as to conversations to be intercepted. The defense claimed that the affidavit was neither factual nor truthful; that it misled the judge who signed the order. The affidavit alleged that the telephone to be tapped was used for criminal activities from Mexico to Laredo, Texas, to Washington, D.C., but no such transactions occurred in the intercepted conversations. The claim that normal investigative techniques would not succeed was contradicted by the extensive surveillance carried on in the investigation and the fact that without wiretapping the Government

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[1] Ralph S. Spritzer, "Electronic Surveillance By Leave of the Magistrate: The Case in Opposition," University of Pennsylvania Law Review, December, 1969, Vol.118, No.2, pp. 179-186.

generated two narcotics sales transactions carrying heavy penalties. As to particularity, the application merely stated that there would be a conversation in violation of some narcotics law; it did not describe the particular communication sought, nor the class or nature of the conversation. In fact, argued the defense, it is impossible to describe a telephone conversation sought with particularity.

In conclusion, the interceptions were declared by the defense to be "a massive set of intrusions run continuously" which allowed the monitoring agents to hear everything that came over the wires.

The Government submitted a 150-page memorandum in opposition to the motion to suppress eavesdrop evidence. It sought to prove, first theoretically and then empirically by the facts in the Tantillo case, that court-ordered eavesdropping is constitutionally permissible and that adequate safeguards are provided by Title III to satisfy constitutional requirements. Justification for the scope and length of the interceptions--thirty-eight days, seven days a week, twenty-four hours a day--was the Government's chief concern, for such continuous and extended eavesdropping opened the door wide to an attack that the right of privacy had been unduly invaded. The Government wanted to show that it elicited conversations related to the purpose of the wiretap. An intricate statistical analysis of intercepted conversations was constructed to show that narcotics-related calls

were spread continuously through the entire 24-hour period every day of the week. Some of the 7,000 conversations intercepted were admittedly non-incriminating. Instead of classifying them as incriminating or non-incriminating as is done in the Report to Congress,[1] the Government grouped the conversations in seven categories, three relating to narcotics distribution, three unrelated, and one ambiguous, as follows:

1. The substance of which reasonably concerned the illicit narcotics distribution scheme.

2. Communications a part of which reasonably concerned the illicit narcotics distribution scheme, utilizing the tapped telephone network.

3. No reference to the trafficking operation, but of particularly crucial evidentiary value--identification of name, telephone number, etc.

4. Might relate to trafficking, but vague, ambiguous.

5. No part relates to trafficking enterprise utilizing the tapped phones. Contains communications which in themselves constitute criminality of another sort or refer to other criminality.

6. Weather recordings, time recordings, Telephone Company recordings.

7. Communications no part of which reasonably related to the trafficking operation or to other criminality.

In five Tables the Government showed how many conversations dealing with narcotics occurred each day, and how many occurred during each 6-hour period of the day. Table I presented a breakdown of the seven categories with totals for each of the 38 days of interceptions. It showed that on an average day, 129 calls were received, one every 12 minutes.

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[1] See page 460.

For only 6 of the 37 full days of intercepts were fewer than 100 calls made and received over the phone network. The daily number of communications was considered important in assessing the degree to which the phone was of a continuing nature. Tables II, III, IV, and V were identical with Table I except that they covered 4 6-hour periods: 12:01 A.M. to 6 A.M.; 6 A.M. to noon; noon to 6 P.M.; 6 P.M. to 12:01 A.M. These tables showed the content of communications for each of the 152 6-hour periods during the entire intercept. The Government analyzed the conversations statistically to show how many conversations relating to narcotics activity actually occurred each day, and also during each 6-hour period. The particular call served as the basic unit of content, regardless of length of the conversation. Hundreds of calls were non-communicative, the caller hanging up after the answerer said "Hello." Summarizing the Tables, the Government found:

4,910 calls intercepted were sufficiently communicative to permit content analysis.

1,999 (41%) related in substance to the trafficking operation.

310 (6%) related in part to the trafficking operation.

46 (1%) were of mere evidence value.

1,792 (36%) were ambiguous.

143 (3%) were unrelated to the trafficking operation, but referred to other criminality.

More than 100 purchasers, it claimed, negotiated thousands of narcotics transactions, revealing the characteristics of a vigorous commercial enterprise, and constituting

a continuing offense that justified continuous wiretapping. If a planned narcotics activity was carried on day and night by sophisticated operators who were skilful in employing counter-investigative techniques, then eavesdropping without interruption over an extended period of time, said the Government, was not overreaching under the rulings of the United States Supreme Court.

The Government's memorandum described the counter-investigative techniques used by the suspects. They were concerned about police surveillance, tried to locate police through binoculars, to identify their license numbers, and became circumspect. In an intercepted conversation, one said:

> Ain't nobody making money ain't being observed some kind of way.

It was claimed that suspects used the device of changing automobiles, decoyed surveilling vehicles, avoided daylight deliveries of customers' orders, had a warning system,and were confident of neighborhood support. They avoided dealing with individuals on probation and checked arrest warrant lists. Drugs were kept at a "stash," not at headquarters, and when too many people knew the location it was moved to a new place. The Government claimed that suspects also had weapon protection. All the parties suspected the existence of the wiretap. One said, in an intercepted conversation: "Mine is tapped, I know that."

Sometimes they spoke directly to the monitoring agents: "Hey, excuse me, Mr. Fed." Despite the strong

suspicion of wiretapping, the telephone continued to be used to effect narcotics transactions. Overt reference to drugs, however, was avoided, and code words were used. The Government concluded that Title III on its face comported in all respects with the demands of the Fourth Amendment; that it adhered rigidly to the judicial process, met the requirements of Katz and Berger, and that the Government conformed its conduct to the demands of the statute.

The Government admitted that "value predispositions and pure subjectivity" could easily find their way into its analysis, but asserted that a determined effort had been made to eliminate these factors. All Fourth Amendment questions involved a balancing of interests and reasoned "accommodation of competing values," the need to search as against the invasion of privacy which the search entails.[1] In wiretapping in the Tantillo case, argued the Government, this balance had been achieved.

Denial of the motion to suppress eavesdrop evidence resulted in a trial that lasted two months, involving tremendous expense, and postponement of appeal by the defendants until after trial. Would the balancing process have been better served if the motion to suppress had been granted? The Government could then have taken an appeal and the Supreme Court might have decided the issues raised by Title III at once. A Government representative in Washington aptly termed

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[1] Citing Camera v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). This case held unreasonable a warrantless inspection by city housing authorities in the absence of any emergency.

the question of choice open to the United States District Court judge as one of "functional judicial management." Judge Robinson simply decided to give the defendants their day in Court. Why did the Federal Government not arrest Lawrence Jackson as soon as it had evidence of conversations effecting two illegal sales? Its answer is that with the tool of court-ordered eavesdropping it was possible to reach the narcotics suppliers as well as the wholesale dealer. Defense counsel claims this is in violation of Title III.

The ultimate fate of Tantillo and Title III will hang in the balance while the test case makes its way to the Supreme Court. The Government believes that if the conviction of the defendants is upheld the District of Columbia will be a better place in which to live. It sees the defendants as leaders of organized crime. Defense counsel retort that the "community has as great a concern with the erosion of personal freedom, privacy, and dignity by arbitrary policy practices as it does with vigorous law enforcement." The defendants are little people, they say, poor, low-echelon victims of narcotics traffic whom frustrated Government agents want to see in jail rather than face the social problems of drugs and poverty.

A social interpreter is needed, says a defense attorney, to sort out the racial overtones of the Tantillo case; there are racial implications in the Government's assertion that normal investigative procedures are inadequate in a ghetto area and that wiretapping is needed. Even among defense counsel, all of whom oppose wiretapping, a difference of

attitude is said to exist, depending on whether he is white or black. White civil libertarians argue the constitutional issues and practical problems of Title III on an intellectual level. The Negro Bar in Washington, D.C. considers wiretapping an aspect of discriminatory law enforcement practices and senses racial and ethnic undercurrents in the vigor with which the Government prosecuted in the Tantillo case.

8. Federal Action Against Private Eavesdroppers

The provisions of Title III banning eavesdropping by private individuals have been discussed on page 127 et seq. In the Department of Justice in Washington, D.C., complaints against private eavesdroppers are handled by the General Crimes Section, Criminal Division. This Section reports that it receives an average of about thirty complaints of eavesdropping a month. About half of them are terminated after preliminary investigation, either because the complaint is not substantiated or because the circumstances of the violation do not warrant disposition as a Federal felony. Only about 10% of the complaints reach a point where some prosecuting action is necessary.

According to an attorney in the General Crimes Section who monitors this statute, an active enforcement program is maintained, since the Justice Department has a keen interest in securing the objectives of Section 2511 and Section 2512 of Title III of the Omnibus Act of 1968. He said the prime targets for Federal prosecution are professional eavesdroppers and suppliers of illicit devices. Initially, instances of apparent inadvertent violations by advertisement were handled

on a compliance basis; letters were sent to the supplier and to the publication calling the statute to their attention. The response was generally cooperative, although in one instance a supplier of a mini-transmitter mike disguised as a toy cockroach was perturbed to learn that the "toy" was an illicit item. Currently, the minimum action is forfeiture of the offending device, for all should now be aware of the prohibitions in Title III. The first forfeiture action involving a West Coast distributor of electronic supplies was completed in November 1970.

Competitors are a common source of complaints. An advertiser against whom a charge has been made and who has been forced to cease advertising and selling a product may then proceed to point the finger against his competitors who may also be violating the law. On a number of occasions professional investigators have provided information on illegal interception activities of their competitors. Investigative reports indicate an awareness among professionals that Section 2511 of Title III is a more effective vehicle for prosecution than the old Sec. 605, and they are generally more reluctant to engage in interception activities.

Section 2512 of Title III bans "any electronic, mechanical, or other device" where the private individual knows or has reason to know "that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire or oral communications." Under this standard borderline cases are bound to arise. In one instance a manu-

facturer proposed to market a burglar alarm which operated on a principle embodied in a notorious interception device. The size of the alarm made it less useful for surreptitious interception than the illegal device itself, but there was considerable potential for abusive use of the alarm. Concluding that the legitimate utility of the device outweighed the risk of such abuse, the Justice Department took no action to prevent production of the alarm. Indication of widespread and general use of the alarm for interception would, however, be the occasion for reappraisal to determine whether the device did in fact come within the prohibition of Section 2512 of Title III.

Most prosecutions under Title III against private eavesdroppers involve rather mundane fact situations. Of interest because of the severe sentence imposed is United States v. Romano, D. Utah, resulting in a sentence of six years' imprisonment on a plea of guilty to two counts under Sec. 2511. Romano was a professional investigator. In United States v. Roth, N.D. Ill., the defendant, a former NBC program director, pleaded nolo contendere to a count alleging illegal interception of proceedings of the Platform Committee of the National Democratic Party during the 1968 Convention. Two interesting issues were litigated in United States v. Six, N.D. Indiana. The trial proceeded on stipulated facts: Six, a professional investigator, had purchased in interstate commerce before enactment of Section 2512 a device within the prohibitions of the statute and retained possession of it after enactment of the law. The Court held that prosecution of Six was not an ex post facto applica-

tionoof the law and his failure to dispose of the device within a reasonable time after enactment of the statute rendered his continued possession of the device subject to prosecution. However, the Court held Section 2512 unconstitutionally vague because of inconsistency between the exceptions in Section 2511 permitting some interceptions and the ban in Section 2512 on certain interception devices. No appeal could be taken by the Government, since the dismissal of the case occurred after jeopardy had attached. In United States v. Novel, D. Nevada, the Court found no inconsistency between Sections 2511 and 2512 and rejected Novel's claim that the standard "primarily useful for the purpose of surreptitious interception" was unconstitutionally vague. His appeal is now pending.[1] Novel, a self-styled expert in electronic surveillance, was a figure in the trials of James R. Hoffa and of Clay Shaw in New Orleans.

The General Crimes Section of the Department of Justice reports that the rate of receipt of interception complaints has dropped to about one-third of the number received under old Sec.605 of the Federal Communications Act, and that the rate of successful prosecutions has increased. According to the attorney handling these matters for the General Crimes Section, one disappointment has been the failure of State legislatures to enact comprehensive laws on interception activities. Interception cases are generally matters of local concern. Long-standing failure of a State to adopt

[1] No. 71-1081, Court of Appeals, 9th Circuit.

some scheme to control private eavesdropping may lead to the conclusion that residents of the State favor interception activities. According to the attorney for the General Crimes Section of the Department of Justice who handles complaints against private eavesdroppers, the Federal government may decline to prosecute offenses in such States unless the victim is a non-resident or other factors of special national interest are present.

PART V. EVALUATION, PROPOSALS, AND PREDICTIONS

BASIS OF EVALUATION

Wiretapping and electronic surveillance by their very nature pose threats to privacy and liberty. Title III attempts to provide safeguards in order to minimize these threats, delimit governmental intrusions, and keep eavesdropping at an acceptable level. Is the law in actual practice succeeding? A meaningful evaluation of Title III in operation must deal with the proposition presented at the beginning of this dissertation: that ambiguities in Title III, lack of clear standards, and failure of officials to follow uniform guidelines may create threats to privacy and liberty that are intolerable in a "free society." An impartial review of Title III must analyze all available data in an effort to determine whether the protections offered by the statute are adequate, whether they have been weakened in practice, and in what respect modifications are needed in both law and procedure. In concrete terms, the following questions must be answered:

1. Have procedures outlined in Title III been followed by Federal and State officials? What changes in practice are needed for such compliance? Is compliance possible as a practical matter?

2. Which, if any provisions of Title III have proved to be ambiguous and require clarification?

3. Has Congressional intent in enacting Title III been carried out? Has the statute been used to combat organized crime? Serious crime?

4. Have practice and procedure at the Federal and State level complied with Supreme Court requirements in Berger and Katz? Does Title III comply with these requirements?

5. Which provisions of Title III are of mostdoubtful constitutionality? Has interpretation contributed to doubts as to constitutional soundness?

6. Has a reasonable balance been achieved in operation of Title III between the right of privacy and the need for law enforcement?

7. Has the potential for abuse inherent in eavesdropping materialized beyond a point of tolerance for a free society?

These are the elements to be weighed in the present evaluation. Each question will be treated separately, although some of the problems overlap. It is recognized that "value predispositions" can influence unofficial as well as official analysis and evaluation of eavesdropping as a law enforcement technique. Every effort has been made to be as objective as possible, to consider opposing views, and to base evaluation on data gathered in interviews and from questionnaires, examination of applications and orders for eavesdropping, official reports filed under Title III, and documents, testimony, and decisions in test cases that have reached the courts.

Question 1

Have Procedures Outlined in Title III Been Followed?

Interviews with Federal and State law enforcement officials indicate that they try to comply with the procedures set forth in detail in Title III to the best of their ability, and follow the safeguards prescribed as they understand them.[1] They know that the validity of every eavesdrop order depends on such compliance, and that practice and procedure are as important to survival of court-ordered wiretapping and electronic surveillance as the law itself. Irresponsibility in carrying out the procedural scheme can result in establishment of more rigid and severe requirements by the Supreme Court, a development that could spell the end of electronic surveillance as a practical law enforcement tool.[2] However, several requirements of Title III offer wide opportunity for exercise of discretion, and these have been met with varying judgment and skill. Pitfalls presenting the greatest threat to authorized eavesdropping relate to:

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[1]This conclusion is based on a sampling of officials interviewed. It is not unreasonable to deduce that others holding high office obey the law as they interpret it.

[2]Stephen Linzer, "Federal Procedure for Court Ordered Electronic Surveillance: Does it Meet the Standards of Berger and Katz," The Journal of Criminal Law, Criminology and Police Science, Vol.60, No.2, 1969, pp. 203-214.

1. Contents of the application.
2. Time period of the order.
3. Method of monitoring.
4. Termination of interception.

As to contents of application: affidavits prepared by State officials differ in the extent to which detailed and sufficient facts are set forth to show "probable cause" and inadequacy of "normal investigative techniques." No standards of draftsmanship have been available, and each State applicant has to depend on his own competence, experience and ingenuity. Apart from being hampered by the need to keep secret the identity of the informant who supplies the facts, some State applicants seem to lack the training, skill, and awareness needed to prepare applications that could survive attack in the appellate courts. The United States Department of Justice has not concerned itself with State practice and has restricted circulation of its "Manual for the Conduct of Electronic Surveillance" to Federal law enforcement officials. The reasons offered for this policy are not altogether convincing even to some people in the Justice Department. Criteria for proper preparation of documents by State officials may eventually be developed by the Law Enforcement Assistance Administration (LEAA), but the LEAA has no way of compelling State officials to accept its recommendations except, perhaps, to withhold discretionary grants from recalcitrants. Federal applications have probably achieved a higher degree of strict

compliance with Title III because of centralized control and supervision in Washington, D.C. However, not all Federal applications have been of equal quality, as is indicated by the technical defects disclosed in the order challenged in Dudley, Sklaroff v. United States (see page 323). Even in a carefully prepared case such as United States v. Tantillo, the affidavit on which the order was based was attacked as being neither factual nor truthful (see page 330).

As to time period: State officials have frequently asked for the maximum period of thirty days. The majority of Federal orders have been limited to fifteen days, but in the Tantillo case the initial period authorized was thirty days. Many extensions have been granted, and the full period has often been used. Persistent requests for orders covering a longer period than is necessary would appear to frustrate the provision of Section 2518(5) which provides that:

> No order . . . may authorize . . . interception . . . for any period longer than is necessary (italics ours) to achieve the objective of the authorization, nor in any event longer than thirty days.

State and Federal officials claim that an extended period is often needed because the offense is a continuing one, but this proffered justification is placed in doubt by the frank admission of persons interviewed that extensions are not infrequently asked in order to postpone giving notice of the interceptions.

G. Robert Blakey, one of the draftsmen of Title III and the Senate Report, maintains that the 30-day period is not too long if probable cause and the need for thirty days are established. "Experience has shown that it is needed," says Blakey.[1] This claim is difficult to reconcile with the disappointment expressed by Senator McClellan, chief sponsor of Title III, after the first six months of operation that too many orders authorized eavesdropping for the full 30-day period, with one or more extensions.[2] It also prompts the question of why Federal applications are generally limited to fifteen days. Of the thirty-four applications reported by the Federal Government for 1969, only three were for the full 30-day period; sixteen were for 15-day periods, and six were for very short periods ranging from one day to ten.[3] The time was extended in less than half the cases, and in a majority the device was in actual operation for less than the full period authorized. By contrast, most State applications in 1968 and 1969 were for 30-day periods. In Arizona where a 30-day period is permitted, all but one of the 1969 orders ran for that period. In New Jersey, out of forty-five orders

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[1] Interview, Washington, D.C., May 11, 1970.

[2] Congressional Record, August 11, 1969, 91st Cong., 1st sess., Vol.115, No.136, p.4.

[3] Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, for the period January 1, 1969 to December 31, 1969, Administrative Office of the United States Courts, Washington, D.C.

reported for 1969 all but three authorized the full 30-day period. Since enactment of the 1969 law in New York allowing 30-day eavesdropping to conform to Title III, District Attorneys in that State seem inclined to ask for the longest possible period on the assumption that interception can always be terminated sooner if the evidence sought has been obtained.

The Director of the American Civil Liberties Union in Washington, D.C. finds the 30-day period particularly objectionable and insists it does not square with Katz in which the Supreme Court expressed approval of interception of specific, not continuous, conversations. He could not conceive of the Court upholding constitutionality of the 30-day clause unless it was ready to expand the principles in Katz drastically. As to renewability, ACLU would like to see it eliminated entirely:

> The moment you extend a wiretap you are engaging in intelligence surveillance and not really trying to get some specific evidence.[1]

A different view was expressed by the Chief of the Appeals Bureau in a District Attorney's office in New York State. He conceded that one way to protect privacy more effectively was to cut down on the time period. "It is possible that some District Attorneys are applying for renewals automatically and that some judges are granting them in each case," he said. But the 30-day provision is notunconstitutional on its face. In his opinion it seemed

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[1]Interview in Washington, D.C. with Lawrence Speiser, June 15, 1970.

unlikely that the Supreme Court would revert to the approach followed in Berger and abandoned in Katz of merely looking at the face of the law. In case of a continuing conspiracy, more than thirty days might be needed.

The consensus of opinion among those who have given careful consideration to the length of the time period leans toward restricting the period to less than the thirty days now allowed under Title III. Even the conservative section of the American Bar Association (ABA) recommended an initial period of fifteen days in the 1971 "Standards Relating to Electronic Surveillance." The more liberal Criminal Law Section of the ABA had proposed a drastic reduction:

> Surveillance should be limited in all cases to an initial period of five days and to one extension of five days.[1]

The Criminal Law Section of the American Bar Association was also of the opinion that the Standards "should not explicitly recognize that electronic surveillance can be used against continuing criminal activity. If surveillance of such prolonged activity is constitutionally impermissible under Berger, Katz, and Osborn, then thirty days is too long for any order under Title III.

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[1]NewYork Law Journal, February 1, 1971, p.1, col. 6. See ABA "Standards Relating to Electronic Surveillance," recommended by the Special Committee on Standards for the Administration of Criminal Justice and the Advisory Committee on the Police Function, January 1971, p.2.

As to method of monitoring: The continuance of at least some automatic monitoring by State officials would seem to indicate that insufficient consideration has been given to the requirement of Section 2518(5) that interceptions "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception" under Title III. The Federal practice of using two tapes, one a complete recording and the other limited to conversations deemed relevant appears equally ineffective in minimizing interception of innocent, privileged, and irrelevant conversations. In the Tantillo case, only 41% of conversations intercepted related in substance to the narcotics traffic that constituted the offense for which the order was issued, according to the Government's own figures. This is not a wilful failure to comply with Title III requirements; it is based on practical necessity. Congressman Celler's statement of the dilemma merits repetition:

> Until one listens to a conversation it is impossible to know whether it is innocent or not.

Some commentators say that if monitoring is not conducted with intelligence and restraint and innocent conversations are intercepted indiscriminately, the Supreme Court will hold that the invasion of privacy outweighs the legitimate needs of law enforcement. They offer no test to determine at what point interception is "indiscriminate." Eavesdropping inevitably results in overhearing innocent

conversations, and it is asking a great deal--perhaps too much--of monitoring agents to determine without guidelines when permissible limits have been reached.

Administrative regulations are sorely needed to supervise and control the agents who man the monitoring devices in wiretapping and electronic surveillance. Recommendations of the American Bar Association for such regulations, as listed below, reflect the potential and actual abuses resulting from ambiguities in the law and from lack of uniform standards, procedures and sanctions:

1. Limit the number of agents authorized to employ the techniques.
2. Specify the circumstances under which the techniques may be used, giving preference to those which invade privacy least.
3. Set out the manner in which techniques must be used to assure authenticity.
4. Provide for close supervision of agents authorized to use the techniques.
5. Circumscribe acquisition and custody of, and access to, electronic equipment by agents.
6. Restrict transcription and custody of, and access to, overheard or recorded communications by agents.
7. Incorporate into training programs the materials on administrative regulation of agents employing techniques of eavesdropping.[1]

The Department of Justice "Manual for Conduct of Electronic Surveillance" provides some guidelines for Federal agents. State investigators are left largely on

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[1]ABA "Standards Relating to Electronic Surveillance," January 1971, p.25.

their own. What is a monitoring agent to do when legally privileged communications are overheard unexpectedly, such as those between lawyer and client, doctor and patient, husband and wife, or clergyman and penitent. Section 2517(4) of Title III provides that otherwise privileged wire or oral communications shall not lose their privileged character, but as a practical matter this intended protection is extremely difficult to implement. Often it requires legal judgment and knowledge as to the law of the jurisdiction which the agent lacks. The agent can cease listening and recording the moment he realizes that the conversation may be privileged and risk loss of a golden opportunity to get valuable information, or he can continue recording, enter the conversation on his log, and consult the prosecuting officer at the end of the day or the following morning. Precautions against disclosure of the log entry must be taken, and such communications should be excluded from the transcript. The problem may be particularly serious in communications between a lawyer and client accused of crime, for interception may also raise claims of violation of the right to consult counsel.

As to termination of interception: The command of Section 2518(5) that interception shall cease on attainment of the authorized objective presents as serious a practical problem as minimizing the overhearing of innocent and privileged conversations. State and Federal officials invariably claim that they comply with the termination

requirement. The investigating agent who monitors the interception has initial responsibility to determine when the communication sought has been overheard and to end eavesdropping. It is, however, extremely difficult for agents monitoring a recording device to know whether a particular conversation overheard is the one specified in the order and whether it will be sufficient evidence to prove the covered offense in a criminal proceeding. On-the-spot judgment must be exercised by the monitoring agent. Ultimate decision to terminate interception is made by the prosecuting official, and the tendency seems to be to continue the interception for the period authorized in the hope that additional conversations overheard will reinforce the evidence.

Theoretically, the problem areas discussed above are subject to supervision and control by an impartial "magistrate." Judges, like prosecuting officials, try to comply with the procedures outlined in Section 2518(2),(3), and (4). Practical necessity, however, forces them to rely on the integrity and competence of the applicant in determining whether the papers are sufficient for issuance of the order, the time period required, and when eavesdropping shall terminate. A heavy responsibility is placed on judges by Title III, and they have tried to lighten their burden where possible. State judges, for example, rarely, if ever, require formal progress reports, since Section 2518(6) declares these to be optional. Federal orders

usually make such reports mandatory, pursuant to recommendations in the Justice Department Manual. The purpose of a progress report is to enable the judge issuing an order to supervise the interception and to terminate it if it is not productive. Failure of State judges to require such reports may thwart the intent of Congress to provide for continuing judicial control. Since Title III makes no provision for maintaining the secrecy of written progress reports, prosecuting officials may find it advisable to obtain a protective order.

Neither State nor Federal judges have been anxious to retain custody of original documents and recordings, and usually they direct that these be kept elsewhere. The requirement that reports be filed by judges within thirty days after expiration of the order (Section 2519) is generally resented as burdensome and treated in perfunctory fashion. Some State judges relegate this task to the prosecuting officer and merely sign the report. Federal judges, more sensitive to criticism because of test cases in which orders signed by them have been attacked, refuse to discuss the routines established in handling eavesdrop orders. A friendly Federal judge in Washington, D.C. defended the secrecy maintained by his colleagues:

> Remember that people come to Washington . . . when they go back they write an article to blast you . . . that is what people have discovered in Washington . . a lot of people have gotten "gun shy."

This dissertation does not "blast" either judges or prosecuting officials. They have tried to comply with the

procedures outlined in Title III. As a practical matter full compliance has not always been achieved, either because of insufficient knowledge and guidelines or because eavesdropping under Title III presents an almost intractable problem in minimizing invasions of privacy.

Question 2

Which Provisions of Title III are Ambiguous?

A Justice Department attorney who participated in preparing the Manual for the Conduct of Electronic Surveillance called Title III an "extremely confused, badly drafted" piece of legislation. This is, perhaps, too harsh an indictment. Attitudes and intent among those who drafted the Act and those who voted for it differed, and the law as enacted represents a compromise arrived at after extensive hearings and considerable revision in the midst of political turmoil and an atmosphere of "fear of crime." The common problem of expressing Congressional intent without ambiguity was complicated by the necessity of conforming to the requirements laid down by the Supreme Court in Berger and Katz, some of which can be described as "slightly fuzzy." The following problems have proved particularly troublesome and require prompt clarification:

1. Who is entitled to an "inventory"?
2. When may a motion to suppress eavesdrop evidence be made?
3. What is an "incriminating" statement?
4. What is meant by the requirement that the "type" of communication be set forth in the order?

5. Does Title III permit eavesdropping for "strategic intelligence" or for apprehending a suspect?

The question of who is entitled to notice under the inventory provision of Section 2518(8)(d) has been discussed on page 109 . If the person named in the order is the sole individual to whom notice is mandatory, and this right to notice is extended to others only within the discretion of the judge, then some people whose privacy has been invaded by overhearing of innocent conversations may never learn about it, or discover it too late to protect their rights. Such individuals seem to fall within the definition of an "aggrieved person" in Section 2510(11) who may move to suppress "in any trial, hearing, or proceeding" (Section 2518(10) (a)).

The time when a motion to suppress may be made is indicated on page 112 . In the Federal test case of United States v. Tantillo the Court devoted six weeks to hearings on the motion to suppress and disposed of it prior to trial. Similarly, in the New York State Supreme Court case of the Black Panthers, hearings were held on the motion to suppress evidence of intercepted conversations prior to trial (see page 322). In the case of the "Chicago 7," Judge Hoffman refused to consider or rule on the motion to suppress wiretap evidence until the completion of the trial, a highly questionable procedure that is unlikely to be sustained by the United States Supreme Court.

The annual report by prosecuting officials must include the frequency of "incriminating" communications

intercepted (Section 2519(2)(b)(i)). The inference seems to be that if the number of incriminating conversations in relation to total number overheard is large, then the eavesdropping has been effective and interception of innocent conversations has been minimal. The difficulty of determining what is or is not an incriminating conversation has been discussed on pages 249-253 . In the Tantillo case the Government acknowledged that no such simple classification could be made, and even a seven-category grouping did not insure 100% accuracy. Some guidelines are sorely needed to help law enforcement officials in determining whether a conversation is "incriminating."

The requirement of Section 2518(1)(b) that the application shall contain a particular description of the "type of communication" sought to be intercepted, and the necessity for indicating the type of communication in the order (Section 2518(4)(c)) need clarification. If all that is necessary is a statement of the nature of the offense to which the conversation is to relate, then the provisions are meaningless, for details of the particular offense have already been presented in the application. If it means a particular description of a particular conversation, then compliance is in many cases impossible. For a further discussion of this problem, see page 108.

One of the most baffling ambiguities in Title III is whether court-ordered eavesdropping may be used to gather "strategic intelligence." The difference between

strategic and tactical intelligence has been discussed on page 93 . If Title III is directed largely against organized crime and top level members can be identified and reached only through wiretapping as proponents of eavesdropping claim, then gathering of strategic intelligence must have been intended by Congress. Assuming that Congress did intend to sanction such eavesdropping and a wiretap order yielded information on members of organized crime, would the Supreme Court uphold it? It seems unlikely that the Court would give blanket endorsement to wiretapping for "leads." If the objective of an order was clearly to gather such indirect information, it would seem to go beyond the requirements of particularity laid down in Berger and Katz and the order would probably not be sustained. The Court might, however, uphold an order despite incidental disclosure of information as to identity of higher-ups.

In United States v. Tantillo, an order directed against a wholesaler in narcotics yielded the name of an alleged supplier. The Government claims that this is what Title III was intended to accomplish. The defense contends that the wiretap was a broad-ranging fishing expedition barred by the statute and by constitutional requirements. Until the question is clarified as to whether gathering of strategic intelligence is permissible, law enforcement officials would do well to use restraint and seek evidence of a specified offense by an identified suspect. State law enforcement officals who assume that Title III orders

can be used for "leads" should be warned of the uncertainty of their position and the dangers it poses for court-ordered surveillance. It is doubtful whether Title III orders can be used to apprehend a suspect, as distinguished from obtaining evidence as to the commission of a covered offense.

Question 3

Has Title III Been Used to Combat Organized Crime? Serious Crime?

Support for the view that Title III was intended largely to combat organized crime or serious crime has been presented on page 137 et seq. Will R. Wilson, the Assistant Attorney General designated to make Title III applications, says that electronic eavesdropping has been used chiefly in organized crime cases:

> Why is it necessary to resort to wiretapping? To answer this requires an understanding of the nature of the type of crime in which electronic eavesdropping is principally used--organized crime . . . An increasingly higher proportion of investigations are resulting in indictments and convictions of organized crime figures.[1]

Interviews with State and Federal law enforcement officers do not seem to bear out the Assistant Attorney General's claim. According to prosecuting officials, the vast majority of orders were NOT directed at top echelon members of organized crime, since leaders are isolated securely from actual commission of specific offenses. Most State officers admitted openly that they were not even

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[1]Will R. Wilson, "What Wiretaps are Doing for U.S. Today," Congressional Record, May 5, 1970, E 3931.

certain that the targets were syndicate members. Their only concern was to use the tool of court-ordered eavesdropping in cases where investigation showed it might be effective in obtaining evidence for prosecution, and to reach as high up in any criminal hierarchy as possible. If the crime revealed by an investigation was an offense covered by Title III and seemed to justify the cost, the application was made. G. Robert Blakey, chief academic spokesman for eavesdropping, justified the contradiction between the intent of Congress and use of Title III in the following way:

> Organized crime is the reason why we enacted this statute. Without something like Title III we will never reach organized crime. Whether the application of the statute will only reach organized crime does not matter. If the law is applicable and the person is violating the law, you would not want to grant him immunity just because he is not in organized crime.[1]

A New York law enforcement officer with long experience in court-ordered eavesdropping summed up the matter of targeting since 1968 in this way:

> There has been an increase in indictments and convictions; there is much more activity. A lot appears to cover low-ranking members of criminal groups. Some claim there is no intent to indict or convict top racketeers.

One State judge voiced with startling frankness an opinion that had been vaguely intimated by other persons interviewed:

> Law enforcement officials do not care whether it is organized crime or not. Once a statute is on the books it is going to be used to its utmost. Local police have wiretaps on people in the policy game. Most . . . know there is no Mafia in the policy game

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[1]Interview in Washington, D.C., May 11, 1970.

> any more . . . there is not enough money in it because the payoffs to the police are too great.

As to whether Title III has been directed against "serious crime," the reports show that by far the largest number of orders have been obtained in gambling cases. Homicide cases for the entire year of 1969 accounted for about 6% of wiretap orders, as compared with almost 60% for gambling and narcotics combined. In the first seven months of 1970, gambling and narcotics accounted for more than 82% of the total number of wiretaps used in criminal cases by the Department of Justice. The remaining 18% was divided among loan-sharking, interstate transportation of stolen property, counterfeiting, kidnapping, and obstruction of justice.[1] One critic of wiretapping asserts flatly:

> It is simply not true that electronic eavesdropping has been most often used in serious crimes. In New York where it has been used most extensively, it was used for minor gambling and vice offenses.[2]

The validity of this unqualified statement depends on which crimes one considers "serious." If profits from gambling are the source of organized crime activities in narcotics, then gambling and narcotics traffic may be considered serious crimes. To many people, however, gambling is a crime only because the law makes it so, and narcotics is a social problem that can never be solved by electronic eavesdropping.

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[1] New York Times, October 6, 1970, p.1,col.4; p.26, col.4.

[2] Herman Schwartz, Professor of Constitutional Law at the University of Buffalo, Letter to New York Times, July 20, 1969, Part VI, p.29.

Question 4

Has Compliance with Berger and Katz Been Achieved?

The Senate Report on Title III states categorically that the legislation on wiretapping and electronic surveillance conforms to the constitutional standards set out by the Supreme Court in 1967 in Berger and Katz. This article assumes complete sincerity in the attempt of Congress to comply with these decisions, despite doubts expressed to the contrary by opponents of eavesdropping. The drafters of Title III were fully aware of the importance of conforming to Berger and Katz if authorized eavesdropping was to be upheld. Most law enforcement officials are also knowledgeable enough to know that practice and law are inextricably interwoven in eavesdropping and that procedure must also conform to Supreme Court requirements.

Title III seems to have succeeded in codifying the prerequisites laid down in Berger and Katz, with a few possible exceptions. Questions of conformity center around the following subjects:

1. Particularity requirements.
2. Duration of eavesdropping.
3. Lack of requirement for a "return" of interceptions made.
4. Disclosure and use of evidence relating to offenses not specified in the order.
5. Dispensing with need for antecedent judicial approval.

In Berger, the Court made it clear that the order must particularly describe the communication, conversation

or discussion to be seized, in order to discourage indiscriminate prying. Katz did not mention this requirement. Title III demands only a particular description of the type of communication sought, a variation that may be justified by practical necessity. In offenses of a continuing nature, it would be most difficult if not impossible to describe a particular conversation sought. Even if a conversation could be described exactly, it is unlikely that this would inhibit intrusions where eavesdropping continued over a prolonged period. To comply fully with Berger, the particularity requirement would have to be narrowly construed, and strict enforcement would make Title III unusable in organized crime cases. As to gathering of strategic intelligence in the face of the particularity requirement, see page 91.

Critics of Title III claim that a period of interception as long as thirty days, with an unlimited number of exceptions, violates the requirements laid down in Berger and Katz (see page106). There is some merit to the claim that thirty days is too long in investigation of ordinary criminal offenses. Continuing investigation of organized crime, however, may require surveillance for thirty days or longer. If Title III is to reach organized crime, then the 30-day provision must be upheld as constitutional, at least on its face. The period was fixed by Congress as a compromise between extreme proposals ranging from a 45-day period to twenty-four hours, and no change in the period

by Congressional enactment can be expected. The Federal practice of limiting the time to no longer than fifteen days wherever possible is one that States would do well to follow. Use of the full period, with extensions, as a pattern of procedure may be construed by the Supreme Court as showing a lack of concern for unnecessary invasions of privacy.

Title III does not contain any provision requiring the prosecuting officer to report the results of the interception in the form of a "return." The inventory required by Section 2518(8)(d) merely furnishes information as to entry of the order, period authorized, and fact of interception; it need not state exactly what was intercepted. This may create constitutional problems, since Berger criticized the New York statute for failing to require a return, and Katz condemned the failure to notify the authorizing judge as to what had been intercepted.

If information relating to an offense not specified in an order is obtained, it may be disclosed to other investigative or law enforcement officers and used as evidence, on judicial determination that the interception was otherwise made in accordance with the order (Section 2517). This provision is open to the criticism that it is subsequent judicial approval rather than prior justification, and may exceed the limits fixed by the Supreme Court. In Katz the Supreme Court emphasized the need for antecedent judicial approval. This requirement casts some doubt on the constitutionality of Title III provisions dispensing with a court

order in national security cases and for forty-eight hours in an emergency.

Summarizing the answer to Question 4, Congress has tried to conform to the constitutional standards laid down in Berger and Katz, and both Federal and State officials have endeavored to comply with the requirements according to their interpretation of the statute. Whether the statute has fully succeeded and whether practices established can continue without change are questions that depend largely on future decisions of the Supreme Court. In the meantime, awareness of the problems and alternatives may help law enforcement officials to develop procedures that are most likely to pass muster. Conversations sought should be described as clearly as possible; the period of time requested for interceptions should not be for the full thirty-day period if a shorter period might be adequate. Lack of a provision requiring a "return" and dispensing with antecedent judicial approval in certain instances are matters that will have to be dealt with by Congress if the Supreme Court decides that they do not square with Berger and Katz.

At least one commentator believes that Title III has gone beyond the demands of the Supreme Court in Berger and Katz. He finds the procedure "so cumbersome and leaky that it would be most unlikely ever to hurt anyone who has a modicum of power or 'connections.'" There is danger, he thinks, that "no honest law-enforcement agency is likely to be able to run this ridiculous gauntlet," and wonders

whether Title III may not turn out to be a "shield for wrongdoers."[1] This is an extreme view and does not seem to be borne out by the experience of law enforcement officials. Use of Title III has increased steadily. Even a District Attorney who finds the requirements of Title III onerous has applied for wiretap orders and obtained them.

Question 5

Which Provisions Are of Most Doubtful Constitutionality?

Sharpest attack against Title III on constitutional grounds has been leveled at the sections permitting eavesdropping without court order for forty-eight hours in an emergency and in "national security" cases. The constitutional and practical weaknesses of the forty-eight hour-emergency clause have been discussed in detail on page 117 et seq. Emergency eavesdropping may be very useful, and it may even be essential as a weapon against organized crime, but it seems to contravene the requirement of antecedent judicial approval laid down in Katz. Since eavesdropping under the emergency clause need not be disclosed in the annual report of prosecuting officials to the Administrative Office of the United States Courts or in the annual report to Congress, there is no way of knowing whether it has been used. Very few of those interviewed at the Federal or State level could see any need for the 48-hour emergency provision, except perhaps in extreme cases such as kidnapping

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[1] King, Gambling and Organized Crime, pp.177,180.

where the life of an individual might be in danger. Unless the meaning of "emergency" is clarified and limited, the whole section may fall when the issue reaches the Supreme Court.

The constitutionality of the provision exempting from court order requirements eavesdropping in "national security" cases is discussed on page121 . Doubts as to the validity of this clause have increased since the broad interpretation by Attorney General Mitchell under which "national security" is claimed to cover threats from domestic sources as well as from foreign governments. Former Attorney General Ramsey Clark calls it "a dangerous, insensitive and lawless claim."[1] Use of the clause by Federal agencies to eavesdrop on political dissenters has reinforced the suspicion of civil libertarians as to the real motive for enacting Title III. Many of the persons interviewed, including loyal members of the Department of Justice who firmly support court-ordered eavesdropping, expressed uneasiness at the blanket authority claimed by the Attorney General. Eavesdropping on political dissidents, free of judicial control, seems at odds with all notions of a democratic system and a "free society."

Congress is not likely to interfere with the Executive Department's interpretation of "national security," and will leave the matter in the hands of the Court. In the past the Supreme Court has shown great reluctance to

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[1]Clark, Crime in America, p. 296.

to commit itself on the subject, but it can hardly continue to avoid the issue in view of the conflicting decisions in various United States District Courts and the opinion in the Court of Appeals for the Sixth Circuit rejecting the claim of the Attorney General that he has authority to eavesdrop without court order on domestic political dissenters in the name of "national security."[1] Whether the Supreme Court will uphold the view of the Court of Appeals for the Sixth Circuit is anybody's guess, in the current climate of uncertainty as to the direction of the reconstituted Court. The two members of the Court appointed by President Nixon, Chief Justice Warren E. Burger and Justice Harry A. Blackmun, are most likely to support the Attorney General, but the position of other so-called "conservative" members of the Court is doubtful. It should be noted that it was Justice Harlan who dissented in the decision of the Supreme Court upholding the constitutionality of "consent eavesdropping" without court order permitted by Title III.[2]

If public sentiment on the subject is sufficiently strong, the Executive Department may be forced to act without waiting for a Supreme Court ruling. The Attorney General may reconsider his interpretation of "national security" and keep eavesdropping by Federal agencies without court order at a minimum.

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[1] United States v. Sinclair, Plamondon et al, discussed on page 289.

[2] United States v. White, decided April 5, 1971, discussed on page 133.

In view of the controversy over the meaning of "national security" and lack of judicial precedent, it may be useful to examine how the term "national security" has been used by political and social scientists, politicians, the military, and others. These avenues of interpretation may be explored by the Supreme Court, and by the Executive and Legislature as well. According to the International Encyclopedia of Social Sciences:

> The term "national security" has long been used by politicians as a rhetorical phrase and by military leaders to describe a policy objective . . . When modern social scientists talk of the concept, they generally mean the ability of a nation to protect its internal values from external threats (italics ours).[1]

The first explicit definition of "national security" appears to have been formulated by Walter Lippmann in 1943:

> A nation has security when it does not have to sacrifice its legitimate interests to avoid war, and is able, if challenged, to maintain them by war.[2]

The current interpretation of "national security" by the Attorney General to include threats from domestic dissident groups would seem to reject the concept of the social scientists with its emphasis on external threats, as well as Lippmann's definition envisaging war as a means of maintaining national security. Congress has not attempted to define the term. The National Security Act of 1947

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[1]Morton Berkowitz and P. C. Bock, "National Security," International Encyclopedia of Social Sciences, Vol.11, p.40.

[2]United States Foreign Policy: Shield of the Republic (Boston: Little, Brown & Company, 1943).

merely established the National Security Council (NSC)"to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security." Since the creation of NSC, academic studies in the field of "national security" have concentrated on international relations and foreign policy, not domestic dissension, although it has been recognized that no sharp dichotomy can be made between domestic and foreign policy.

Apart from the validity of specific provisions of Title III, some critics claim that the whole Title III is unconstitutional as a violation of the Fourth Amendment edict against unreasonable search and seizure, the Fifth Amendment privilege against self-incrimination; that it also violates the First Amendment guarantees of freedom of speech and association, since without privacy of communication people are reluctant to exercise their rights. These claims cannot be dismissed summarily, but in Berger and Katz the Supreme Court declined to consider First or Fifth Amendment claims. In motions to suppress eavesdrop evidence, the constitutionality of Title III as a whole is invariably attacked, as well as the interception in the particular case. It is highly unlikely that the Court will, in the foreseeable future, abandon the view expressed in Katz that eavesdropping falls within the protection of the Fourth Amendment, and that if adequate safeguards are provided the search and seizure is not unreasonable.

Question 6

Has a Balance Between Privacy and Law Enforcement Been Achieved?

Eavesdropping is by its nature an invasion of privacy. Governmental intrusions under Title III are often sought to be justified through a balancing process. The individual's right of privacy, it is said, must be weighed against society's need for effective law enforcement to combat organized crime and serious crime. The balance approach to the problem of eavesdropping appeals to common sense, but it is difficult to apply. Neither the right of privacy nor the need of law enforcement lends itself to accurate measurement. Senator Philip A. Hart, Democrat of Michigan, a strong opponent of eavesdropping, doubts that "balancing" can ever work:

> I did not buy the idea that we could balance out these competing principles, society's interest, the individual's rights in the fashion that they proposed it without doing more damage than good. I still have terrible difficulty convincing myself that there is a way.[1]
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> * * *
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> How you balance these things I don't know, and I envy the editorial writers who think they do.[2]

The same uncertainty as to the viability of a balancing process was expressed by former Attorney General Ramsey Clerk in his testimony before the Subcommittee on Admin-

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[1]U. S. Congress, Senate, Hearings, "Controlling Crime Through More Effective Law Enforcement," before the Subcommittee on Criminal Laws and Procedures, of the Committee on the Judiciary, 90th Cong.,1st sess., July 11, 1967, p. 904.

[2]Hearings, Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, on "Right of Privacy Act," 1967, Part 2, p.173.

istrative Practice and Procedure:

> I really do not subscribe to the balance theory. In my judgment, we have the potential to enlarge simultaneously the public safety and the right of privacy. I do not think it is a matter of balance . . . it is a matter of the devotion of adequate resources to secure the public safety . . . Manpower . . . devoted to wiretapping and electronic eavesdropping . . . might be more beneficially used for purposes of public safety in other ways.[1]

Clark rejects the idea that a conflict exists between the rights of the individual and the safety of society.

> There is no contest between liberty and safety. We have the means of enlarging both. Unless we do, we will lose both, because neither freedom nor security can long endure without the other . . . nothing can so weaken security as the loss of liberty.[2]

The real danger in the balancing process lies in faulty selection of the elements to be weighed and exaggeration of one side of the scale. Senator Hruska, for example, equates on the one hand the rights of the individual and on the other hand the "survival of society" rather than the requirements of law enforcement.

> Senator Percy: Does the Senator from Nebraska feel that the pendulum of our system of criminal justice has swung too far away from the public's rights to protection from the criminal element?
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> Senator Hruska: There has been a loss of balance . . . between the rights of the individual on the one hand and the right of survival of society on the other.[3]

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[1] Hearings, Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, on "Right of Privacy Act," 1967, Part 2, p. 36.

[2] Clark, Crime in America, pp.344-345.

[3] Congressional Record, 90th Cong., 1st sess., Senate, June 29, 1967, Vol.113, No.104, p.6.

Title III is a policy judgment made in an attempt to weigh competing interests, and evaluation cannot be avoided. Balancing is the essence of the legislative, judicial, and executive process. Whether an acceptable balance has been reached must be determined on a practical as well as theoretical level. What elements should be considered on each side of the scale? As to the right of privacy, one must ask whether intrusions against innocent persons have been minimized by the safeguards provided in Title III and carried out in practice. Consideration must also be given to the potential for abuse inherent in eavesdropping, and whether Title III has reduced illegal eavesdropping. As to law enforcement needs, one must ascertain whether public security has been strengthened by use of Title III against organized crime and serious crime. The sensitivity of the public must also be considered in weighing the right of privacy against the need for law enforcement, and this depends on who are the subjects of surveillance and for what purpose they are the targets of eavesdropping.[1]

The American Civil Liberties Union, inveterate defender of the right of privacy, claims that the safeguards of Title III are a fraud. Former Attorney General Ramsey Clark contends that eavesdropping is an indiscriminate dragnet. These are extreme views and need not be accepted in an objective evaluation. The examination of Title III in operation, however, reveals that it is almost impossible to

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[1]Public sensitivity as an element in the balancing process was suggested by Westin in Privacy and Freedom, p.365.

avoid overhearing many innocent conversations where interceptions are continued over an extended period of time. In the test case of United States v. Tantillo, many conversations overheard during thirty-eight days of interception had no relation to the offense covered by the order. Invasions of privacy can be minimized, as previously stressed, only by limiting the duration of orders to the shortest possible time, restricting them to cases where less intrusive tools of law enforcement are clearly not serviceable, and supervising interception of conversations periodically.

The most careful scrutiny by an impartial judge of applications for orders, and continued judicial concern throughout the period of the order are essential if safeguards are to be meaningful and invasion of privacy is to be kept at a minimum. The ease with which it is possible to shop for a compliant judge who will sign an order for whatever period a prosecuting official asks, and the failure of State judges to require progress reports leave the door open to unjustified invasions of privacy.

The conclusion is inescapable that to the extent that safeguards provided by Title III are ambiguous, the statute as enacted is inadequate in protecting privacy. In so far as the ideal of an impartial magistrate has not been realized, the safeguards against undue invasion of privacy have not been fully applied. In balance, privacy has been weakened.

In July 1970, after two years of operation under Title III, Senator McClellan declared that "there has not been reported a single instance of abuse or misuse of the authority and the power that the Act [Title III] confers."[1] This is, of course, pure rhetoric by the sponsor of Title III to attest to its success. There is no way of knowing how much illegal eavesdropping has been going on. The temptations are so great and the risk of detection so slight that it would be fatuous to suppose that Title III has eliminated all illegal eavesdropping.

Each person interviewed was asked whether he believed that investigating agents were eavesdropping illegally despite Title III which makes legal eavesdropping possible. Some said it was possible, others said it was probable, and a few were sure that conversations not covered by court order were being intercepted. Congressman Emanuel Celler, Democrat of New York, long a foe of eavesdropping, is certain that illegal wiretapping occurs all the time:

> Once you give them the tool, you can't stop it. The police with wiretapping equipment listen to everything, if only out of curiosity and even if it doesn't help their case.

A member of the staff of the Subcommittee on Administrative Practice and Procedure headed by Senator Edward M. Kennedy, Democrat of Massachusetts, who does not favor eavesdropping, expressed his candid opinion in an interview that illegal eavesdropping continues:

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[1] Congressional Record, Senate, July 31, 1970, S 12548.

> Proponents of Title III said this was going to stop illegal eavesdropping, but it hasn't. If the police get a certain amount of authorization, they are going to say they do wiretapping with authorization . . . If they met constitutional standards, there would hardly be any eavesdropping. The court order gives them a piece of paper and they use it to justify listening to everything.

Those who favor eavesdropping under Title III are inclined to minimize the potential for abuse; those who oppose it are sure that illegal eavesdropping continues to be extensive. There is nothing to indicate that Title III has made any appreciable difference either in increasing or reducing illegal eavesdropping.

On February 26, 1971, the Federal Government announced that it had discontinued its past policy of making voluntary disclosure to criminal defendants of illegal electronic surveillance; it was now up to the accused to find out if the Government overheard him.[1] A man convicted in 1968 of planting a bomb on an airline argued on petition to the United States Supreme Court for a writ of certiorari that the Government must disclose whether there had been electronic surveillance, and that he was entitled to a judicial determination of the existence and legality of electronic eavesdropping. The Government had refused to disclose whether he had been the object of indirect eavesdropping. The Supreme Court by a vote of seven to two

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[1]The Government claimed this policy was permissible under the Organized Crime Control Act of 1970.

denied the petition and let the conviction stand. For the present the Court refused to consider the issue of the Government's burden to disclose any type of illegal eavesdropping evidence.

Justice Douglas, joined by Justice Brennan, protested strongly in dissent that the petition should have been granted on the issue of electronic surveillance. "Electronic surveillance is today common and pervasive," said Justice Douglas, "as we know from reports filed pursuant to §2519(3) of the Act and from various Senate and House investigations, including the one just concluded by Senator Ervin." The Government's refusal to make disclosure raised new and important questions involving "high matters of policy" affecting many cases.

> It is appropriate that we reach the questions here and now so that the procedures to be used in protecting the rights of the citizen and confining the prosecution within constitutional bounds be resolved . . . The procedure to be designed here is not relevant only to criminals . . . These invasions of privacy apparently touch not only criminals but reputable people whose only offense is political, social, or ideological non-conformity.[1]

A sharp difference of opinion continues to exist as to the need for eavesdropping in law enforcement. Before enactment of Title III, many police chiefs, prosecutors, and other law enforcement spokesmen testified before the Senate Subcommittee on Criminal Laws and Procedures that eavesdropping was an indispensable tool in dealing with organized crime. Opponents of eavesdropping, including

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[1] Cook v. United States, No.1166, decided March 29, 1971; See New York Law Journal, March 30, 1971, p.3,col.7.

some prosecuting officials, claimed it was a costly, wasteful, lazy-man's weapon, a threat to innocent persons, and useless against top echelon criminals. Congressional hearings over a decade produced nothing but conflicting expert opinions on the question of need for eavesdropping. No one ever succeeded in proving need, or even in defining it clearly, nor has the question of who should bear the burden of proving need ever been settled. As a start in determining need, alternatives to eavesdropping would have to be analyzed, and time and cost factors compared. Would the same resources devoted to normal types of surveillance produce equal or better results, or no results at all? If Title III has not been used against organized crime or limited to serious crime, the need to effect public security is weakened in balancing it against invasion of privacy.

It seems fair to say that operation of Title III has demonstrated neither need nor lack of need for eavesdropping. Nor does the information required to be furnished in reports under Title III further examination and analysis of need. Cost of each wiretap order must be reported, but the basis of cost is ambiguous and the relation between cost and results of interception unclear. It may be significant that the Commission to review operation of Title III in 1974 is not required to determine "need," but only "effectiveness."

Has Title III been "effective"? If it has not, then the balance is tipped in favor of right of privacy and against law enforcement requirements. The vagueness

of the concept of "effectiveness" has been noted, and its evaluation is attempted here largely because the Commission will have to deal with it. One factor that Congress appears to have considered significant in "effectiveness" is the number of arrests and convictions that result from eavesdropping, since this item of information must be included in official reports. Senator McClellan, commenting on the orders obtained in 1969, noted that of the 133 orders executed, 121 "were successful and productive, resulting in 449 arrests and 325 persons being indicted to date." The "effectiveness" of this statute in the war on organized crime, said Senator McClellan, "is now firmly established." Observers of governmental action noted wryly that officials develop a vested interest in seeing to it that actions and policies supported by them appear to be successful.[1]

Former Attorney General Ramsey Clark, commenting in the Fall of 1970 on the number of arrests, said that many of the persons apprehended by Government wiretapping might have been arrested without eavesdropping. The leading anti-wiretap spokesman among law professors also questioned whether the arrest of a "bunch of two-bit gamblers" is worth the creation of an atmosphere that encourages police eavesdropping.

Those who favored eavesdropping before enactment of Title III now claim that the statute is effective. Those who opposed it before 1968, question the adequacy of the

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[1]See New York Times, October 11, 1970, Sec.E, p.9, col.4.

empirical evidence offered to show effectiveness and deny that any meaningful relationship exists between wiretapping and arrests or convictions. The failure of the reports to indicate the quality of arrests and convictions, in addition to quantity, diminishes its utility in determining effectiveness. The fact that no report to the Administrative Office of the United States Courts indicates whether arrests during the preceding year resulted in convictions merely aggravates the lack of useful information and adds to the inaccuracy of data on which evaluation of effectiveness can be based.

Law enforcement officials can always point to some cases in which wiretapping resulted in arrests and convictions. Critics of eavesdropping can likewise cite important investigations in which it proved to be of insignificant or no value, as compared with normal techniques.[1] It can be conceded that eavesdropping has been effective in some cases in obtaining arrests and convictions. This does not prove that other methods of surveillance would not have been equally effective. Nor, in determining effectiveness of Title III, can the quality of an arrest or conviction be ignored. If, as critics claim, Title III has been successful

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[1] In a case history of one of the largest seizures of pure heroin, worth $32,500,000 on the streets, investigation began with a request for a wiretap order, but eavesdropping was reported to be fruitless for typical reasons--irrelevancy of conversations intercepted and unintelligibility of recordings. See Robin Moore, The French Connection--The World's Most Crucial Narcotics Investigation, (Boston: Little, Brown and Company, 1969), p.147.

only in apprehending small-time offenders and has failed to reach top echelon members of organized crime, then court-ordered eavesdropping has not been very effective. Nothing in Title III restricts the use of eavesdropping to important cases. The offenses for which a Federal order may be obtained cover a wide range, and the types of offenses for State orders are practically unlimited.

Students of crime claim that efforts of law enforcement in offenses such as gambling, narcotics and loan-sharking which involve willing participants rather than victims can have only limited effectiveness, no matter what tools are used. So long as the public wants the services provided and the demand is not satisfied through legal channels, the illegal activities will continue.[1] In 1969 Attorney General Mitchell admitted that the growth of organized crime in the United States had not been arrested. Although several organized crime figures had been convicted, none of the major Cosa Nostra "families" had been destroyed.[2] His conclusion was that additional tools of law enforcement were needed. Congress provided the tools requested by the Crime Control Act of 1970. In 1971, the Attorney General claimed that Federal, State, and local law enforcement agencies across the country were making sizable gains against organized

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[1]Edwin M. Schur, Our Criminal Society: The Social and Legal Sources of Crime in America (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1969), p.200.

[2]Congressional Record, Senate, August 12, 1969, p. S. 9698.

crime; that court-authorized wiretapping and additional funds were enabling the Nixon Administration to move with greater strength on the Federal level. Speaking of the overall impact on organized crime, Mr. Mitchell said:

> I won't say we have them on the floor yet, but I will say they're taking a terrific pounding.[1]

The approach of both the Executive and Congress to crime has been criticized as political and "in large part misguided."[2] On June 4, 1970, President Nixon issued an Executive Order creating a National Council on Organized Crime under the chairmanship of the Attorney General to formulate a national strategy for the elimination of organized crime. The creation of the Council, said the President, was "the inevitable result of the success of the Federal Strike Forces . . . in metropolitan areas where the organized crime problem is most concentrated." The Statement of the President accompanying the Executive Order recognized that organized crime was "a malignant growth in the body of American social and economic life." However, the Federal agencies represented on the new Council are largely the same ones that have traditionally sought to catch individual malefactors, rather than to deal with organized crime as a social,

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[1] New York Times, March 13, 1971, p.1, col.5; address before 600 Republicans at a $100-a-plate fund-raising dinner in Millburn, New Jersey.

[2] Alexander M. Bickel, "Crime, the Courts, and the Old Nixon," New Republic, Vol.158, No.25, June 15, 1970, p.8. The Organized Crime Control Act was signed by the President three weeks before election. New York Times, October 18, 1970, Sec.E, p.9, col.1.

economic, and political phenomenon of American society.[1]

The real issue today would seem to be not the need for eavesdropping or its effectiveness in law enforcement (since evaluation on these bases is so elusive), but a question of balancing of values: Is the apprehension of some additional criminal suspects worth the risks to privacy and personal freedom inherent in eavesdropping? These risks are surely intolerable in a "free society" if eavesdropping is permitted under a statute that is ambiguous and is carried on without clear standards and uniform guidelines by a large number of officials in a wide variety of cases without adequate control. Former Attorney General Ramsey Clark, leader of the opposition to eavesdropping, claims that Congressional forces that favor wiretapping generally oppose professionalization of police, prisoner rehabilitation, and research; that these same forces refuse to acknowledge the relationship between crime and slums, racism, poverty, and oppose enforcement of civil rights.[2] On the other hand, Attorney General John N. Mitchell insists that:

> In this period of intensive organized crime activity, we cannot afford to shun a method that is both effective and compatible with constitutional law . . . the only repression that has resulted is the repression of crime.[3]

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[1]Release issued by the Office of the White House Press Secretary June 4, 1970.

[2]Clark, Crime in America, pp.294-295.

[3]Quoted in New York Times, October 11, 1970, Sec.E, p.9, col.4. Address to International Association of Chiefs of Police, Atlantic City, New Jersey. Commenting on this statement, Clark accused Mitchell of playing politics with criminal justice. New York Times, October 9, 1970,p.1,col.4.

Congress and the Executive have endorsed eavesdropping by law enforcement officials under Title III, but has the public accepted it? Sensitivity of the public, it has been suggested, should be considered in weighing the right of privacy against the need for law enforcement. Most individuals have been opposed to wiretapping and electronic surveillance only when their own conversations or those of a group with which they identify have been intercepted.[1] Italian-Americans, as previously indicated, charge harassment by the Department of Justice, the F.B.I., and the press because organized crime is repeatedly referred to as the "Mafia" or "La Cosa Nostra," and many Americans of Italian descent have been subjects of eavesdrop orders. Political dissenters object to interception of their conversations without court order under color of Title III. Blacks in Washington, D. C. are convinced that a special drive is being directed against them by the Bureau of Narcotics and Dangerous Drugs. Attorney General Mitchell claims that popular concern about wiretapping is exaggerated. Individuals worried about the security of their telephone can "come to the Justice Department" to check their status.

> Any citizen of these United States who is not involved in some illegal activity has nothing to fear whatsoever.[2]

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[1]For public opinion poll, see page 416.

[2]Quoted in New York Times, July 15, 1970, p. 1, col.7.

Mr. Mitchell's assurances are not entirely convincing in view of the many innocent conversations that are overheard.[1] No one knows to whom bits of information obtained through eavesdropping may be revealed, or where they may be stored for future reference. Recent revelations of surveillance by Army intelligence agents of prominent political figures has increased awareness of the public to the dangers of governmental interference with the right of privacy.[2] If the Executive Department persists in claiming that the military has engaged in wiretapping and electronic eavesdropping "under terms prescribed by Congress and the Attorney General, public disapproval of eavesdropping may increase and tip the balance in favor of the right of privacy.[3]

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[1]Critics have reminded the Attorney General that the F.B.I. indulged in eavesdropping on Dr. Martin Luther King, Jr., the civil rights leader. Time, July 25, 1969, p.47.

[2]New York Times, December 27, 1970, p.1, col.7; December 29, 1970, p.13, col.1; Tom Wicker, "Conus Tel Unleashed," New York Times, January 19, 1971, p.37, col.1.

[3]A Department of Justice intelligence unit is reported to have replaced the Army intelligence detachment as the main watchman of political dissidence. The unit, known as the Interdivisional Information Unit (I.D.I.U.) has compiled computerized dossiers on nearly 14,000 Americans, concentrating on black militants, opponents of the Vietnam War, and the New Left. It is reported that dossiers are also maintained by the I.D.I.U. on elected political officials and moderates who are believed to condone or encourage civil disobedience. The I.D.I.U. was set up by former Attorney General Ramsey Clark during the Johnson Administration in 1967. Testimony as to the supplanting of the Army by the I.D.I.U. in collecting information on political dissidence was presented at the Hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, under the chairmanship of Senator Sam J. Ervin,Jr., Democrat of North Carolina. I.D.I.U. gets about 90% of its information from the F.B.I. and is currently under the administrative control of the Internal Security Division. New York Times, April 2, 1971, p.25, col.3.

The balance between competing values of privacy and law enforcement is constantly shifting and requires periodic re-examination. Today the fear of crime is so great that the public seems willing to accept any type of surveillance, including eavesdropping. Tomorrow it may protest vigorously against governmental intrusions, particularly if the powers under Title III are not exercised with sufficient restraint.

Question 7

Is Eavesdropping under Title III Compatible with a Free Society?

A study proposed some years ago on issues fundamental to the maintenance of a "free society" listed the areas deemed to be of significance: problems of constitutional law, the political process, communications, the economic order, war as an institution, and the American character.[1] In a broad sense, all these affect the freedom of a people and reflect the nature of the "free society" in which they profess to live. In the context of eavesdropping, however, freedom must be placed within narrower confines, and the term "free society" must be used in a more limited sense, as previously defined.[2] Viewed from the threat posed by wiretapping and electronic surveillance, freedom in the United States is based on the liberties enumerated in the Constitution. The

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[1] Center for the Study of Democratic Institutions, Santa Barbara, California. See William J. Brennan, Jr., The Bill of Rights and the States (The Fund for the Republic, Inc., 1961).

[2] See page 13 for definition of a "free society."

American form of government guarantees freedom from governmental interference--the right of the individual to be let alone. This freedom from arbitrary government rests most heavily on the Fourth Amendment protection against unreasonable search and seizure, the First Amendment prohibition against abridgment by Congress of the freedom of expression, and the right of privacy based on a penumbra of constitutional rights.

The Supreme Court has ruled that eavesdropping falls within the prohibitions of the Fourth Amendment, and Title III was drafted to provide the safeguards required by the Constitution.and articulated by the Court in Berger and Katz.[1] At the heart of the Fourth Amendment is the right to be secure against arbitrary intrusion by the police, a protection basic to a free society.[2] Champions of the right of privacy remind spokesmen for "law and order" that wiretapping and electronic surveillance were high on the list of techniques used by the Gestapo. Eavesdropping, say its opponents, is offensive to liberty and completely contrary to the idea of a free society; constant governmental intrusion and surveillance inhibit and constrict a free people.[3]

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[1]For a discussion of Berger and Katz, see page 49 et seq.

[2]See Alan Barth, The Price of Liberty (New York: Viking Press, 1961), p.75; Irving Howe, Orwell's 1984 (New York: Harcourt, Brace & World, Inc.,1963), p.251.

[3]Sen. Edward V. Long, The Intruders, The Invasion of Privacy by Government and Industry (New York: Frederick A. Praeger, 1967), p.21.

Former Attorney General Ramsey Clark, still the chief spokesman against eavesdropping, has said:

> Nothing so mocks privacy as the wiretap and electronic surveillance . . . they are incompatible with a free society . . . Privacy is the ultimate freedom. Crush privacy for a generation and it is gone forever.[1]

The American Civil Liberties Union has consistently maintained that permitting official wiretapping, even in cases of serious crime and national security, would seriously impair the privacy so necessary to a free society and move the nation closer toward a police state. A hallmark of totalitarian societies is that people are apprehensive of being overheard.[2] Herman Schwartz, a leading critic of Title III among academicians, charges that "any kind of surreptitious eavesdropping produces a gross invasion of privacy, threatening the fabric of trust essential to a free society.[3]

The importance of privacy in a free society and the danger of eavesdropping to human freedom has been recognized by those who are willing to accept limited interception of conversations, as well as those who would ban all wiretapping and electronic surveillance. Before Title III was

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[1]"The Death of Privacy," McCalls, Vol. XCVII, No.5, February 1970, p.67; See also"Crime and Justice in America," Congressional Quarterly Service, 1967, p.33.

[2]See Vance Packard, Naked Society (New York: David McKay Company, Inc., 1964), p.11.

[3]"Electronic Eavesdropping--What the Supreme Court Did Not Do," Criminal Law Bulletin, March 1968, Vol.4, No.2, pp. 83-89, at p.88.

enacted, Alan Westin stressed the need for privacy in a democratic society:

> In totalitarian societies, the idea of privacy is attacked as immoral, anti-social, and part of the 'cult' of individualism. In a free society privacy is not a luxury but a vital need.[1]

Without privacy our whole system of civil liberties could become "formalistic ritual." No society concerned with providing liberty, said Westin, failed to provide limits on the surveillance power of authorities.[2] Are the limits on eavesdropping imposed by Title III and carried out in practice adequate to protect privacy and guard against unreasonable searches and seizures? If they are not, then eavesdropping under Title III is not compatible with a free society. The Supreme Court in Katz refused to translate the Fourth Amendment into a general constitutional "right of privacy" but it recognized that individual privacy was protected by the Fourth Amendment from certain kinds of governmental intrusion, including eavesdropping.[3]

The Supreme Court has declined to consider whether eavesdropping violates freedom of expression guaranteed by the First Amendment. The First Amendment provides:

> Congress shall make no law abridging the freedom of speech or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

The Court did, however, recognize in Katz that the First

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[1] Privacy and Freedom (New York: Atheneum, 1967), pp.23, 51.

[2] Ibid., pp.21, 22, 399.

[3] For a discussion of Katz v. United States, see page 59.

Amendment protected personal privacy, specifically privacy of association.[1]

The issue of First Amendment protection against eavesdropping has been revived by the claim of the Attorney General that Title III permits wiretapping without court order on domestic groups of political dissenters under the umbrella of "national security."[2] The press has sounded the alarm of danger to a free society involved in warrantless surveillance directed at political protesters in the name of "national security":

> No more pernicious notion has ever been propounded by an agency of the United States Government . . . What the Department of Justice has so blandly enunciated is the rationale of dictatorship.[3]

Opponents of eavesdropping anticipated that the right of free speech and assembly could be abused in the name of "national security":

> [T]he McCarthy era abuses of free speech and assembly in the name of national security are only a few years behind us and their effects still linger . . . those barbarisms are only more recent outbreaks of a disease which has persisted through history, and includes such episodes as the Alien and Sedition Laws, and the Palmer raids and Red scares of the 1920's. Were the hysteria of such periods to be with us again--and if the Vietnam war continues, it may be . . .

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[1]For a discussion of Katz v. United States, see page 59.

[2]See pages 121 and 282 for discussion of eavesdropping in "national security" situations.

[3]Quoted in comment by Hon. John D. Dingell, in House of Representatives, Congressional Record, July 14, 1969, E-5891.

> "national security" could easily be read to permit attacks on speech and assembly in the name of fighting sedition and subversion.[1]

Constitutional experts warn that concentration by law enforcement officers on politically active groups threatens freedom of thought and speech.[2] It is incompatible with a free society and tolerable only in cases of national security, narrowly defined to cover threats from foreign powers.

Eavesdropping without judicial control in the name of "national security" is particularly menacing to freedom of expression, but the protest that all wiretapping and electronic surveillance, with or without court order, violates First Amendment rights has been rekindled by the vast number of innocent conversations intercepted under Title III orders, as revealed in United States v. Tantillo and other cases.[3] Motions to suppress eavesdrop evidence obtained under Title III invariably raise First Amendment as well as Fourth Amendment and other constitutional objections.

In Berger v. New York the New York Civil Liberties Union (NYCLU) as amicus argued that electronic surveillance, whether or not under court order, had an inhibiting effect

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[1] Testimony of Herman Schwartz, Hearings before the Subcommittee on Administrative Practice and Procedure on "Right of Privacy Act of 1967," p. 408.

[2] Kent Greenawalt, "Privacy in One's Home and Person," New York Law Journal, June 18, 1970, Vol.163, No.117, at p.4, col.1; June 19, 1970, Vol.163, No.118, p.4, col.2.

[3] For discussion of United States v. Tantillo, see page 330 et seq.

on freedom of speech that violated the First Amendment. Freedom of speech, argued the NYCLU, is the most basic of our freedoms.. It means "the right to say what one chooses to say to those to whom he would say it at a time and under circumstances of his own choosing." Eavesdropping systematically conducted by law enforcement officers has a subtle impact on free discussion, and results in a loss of freedom of speech for all citizens, innocent as well as criminal.[1]

The Supreme Court did not discuss First Amendment objections in its opinion in Berger, but Justice Harlan in dissent indicated his view that the First Amendment would have only a case-by-case impact in the area of eavesdropping.[2] G. Robert Blakey who helped to draft Title III inferred from this that the Court rejected the First Amendment on the level of a principle which would render a court order system per se unreasonable.[3] It is probably true that Title III is unlikely to be struck down as a whole on First Amendment grounds, at least for the present, but it is not inconceivable that wiretapping on political groups without court order and extended interception of conversations of innocent persons under eavesdrop orders may be deemed a violation of freedom of expression.

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[1]Brief of NYCLU as amicus curiae in Berger v. New York, p.23, et seq.

[2]For analysis of the Berger case, see page 49.

[3]Testimony at Hearings before the Subcommittee on Criminal Laws and Procedures, of the Committee on the Judiciary, U. S. Senate, 90th Cong., 1st sess., July 11, 1967, p.933.

An explanation of how eavesdropping may inhibit freedom of expression and threaten the right of privacy appeared in the Report of the President's Commission, although a majority of the members recommended limited eavesdropping:

> In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas . . . External restraints, of which electronic surveillance is but one possibility, are thus repugnant to citizens of such a society.[1]

The need for privacy and freedom of expression in a free democratic society was expressed in similar fashion by one of the most outspoken opponents of eavesdropping:

> The free society must . . . provide an enclave of privacy where a man can think and live in his own way, free from the pressures and fears of authority . . . at stake is not merely the right to dissent and to differ, but the right to think at all, for to think as often to dissent . . . free and independent thought is a prerequisite to effective political democracy.[2]

The "chilling effect" of eavesdropping on freedom of expression was a matter of repeated comment at Congressional hearings on the right of privacy:

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[1] "The Challenge of Crime in a Free Society," U. S. Government Printing Office, Washington, D.C., February 1967, p. 202.

[2] Herman Schwartz, Testimony at Hearings before the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U. S. Senate, 90th Cong., 1st sess., April 20, 1967, p. 401.

> Wiretapping . . . promotes an atmosphere of psychological intimidation that seems entirely alien to everything for which the United States stands . . . it could lead only to the development of an Orwellian society in which . . . the Government is encouraged to develop a stranglehold on the freedom of the populace. This would certainly be a final tragic irony for a country which professes to enshrine the ideal of liberty and prides itself on the export of freedom as our most precious commodity.[1]

What does freedom of speech as guaranteed by the First Amendment mean, and what limits may Government place on it, if any? The Supreme Court has had to pass judgment on these questions many times and may have to do it again when First Amendment objections are raised against the validity of Title III and eavesdropping conducted under color of the 1968 law.

The constitutional conception of freedom of speech was derived from the experience of the Framers of the Constitution with prosecutions for sedition. The First Amendment is a declaration of national policy favoring free discussion of public questions, and a command to Congress not to interfere with it. The Fathers of the Constitution were also influenced by the philosophical speculations of John Stuart Mill[2]. Mill argued that if men were left alone, they would recognize the best ideas and choose the wisest course.

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[1]Statement of Senator Howard W. Cannon of Nevada, at Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 90th Cong., 1st sess., Part I, March 20, 1967, p.6.

[2]See Zechariah Chafee, Jr., "Free Speech in the United States (Cambridge, Mass.: Harvard University Press, 1942), pp. 30, 559.

"We can never be sure," said Mill, "that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still." Mill's simple proposition was not unqualified, and he was aware of the dilemma it raised:

> " . . . the practical question, where to place the limit--how to make a fitting adjustment between individual independence and social control."[1]

The individual's right to freedom of speech in the American system had to be weighed against the need for public order. Freedom of speech and thought, however, was given an exalted position and its primacy was proclaimed by Oliver Wendell Holmes in eloquent words:

> If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free thought for those who agree with us but freedom for the thought that we hate.[2]

In his classic work, "Free Speech in the United States," Zechariah Chafee, Jr. summed up the conflict between freedom of speech and order and intimated how the problem should be approached:

> Oneoof the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion . . . Nevertheless there are other purposes of government such as order, . . . protection against external aggression. Unlimited discussion sometimes interferes with these purposes

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[1] Mill, On Liberty (Chicago, Ill.: Henry Regnery Company, Gateway Edition, 1955), p.24.

[2] Dissent in United States v. Schwimmer, 279 U.S.644 (1929), at pp.654-655.

> which must then be balanced against freedom of speech. Freedom of speech ought to weigh very heavily in the scale.[1]

Chafee reminded the American people that freedom of speech in the First Amendment protects two kinds of interests: (1) an individual interest--the need to express opinions, and (2) the social interest. The social interest embraces not only public safety but the search for truth. Only when the interest in public safety is really imperiled, said Chafee, should free speech be sacrificed.[2]

At what specific point must individual freedom of expression give way to the needs of public order? What test should be applied to decide when Government may step in and limit individual liberty? This is the difficult question that has plagued our "free society" since the 18th century, and continues to confront us today in authorizing eavesdropping. Half a century ago, Justice Holmes enunciated the "clear and present danger" test.[3] His colleague, Justice Louis D. Brandeis, dissatisfied with the manner in

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[1]Chafee, Free Speech in the United States, p. 31.

[2]Ibid., p. 35.

[3]Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919). Justice Holmes said: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." See also dissenting opinion of Justice Holmes in Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919).

which the test had been distorted and applied, elaborated on the formula:

> Those who won our independence . . . did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[1]

Controversy as to the meaning of "clear and present danger" has continued for more than fifty years, but Congress nevertheless used the term in Title III. Section 2511(3) states:

> Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger (italics ours) to the structure or existence of the Government.

Why did Congress employ such a vague and ambiguous concept as "clear and present danger"? It can be explained only as a legislative compromise. Justice Black and Justice Douglas insist that the "clear and present danger" test has no place in consideration of First Amendment freedoms. Justice Douglas is particularly disturbed by persistent use of this test:

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[1] Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 7 L.Ed. 1095 (1927).

> When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied great misgivings are aroused.[1]

Is this "clear and present danger" test to be applied in determining whether or not an interception without court order is to be deemed a reasonable search and seizure under the Fourth Amendment? If it is, then Title III has furnished an unreliable measuring rod.

Justice Brennan has inveighed against "the 'chilling effect' upon exercise of First Amendment freedoms generated by vagueness, overbreadth, and unbridled discretion to limit their exercise."[2] Whether eavesdropping authorized by Title III and conducted in actual practice is so broad, uncontrolled, and ambiguous as to violate constitutional protections is the key question that the Supreme Court must answer. If the answer is "Yes" then eavesdropping under Title III is not compatible with a free society.

Interceptions of conversations for a wide variety of offenses, even under court order, pose threats to a free society if limitations imposed are inadequate to protect innocent persons or are not fully respected. This dissertation does not accept the view that the safeguards provided by Title III are fraudulent and completely ineffective in

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[1]Justice Douglas concurring in Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 13 L.Ed. 2d 430 (1969).

[2]Dissent in Walker v. Birmingham, 388 U.S. 307, 87 S. Ct. 1824, 18 L.Ed. 2d 1210 (1967).

protecting privacy and freedom. The data presented, however, would seem to support the charge that the power to intercept conversations, even under court order, is not sufficiently circumscribed. The chief defects of court-ordered eavesdropping under Title III and its danger to a free society have been summed up in a deceptively simple sentence:

> Too many persons may obtain orders in too many courts for too many offenses and for too long a time.[1]

Liberties essential to a free society are not preserved merely by enumerating them in a written Constitution. In England a good measure of freedom has been attained through adequate legal measures and efficient remedies.[2] The machinery of the law, procedures for putting rules and regulations into operation, and the individuals who establish practice are as important to freedom as a declaration of policy in the Constitution. Eavesdropping under Title III has placed enormous power in the hands of judges, prosecuting officials, and investigating agents over the minds, thoughts, and expression of others, as the data presented amply demonstrates. If it is misused, a free society is jeopardized. Eavesdropping without court order merely raises the potential

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[1]Kent Greenawalt, "Privacy in One's Home and Person," New York Law Journal, June 17, 1970, Vol.163, No.116, p.4, col.2.

[2]In June 1957, three Privy Councillors were appointed to investigate interception of communications in Great Britain. Their Report indicated that power to intercept was limited to serious crimes and issues of the security of the state. Interception could only be made on order issued by the Secretary of State. For a conclusion of the report, see American Bar Association, "Standards Relating to Electronic Surveillance," June 1968, p.197.

for arbitrary use of governmental power. The right given by Title III to aggrieved persons to question the legality of eavesdropping after it has occurred does not cure abridgment of constitutional rights of innocent persons whose conversations have been intercepted.

> When the determination of the scope of liberty is of immediate importance, a slow and costly review is no review, and the initial stage becomes of vastly greater importance as to both methods and personnel.[1]

This was Chafee's observation many years ago, and it is even more accurate today. Review of governmental action is now so slow and costly that a fundamental freedom taken away from an individual can practically never be retrieved.

A free society cannot take its liberties for granted; they must be reexamined continually and reasserted periodically. The current climate of fear over crime, reaction to the upsurge in political dissent, and emotional appeal of the symbol of "law and order" have put freedom in a precarious position in American society. Eavesdropping by law enforcement officials under Title III can weaken and even destroy that freedom if it is not used with greater restraint and if the defects disclosed in operation of the statute are not corrected.

Wiretapping under Title III has taken on proportions that would have been considered a few years ago as completely

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[1]Chafee, Free Speech in the United States, p.565.

at odds with the American view of a free society.[1] Until recently, electronic eavesdropping used to be regarded with contempt in the United States, and every schoolboy knew that Justice Holmes called wiretapping "dirty business."[2] With rising fear of crime, official eavesdropping is slowly gaining acceptance. In a public opinion poll conducted in July 1969 by a national periodical, the count was heavily in favor of eavesdropping. People in the West seemed to favor wiretapping and electronic surveillance as much as those in the East, South, or North. Many said they did not find it objectionable so long as it was restricted to organized crime or espionage. The response from big cities was no different from that of small-town residents.[3] Public outcry against eavesdropping under Title III developed, as previously indicated, only among those who perceived themselves as special targets--Italian-Americans, political dissidents, and Blacks prosecuted for gambling and narcotics. Today the public is being jolted into awareness of the danger to a free society of widespread and indiscriminate surveillance. Secret files stolen from the F.B.I. are reported to reveal "pervasive surveillance of the political Left, as

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[1] New York Times, March 21, 1971, Sec.E, p.12, col.1.

[2] Dissent in Olmstead v. United States, 277 U.S.438, 48 S.Ct. 564.

[3] "Tapping a Vein of Controversy," Nation's Business, July 1969, p.81.

well as campus and Black activist organizations."[1] Senator Edmund S. Muskie accuses the F.B.I. of widespread surveillance of anti-pollution rallies on Earth Day.[2]

Senator Sam J. Ervin, Jr., Democrat of North Carolina, charges that computerized files compiled by Federal agencies are leading the country toward a police state. Much of the information in these files has been obtained through eavesdropping.[3] In well-publicized hearings before the Subcommittee on Constitutional Rights, of the Senate Committee on the Judiciary, of which Senator Ervin is Chairman, a legal scholar testified that:

> [T]he information gathering and surveillance activities of the Federal Government have expanded to such an extent that they are becoming a threat to several basic rights of every American--privacy, speech,[4] assembly, association and petition of government.

The abuses, said other witnesses, were frightening; collection of political information by a dozen Government agencies has subjected citizens to the "chilling effect." Wiretapping and surreptitious tape recording by the Army,

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[1] New York Times, March 28, 1971, Sec.E, p.9, col.1; March 25, 1971, p.1, col.2; March 24, 1971, p.24, col.3. A New York Times editorial declared that "such procedures assume undertones of latent racial prejudice," and that political surveillance as currently practiced has a "chilling effect" on free expression of dissent. March 29, 1971, p. 32, col.1.

[2] New York Times, April 15, 1971, p.1, col.1.

[3] See Ben A. Franklin, "Federal Computers Mass Files on Suspect Citizens," New York Times, June 28, 1970, p.1, col.3; Editorial, April 27, 1970, p.32, col.3; February 28, 1971, p.4, col.3.

[4] New York Times, March 21, 1971, Sec.E, p.12,col.1.

Navy, and Air Force has been extensive. Information from the Federal Bureau of Investigation, the United States attorneys throughout the United States, and other Government agencies are fed into a computer maintained by the Department of Justice. "The United States," said a former captain of military intelligence, "possesses the intelligence apparatus of a police state!"[1] The dangers now rather belatedly recognized by Senator Ervin were pointed out in 1967 by Senators Hart and Long in opposing Title III:

> A computerized consolidation of all such information could certainly make available some sort of information on almost 9 out of every 10 citizens in the country. Much of this information has been obtained through illegal, unconstitutional, and unconscionable electronic eavesdropping.[2]

A panel of the Subcommittee on Constitutional rights, created to draft legislation for curbing surveillance, noted the long-range effect of pervasive surveillance on political freedom:

> The thought that a citizen is being watched can have a "chilling effect" that makes him reluctant to take part in political activity, especially if it is dissent.[3]

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[1] New York Times, February 26, 1971, p.8, col.3; February 25, 1971, p.15, col.1. Counsel for the Department of Justice denied that the Army's political surveillance of civilians from mid 1967 to mid 1970 stopped people from exercising their right to free speech and assembly. New York Times, March 18, 1971, p.19, col.1. For role of Army counterintelligence which has been shown to have spied on more than 18,000 Americans from 1967 to 1969, see New York Times, January 29, 1971, p.10, col.1.

[2] Senate Report, No.1097, p.164.

[3] New York Times, March 22, 1971, p.12, col.4.

Most of the surveillance as revealed in four weeks of hearings before the Subcommittee on Constitutional rights was conducted in the name of "national security." The Government now claims that its "national security" information must be exempt from all Congressional regulation.[1]

In his dissent from the report of the American Bar Association's Special Committee on "Standards Relating to Electronic Surveillance," Arthur J. Freund warned of the threat to freedom posed by eavesdropping:

> Wiretapping is an enormously serious assault upon our freedoms, our privacy and the fundamental values of our democracy. The American Bar Association should stand aloof from giving its imprimatur to the adoption and extension of rules for the widespread use of devices which impinge upon the rights of a free people.[2]

Can the United States survive as a "free society" in the face of increasing eavesdropping and other forms of surveillance? Assuming that innocent persons have nothing to fear as the Attorney General assures them, denial of freedom to a few may silence the many, and threaten a "free society," as the history of the McCarthy era so vividly illustrated. If the Department of Justice and other agencies engage in wiretapping on political dissenters under the cloak of

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[1] New York Times, March 21, 1971, Sec.E, p.12,col.1.

[2] American Bar Association, "Standards Relating to Electronic Surveillance," recommended by the Special Committee on Standards for the Administration of Criminal Justice, and the Advisory Committee on the Police Function, January 1971, p.26.

"national security" and on petty gamblers in the name of "law and order" rather than against leaders of organized crime, the freedom of all is in danger. Liberty in the United States can be completely lost through misuse and abuse of eavesdropping, with or without court order.

Official Review of Title III

Eavesdropping by law enforcement officials was authorized by the Omnibus Crime Control and Safe Streets Act of 1968 as an experiment, a tentative procedure on trial. Congress recognized this by providing for a 15-member "National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance" (called the "Commission") to come into existence in 1974. This 6-year period has been criticized as too long to wait for commencing review and evaluation. Creation of a Commission six years in the future is seen as "a transparent attempt to 'freeze' the situation and excuse Congress from doing anything more for that period of time."[1] The Chief draftsman of Title III acknowledges the need for current and continuing evaluation:

> The more people who examine the problems now and see how Title III operates, the more informed the Commission will be. Any study now being made will help the Commission.[2]

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[1] Rufus King, Gambling and Organized Crime (Washington, D.C.: Public Affairs Press, 1969), pp.181-182.

[2] Statement of G. Robert Blakey, in an interview in Washington, D.C., May 11, 1970.

Will the Commission be able to make an impartial and meaningful review of eavesdropping under Title III? The answer depends on the qualifications of its members, the function and goal of the Commission, and the data on which its findings are based. Section 804 of Title III provides for appointment of the fifteen members to the Commission as follows:

> 4 Senators, to be appointed by the President of the Senate.
>
> 4 Members of the House of Representatives, to be appointed by the Speaker of the House.
>
> 7 members to be appointed by the President of the United States, none of whom shall be officers of the Executive Branch.

It is regrettable that the Commission is not to be completely non-partisan and non-political.[1] Members of Congress appointed to the Commission and members appointed by the President of the United States may find it difficult to resist political pressures.

The stated function of the Commission is "to conduct a comprehensive study and review of the operation of the provisions" of Title III, in order to determine its "effectiveness." It is not clear whether "operation" refers specifically to procedures and practice, without consideration of

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[1] Note that all fifteen members of the Title III Commission may be members of the same political party. The same is true of the "National Commission on Individual Rights" to review Federal laws and practices relating to "wiretapping and electronic surveillance," created by the Organized Crime Control Act of 1970 (Public Law 91-452, 91st Cong., S.30, October 15, 1970, Section 1201).

constitutionality, nor does the statute indicate what is meant by "effectiveness." Is effectiveness to be determined by the impact of wiretapping and electronic surveillance on organized crime? On serious crime? Is it to be measured by the number of arrests and convictions produced? Is the Commission to assume that a significant relationship exists between manhours and dollars spent and number of incriminating conversations overheard? The most effective eavesdropping may entail the greatest invasion of privacy, but it is uncertain whether it is within the scope of the Commission's function to examine the extent of governmental intrusion. The "need" for eavesdropping seems to be assumed; the Commission is to be concerned only with "effectiveness."

The Report of the Commission, due within one year after it comes into existence, is to be based on "statistical data, reports, and other information deemed necessary by the Commission to perform its function." These must be furnished by "each department, agency, and instrumentality of the executive branch, including independent agencies." How is the Commission to enforce this requirement? Subpoena power is not specifically provided, and even if it is available experience has shown that executive agencies determined to withhold information can find ways to do so. The data to which the Commission will surely have access and on which it must rely, at least in part, consists of:

1. Reports by prosecuting officials and judges to the Administrative Office of the U. S. Courts, and

2. Annual Report to Congress.

According to the Senate Report, these were "intended to form the basis for a public evaluation" of the operation of Title III.[1] These statistical compilations have, however, been shown to be inadequate. As is abundantly clear from the examination of operation under Title III:

> Only an independent inquiry which goes beyond the statistics can provide full light on this difficult issue of crime control and the right of privacy.[2]

The study on which this dissertation is based is an independent inquiry that has looked beyond the statistics. The data gathered seems to indicate clearly that if eavesdropping under Title III is to be kept at a level that is tolerable in a "free society," the law must be clarified and practice must be improved. Impartial investigation on a continuing basis is essential, for eavesdropping is a dangerous tool that requires careful supervision, and freedom is a vulnerable right that must be constantly reinforced.

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[1] U. S. Congress, Senate Report No. 1097, 90th Cong., 2nd sess., to accompany S.917, p.107.

[2] New York Times, October 8, 1970, p.46, col.2.

PROPOSALS AND PREDICTIONS

The operation of Title III during its first two years has involved a tremendous and costly effort in law enforcement. It has produced many arrests and some convictions that law enforcement officials insist would not have been possible without eavesdropping, most of them in gambling and narcotics activities.[1] No one claims that Title III has been a panacea in detecting, punishing, or deterring crime. In 1970, reported crime in the United States rose 11% compared with 1969.[2] Comparatively few of the 5,000 alleged members of "La Cosa Nostra" have been apprehended and incarcerated on evidence obtained through court-ordered eavesdropping. The French scientist, Raymond Aron, finds it amazing that with so much knowledge about members of organized crime so little has been accomplished. There must be something wrong with such a system, says Aron.[3]

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[1]Former Attorney General Ramsey Clark claims that "these activities could have been broken up and important seizures made without wiretaps. Crime in America, p.291.

[2]New York Times, March 29, 1971, p.1, col.7. There is, of course, no clear connection between the crime rate and the legal status of wiretapping and electronic surveillance, nor does the reported crime rate furnish an accurate picture of the extent of crime.

[3]Milton Viorst, "Talk with a Reasonable Man," New York Times, Magazine Section, April 30, 1970, Part I, p.34, col.1, at p.97.

American sociologists have been saying for some time that our approach to the problem is at fault. Eavesdropping permits us to do what we have been doing since the Prohibition days of the 1920's--ferreting out individual criminals who are replaced by others. We must change our values and not our tools of law enforcement. Organized crime is part of the American way of life and cannot be dealt with through increased use of wiretapping and electronic surveillance. We have to give up our myths and stop being a nation of "overnight fortune hunters." Organized crime provides goods and services demanded by large segments of the public, particularly gambling and narcotics, made illegal by our laws. It could not flourish without the cooperation and even connivance of part of the law enforcement and political machinery.[1]

Professor Thomas Schelling of Harvard, as consultant to the President's Crime Commission, criticized the dominant national approach to organized crime through indictment and conviction of individuals. He suggested instead a process

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[1]Stuart L. Hills, "Combating Organized Crime in America," Federal Probation, March 1969, Vol.XXXIII, No.1, pp.23-28, at p.26. See also Edwin M. Schur, Our Criminal Society: The Social and Legal Sources of Crime in America (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1969), pp. 230-231; Ramsey Clark, Crime in America (New York: Simon and Schuster, 1970); Daniel Bell, "Crime as an American Way of Life," The Antioch Review, June 1953, Vol.XIII, No.2, pp.131-154; Stanley M. Beck, "Electronic Surveillance and the Administration of Criminal Justice," Canada Bar Review, Vol. 46 (1968), p.683. Beck says that in the attempt to legislate morality, we have spawned a worse evil--organized crime.

of regulation, accommodation, and restructuring of the market as in the case of food and drugs, broadcasting, and monopolies. The Government should consider going to the peace table with "La Cosa Nostra"--perhaps let them run gambling and get out of all other illegal activities.[1] Donald R. Cressey has also suggested negotiating with "La Cosa Nostra" and establishing "diplomatic or accommodating relations with it." If it could conduct bet-taking lawfully and keep the profits after payment of taxes, organized crime might be willing to relinquish illegal operation of legitimate businesses and political activities.[2] Robert M. Morgenthau, former United States Attorney for the Southern District of New York, a vigorous prosecutor of organized crime during his term of office, also had doubts about the efficacy of dealing with organized crime through prosecution:

> Sometimes I've thought we ought to declare a moratorium on the prosecution of organized criminals for five or ten years and let them get so rich they'd give up their predatory instincts and be more concerned about getting their children into college.[3]

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[1]Victor Navasky, "A Famous Prosecutor Talks About Crime," New York Times, Magazine, February 15, 1970, p.32, at p.98. See also Thomas Schelling, "Economic Analysis of Organized Crime," Appendix D, Task Force Report: Organized Crime, 1967, p.114.

[2]Theft of the Nation--The Structure and Operations of Organized Crime in America (New York: Harper & Row, 1969), p.322.

[3]Victor Navasky, "A Famous Prosecutor Looks at Crime," New York Times, Magazine, February 15, 1970, p.33. Top members of organized crime do send their sons to college, particularly to schools of law, accounting, and business administration. Frank Cavalcante, son of Simone Rizzo (Sam the Plumber) Cavalcante, alleged Mafia chief, was reported to be completing a doctorate in English at Kent State University in Ohio. New York Times, January 4, 1970, p.65, col.3.

Since the enormous profits from illegal gambling are the foundation of all organized crime activities, legalization of gambling has often been suggested as the way to combat organized crime.[1] Repeal or revision of laws against gambling would permit shifting of hundreds of law enforcement officials to other areas. The President of the National Council on Crime and Delinquency, the nation's largest voluntary agency concerned with crime, has recommended that the Federal Government legalize, computerize, and run gambling at all levels to deprive organized crime of a portion of its income.[2] But legalization of gambling has its opponents as well as supporters:

> Licensed gambling activities . . . cannot be effectively controlled by public authorities in a democratic society; sooner or later they always corrupt.[3]

The Organized Crime Control Act of 1970 prohibits illegal gambling and provides for establishment of a "Commission on the Review of the National Policy Toward Gambling," to conduct a "comprehensive legal and factual study of gambling"

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[1]Legalization in New York of off-track betting is not expected to make an appreciable dent in playing the "numbers." Numbers in the black ghettos of New York City are "a part of the community, an accustomed ritual," and convenient. New York Times, January 31, 1971, Sec.E, January 31, 1971, p.6, col.2.

[2]New York Times, August 14, 1970, p.14, col.1.

[3]King, Gambling and Organized Crime, p.168.

and to consider possible alternatives.[1]

It is an acknowledged fact that organized crime could not flourish without official corruption. Heavy contributions to election campaigns enable organized crime to exercise considerable power over elected officials. Laws requiring accounting for campaign funds and disclosure of personal assets by public officials have been suggested to deal with the problem of corruption and organized crime.[2] Failure to curb organized crime has been characterized as a political failure, not a police failure. For years, judges have been charged with giving racketeers light sentences.[3] The Organized Crime Control Act of 1970 attempts to remedy this by providing heavy penalties for racketeering activity and additional sentence up to twenty-five years for dangerous special offenders.[4]

Legalization of narcotics distribution has also been suggested as a way of undercutting the profits of

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[1]Public Law 91-452, 91st Cong.,S.30, October 30, 1970, Section 804-809.

[2]King, Gambling and Organized Crime, p.14. Candidates for office do not refuse campaign funds, for the cost of an election campaign is phenomenally high. Federal and State laws limiting campaign contributions are easily circumvented and have rarely been enforced.

[3]Edward J. Allen, Merchants of Menace--The Mafia: A Study of Organized Crime (Springfield, Illinois: Charles C. Thomas, 1962). The Joint Legislative Committee on Crime in New York is investigating an alleged pattern of light sentences for organized crime figures, handed down by certain State judges. See New York Times, December 13,1970, p.26, col.1.

[4]Public Law 91-452, 91st Cong.,Titles IX and X.

organized crime. Federal and State prosecutors have been conducting concerted drives against narcotics smugglers and dealers, and obtaining wiretap orders under Title III in an attempt to seize the largest amounts of narcotics possible. Next to gambling, the greatest number of orders were obtained in narcotics cases during 1969, resulting in some indictments and convictions. The Federal Government's test case under Title III (United States v. Tantillo) involves narcotics distribution.[1] However, as a Deputy Chief Inspector of the Narcotics Squad observed:

> Increasing narcotics arrests . . . cannot curb drug abuses as long as tons of heroin are smuggled across the nation's borders each year.[2]

Federal studies acknowledge that there is scant hope of curbing traffic in heroin and other dangerous drugs without the cooperation of governments of the countries where they originate. It has been proposed that the United States give funds for a United Nations drive to buy up all available narcotics before they reach the United States.[3] Legislation to cut off economic aid to governments that refuse to act against the illegal drug trade has also been suggested.[4] A proposal that is gaining acceptance is the creation of government centers to dispense free drugs to narcotics addicts, in order to end the profit of gangsters and pushers.

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[1]See page 330.

[2]New York Times, April 15, 1970, p.13, col.2.

[3]Ibid., June 28, 1970, p.53, col.2.

[4]Ibid., March 30, 1971, p.28, col.5.

Drugs sold on the street by criminal elements for $15 could be obtained legitimately for less than 15 cents.[1] Many doctors, lay experts, judges, legislators, and others have urged legalization of the use of marijuana in order to "take the syndicate out of business by eliminating the profit."[2]

Other proposals for dealing with organized crime include vigorous use of anti-trust laws to prevent infiltration of legitimate business by organized crime, analyzing the economics of loan-sharking and the relation between financial policies of respectable lending institutions and the need for usurious loans by the poor, the average businessman, and gamblers, and finally, a concerted long-range effort to eliminate the slums and ghettos in which organized crime breeds.[3]

The Act passed by Congress in 1970 to combat organized crime seeks to provide additional tools for prosecution of suspects.[4] Law enforcement officials interviewed could

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[1] New York Times, May 26, 1970, p.28, col.7.

[2] Gertrude Samuels, "Pot, Hard Drugs and the Law," New York Times, Magazine, February 15, 1970, pp.4-19; New York Times, January 18, 1971, p.16, col.2.

[3] New York Times, January 30, 1970, p.1, col.1 (anti-trust); Cressey, Theft of the Nation, pp.68, 80 (loan-sharking); Herbert A. Block, Crime in America (New York: Philosophical Library, Inc.), p.15.

[4] Analysis of the 1970 Crime Control Act to deal with organized crime is outside the scope of this article, and is referred to only in so far as it relates to interception of wire and oral communications.

see no relation between the 1970 Crime Control Act and Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The new tools are not alternatives to eavesdropping and will not diminish its use. If court-ordered eavesdropping had not been provided in 1968, they say, it would surely have been included in the 1970 Act.

Eavesdropping by law enforcement officers under Title III is an accomplished fact, and despite the polarization of opinion that continues to exist as to its acceptability in a free society, Americans must live with it--at least until Congress repeals it, the Supreme Court declares it unconstitutional, or the Executive orders Federal agencies not to use it. Since none of these events are likely in the foreseeable future, the immediate problem is how to minimize invasions of privacy and maximize meaningful law enforcement.

The empirical data gathered for this dissertation suggest the following as essential steps to eliminate weaknesses in Title III that may upset the balance between privacy and law enforcement and make it intolerable in a free society:

1. Clarify ambiguous provisions of Title III as listed on page 370.
2. Press law enforcement officials to exercise restraint and limit eavesdropping to organized crime and serious crime.
3. Establish uniform procedures and standards to guide State officers and Federal officials in complying with Title III and the requirements laid down by the Supreme Court in Berger and Katz.

4. Improve reporting practices to aid meaningful evaluation of Title III and its impact on the right of privacy.

5. Check Federal and State practices under Title III on a regular basis.

Who is to clarify ambiguous terms and clauses? No changes in Title III can be expected from Congress, at least not before 1975 when the Commission to review operation is scheduled to file its report. Members of the House of Representatives who have opposed eavesdropping for many years and still find it distasteful admit that not more than forty Congressman could be induced today to consider any amendment. In the Senate, opponents of eavesdropping like Senator Philip S. Hart, Democrat of Michigan, and Senator Edward M. Kennedy, Democrat of Massachusetts, have turned their attention to other more pressing matters and left the sponsors of Title III to oversee its operation.

Interpretation of clauses in Title III and terms of doubtful meaning must come from the Supreme Court. Practices by Federal and State law enforcement officials of challenged constitutionality will also be reviewed ultimately by the Court. Predictions as to future action of the United States Supreme Court are always hazardous, since action taken by the Court depends on conflicting pressures, personal reaction of members of the Court, and the circumstances under which a particular question is presented for solution. Forecasting Supreme Court action is a particularly frustrating pastime today, since a change in direction is indicated but the arrows are not yet clearly marked. Of the present members of the Court, only Justice Brennan and Justice Douglas

have expressed a general hostility towards eavesdropping. While they joined the majority in Katz, thus indirectly sanctioning electronic eavesdropping under limited conditions, their comments during oral argument in Berger were revealing. Justice Brennan called eavesdropping legalized burglary--like having a policeman hide in a closet, and Justice Douglas in his extreme inimitable way commented that one might as well put a policeman under the bed![1]

Justice Thurgood Marshall did not participate in Katz. As Solicitor General of the United States he had the distinctly unpleasant task of disclosing to the Supreme Court that the Department of Justice had installed eavesdropping devices in the hotel suite of Fred B. Black, Jr., former business associate of Robert G. Baker, for a period of three months while Mr. Black was under indictment for income tax evasion.[2] The Solicitor General subsequently announced that the Department of Justice would review all past and pending cases in which evidence might have been obtained by electronic eavesdropping.[3] Mr. Justice Black will undoubtedly continue to urge judicial restraint. He insists that eavesdropping is not a search and seizure, that it is not controlled by the limitations of the Fourth Amendment, but he is not likely to interfere with the Congressional

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[1] New York Times, April 14, 1967, p.1, col.4.

[2] Ibid., May 29, 1966, Sec.E, p.8, col.3.

[3] Ibid., December 1, 1966, p.1, col.2.

enactment on the subject. Nor can the two new members of the Court, Chief Justice Warren E. Burger and Justice Harry A. Blackmun, committed as they are to the doctrine of judicial restraint, be expected to brook interference by the judicial branch with the position taken on the subject of eavesdropping either by the Legislature or the Executive.

It seems reasonable to predict that the Supreme Court will not feel obligated to postpone decision on Title III issues until the Commission files its report in 1975, since the function of the Commission is limited to evaluation of "effectiveness of operation." The Supreme Court must, of course, wait until a suitable case is presented to it for consideration. The United States District Court decisions in United States v. Escandar and United States v. Tantillo will probably reach the highest court by 1972. The constitutionality of Title III as a whole is under attack in these cases, as well as the validity of the eavesdrop order and interceptions under the particular circumstances. While the Government in the Tantillo case questioned the right of defendants to challenge Title III on its face apart from the facts, it nevertheless confronted the attack and submitted arguments to support its view that Title III comported with the demands of the Fourth Amendment. The decision of the United States Court of Appeals for the Sixth Circuit in United States v. Sinclair, Plamendon, et al. may be reviewed by the Supreme Court in 1971.

It is reasonably safe to say that the Supreme Court will not declare the whole of Title III unconstitutional within the next few years, regardless of the composition of the Court.[1] There are powerful practical and political reasons why the Supreme Court is unlikely to do so. The Court would expose itself to bitter attack if this tool of law enforcement were withdrawn at a time when "fear of crime" grips the nation. Besides, the Court is always reluctant to overturn an Act of Congress, even if it is in the nature of an assault on the Court itself. The two newest members of the Court, Chief Justice Warren E. Burger and Justice Harry A. Blackmun, are, as previously indicated, committed to the doctrine of "judicial restraint." Any new appointments that President Nixon may have an opportunity to make during the next two years will only move the Court further toward a "hands off" policy on legislation. The Court will undoubtedly limit its decision to the specific facts of the case before it. Precedent is strong for

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[1]Will the Supreme Court consider the purpose and intent of the statute in deciding the constitutionality of Title III, or will it be concerned only with the effect of the statute and how it is applied in actual practice? The Court has not been consistent in its pronouncements on whether motive will be taken into account. See "Legislative Purpose and Federal Constitutional Adjudication," Harvard Law Review, June 1970, Vol.83, No.8, p.1887, commenting on United States v. O'Brien, 391 U.S. 367, 383 (1968).

The Omnibus Act of 1968 contains a separability clause (Title XI), but the entire Act may fail if key provisions are held unconstitutional. Presumption of separability may be overcome if legislative intent would not be fulfilled by the deletion. See Valparaiso Univerity Law Review, Fall 1968, p.101, footnote 76.

deciding constitutional questions on as narrow a basis as possible, and in the present climate of "strict construction" the Court will probably go no further than is absolutely necessary.

Will the Supreme Court be less concerned with intrusions on privacy and more sympathetic to the problems of law enforcement than it was in 1967 when Katz and Berger were decided? Continuing emphasis on the theme of "law and order," even if it is regarded with suspicion by some as a spurious political rallying cry, cannot leave the Court unaffected, and it is possible that the Court may go beyond the limits fixed by Katz. In view of current public concern with the problem of crime, the Court will probably uphold the general scheme of court-ordered eavesdropping if it finds that a reasonable effort has been made to comply with the safeguards provided by the Act. The attention given in United States v. Tantillo as to the adequacy of the affidavits on which the order was based reflects the expectation that the Supreme Court will scrutinize applications and hold them strictly to the protections provided by Title III.

Despite some disquieting evidence that the spirit of the present Court is leading it to narrow the rights of the accused in criminal cases,[1] law enforcement officials should not expect that the Burger Court will sacrifice constitutional liberties lightly to their demands. In an address in May 1970, Chief Justice Burger said:

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[1] New York Times, April 11, 1971, Sec.E, p.6, col.1.

> In periods of stress there are always some voices raised urging that we suspend fundamental guarantees and take shortcuts as a matter of self-protection . . . we often found, in retrospect, that we have overreacted when basic guarantees of the individual have been denied.[1]

The record of the full Burger Court since the advent of Justice Blackmun to the Bench indicates that it intends to be "tough on criminals," but some convictions have nevertheless been overturned on technical grounds.[2]

The Supreme Court will undoubtedly pass on the validity of some specific provisions of Title III and the procedures followed under it by Federal and State officials as cases reach the Court. The two provisions of Title III permitting eavesdropping without court order in emergency and national security cases are most vulnerable to attack on constitutional grounds. A test of the 48-hour emergency clause through the Courts will be difficult, for there is no way of knowing whether or not this power has been used. Nothing in Title III prevents Federal law enforcement

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[1] New York Times, May 20, 1970, p.1, col. 6.

[2] The Court let stand the conviction and four-year prison sentence of Salvatore Bonnano, New York alleged Mafia figure. Bonnano v. United States, decided December 21, 1970. It declined to disturb the larceny, fraud, and tax evasion conviction of Robert G. Baker. Baker v. United States, decided December 21, 1970. But see Whitely v. Warden, decided March 29, 1971, in which the Supreme Court in a 6 to 3 decision overturned a conviction and held that policemen may not legally arrest occupants of an automobile solely on the basis of a police radio bulletin where there was insufficient proof of probable cause to justify broadcasting the radio alert. In this ruling, the so-called "conservative" Justices Harlan, Stewart, and White disagreed with Justices Burger and Blackmun. Justice Black joined the two new "law and order" members in dissent.

officials from eavesdropping under this clause up to forty-eight hours and then deciding not to apply for a court order; the information obtained may be excluded as evidence but it may well serve "intelligence" purposes. No report of such emergency eavesdropping is required by statute, nor has any been made.

The "national security" clause is more likely to be tested in the Supreme Court by political dissidents against whom it has been used, particularly since conflicting decisions have been reached at the United States District Court level and the United States Court of Appeals. One Circuit has held against the Government on the subject. Neither Berger nor Katz ruled on the meaning of "national security" or whether eavesdropping in national security cases falls within the limitation of the Fourth Amendment. As indicated in the analysis of Katz v. United States,[1] Justice Stewart deliberately rejected any consideration of whether a court order was required to eavesdrop in "national security" cases. Justice White was the only member of the Court who recognized that "the warrant procedure and magistrate's judgment" might be dispensed with if the President of the United States or the Attorney General as his chief legal officer "considered the requirements of national security and authorized electronic surveillance as reasonable." The one member of the Court who specifically objected to eavesdropping without court order in such cases was Justice Douglas. While no

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[1]See page 59.

prediction as to the position of the justices can be made with complete confidence, it is likely that Justice Brennan would join Justice Douglas in opposing warrantless eavesdropping, particularly on domestic groups.

The Court may be unwilling to break new paths in constitutional doctrine and decide that interpretation of "national security" is a political question and hence non-justiciable. This is in essence the claim of the Attorney General and pressures will be strong to prevent the Court from interfering with the Executive Branch in this delicate area. However, the Attorney General's assertion that the question of whether eavesdropping can be used to gather information about domestic dissidents "properly comes within the competence of the executive and not the judicial branch" may irk the members of the Court sufficiently to induce them to grant certiorari. The issue of executive power to authorize warrantless eavesdropping on domestic political dissenters has been met squarely by the Court of Appeals in the Sixth Circuit and the claim of power rejected.[1] It is now up to the Supreme Court to come to grips with the problem.

Should the Court decline to deal with the question of "national security," it will be incumbent on the President to issue clear directives.[2] The Attorney General may be

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[1]See page 292.

[2]Existing Presidential directives have been criticized as "vague . . . to the point of vacuousness." New Republic, July 5, 1969, p.6.

forced by public opinion to exercise restraint and to refrain from using executive power under Title III as a political tool. If the Court does agree to pass on the question of "national security," it is doubtful that it would sanction the broad and uncontrolled authority claimed by the Attorney General.

While decisions of the Supreme Court must wait until cases reach the Court, immediate improvements in eavesdropping practices under Title III can be effected by law enforcement officials who apply for orders, by judges to whom they are submitted for signature, and by investigating agents who monitor recordings. On the Federal level, a revised statement of policy and issuance of clear instructions by the Department of Justice could revise practice overnight throughout the country. So far as the States are concerned, the only present hope of establishing improved, uniform procedures lies in the efforts of the Law Enforcement Assistance Administration to conduct training programs and make recommendations. Even if the Department of Justice reversed its present policy and circulated the Federal Manual for the Conduct of Electronic Surveillance among State officials, there is no guarantee that the States would follow Federal suggestions. Law enforcement has traditionally been considered a local responsibility, and the States are always sensitive to interference by the Federal Government.

In the long run, the durability of Title III will depend not only on how the Court interprets it, but also on the socio-political pressures to which Congress, the

Executive, and even the Courts are subject. The public has as yet made no great outcry against surveillance by governmental authorities largely in the belief that it is directed at the hard core of serious crime. Former Attorney General Ramsey Clark says that "fear causes us to condone government wiretapping."[1] If the power of surveillance is diverted by Federal officials to eavesdropping on political dissenters or used indiscriminately by State enforcement officers for minor offenses against selected groups, wiretapping and electronic surveillance can be completely lost as a tool of law enforcement. Total banning of eavesdropping by law enforcement officials does not have present appeal. However, if there are highly publicized instances of extended interceptions of conversations of innocent persons and abuse of power under Title III and State statutes, the pendulum may swing the other way.

In enacting Title III Congress decided that the advantages of wiretapping and electronic surveillance in law enforcement were worth the risk to basic freedoms and the right to privacy. Government officials who want to preserve eavesdropping as a tool of law enforcement should be mindful that in a society that is still free and democratic, no decision is irrevocable.

Almost half a century ago, Justice Louis D. Brandeis called the right of privacy "the most comprehensive of

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[1] Crime in America, p.297.

rights and the right most valued by civilized men." He would probably have opposed sanctioning governmental wiretapping and electronic surveillance with its great potential for misuse. Congressman Emanuel Celler, who has been a member of the House of Representatives continuously since 1922 and has consistently championed civil rights, says of all eavesdropping:

> There is no middle ground . . . there is no way you can abate the abuses.

Those who defend eavesdropping in the interest of law enforcement tend to belittle the importance of privacy and the dangers of intrusion. Senator McClellan, in urging adoption of Title III, said:

> Now, you have got to make a choice. You either give up some minor right or privilege, yield it on some occasions in aid of law enforcement, or you yield to the superior power of the lawless element.[1]

He called it a "very minor concession" to yield to the authority for electronic surveillance "of known criminals."[2] Surrender of a valued right in a free society is never a minor concession, as Senator McClellan must surely know, and those to whom power is entrusted to invade privacy should use it with the greatest circumspection. The Senator himself has cautioned against misuse of eavesdropping:

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[1]U. S. Congress, Senate, Hearings before the Subcommittee on Criminal Laws and Procedures, of the Committee on the Judiciary, "Controlling Crime Through More Effective Law Enforcement," 90th Cong., 1st sess.,July 12, 1967, p.1136.

[2]Hearings, Subcommittee on Criminal Lawsand Procedures, July 12, 1967, p.1119.

> This is an invaluable and powerful tool and must not be subjected to abuse. Those who violate the standards can and must either be punished and if they cannot learn to follow the law they must face loss of this law enforcement tool.[1]

Congress has made a choice and attempted to find a middle ground between privacy and law enforcement. It is up to the Executive and the Courts to see that the concession is not abused. Examination, analysis, and evaluation of Title III in operation during its first two years reveal that, in a society claiming to be free, it is a formidable task to balance the individual's precious right of privacy against the community's pressing need for security. Clarity in the law, promulgation of uniform standards and guidelines, strictest conformity by officials with all available safeguards, and constant vigilance by the public and the Courts are imperative if the right of privacy, authorized eavesdropping in law enforcement, and a free society are all to survive.

Americans have been inclined to take it for granted that the United States is a "free society," relying on the comforting assurance that the ideals of freedom and the rights enshrined in them are protected against abridgment under the Constitution and guarded by the Supreme Court. Almost five decades ago, Justice Oliver Wendell Holmes warned of the precariousness of the basic rights on which freedom rests:

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[1] Congressional Record, August 11, 1969, Vol.115, No. 136, p.4.

> We have grown so accustomed to the enjoyment of those rights that we forget that they had to be fought for and may have to be fought for again.[1]

A good measure of the right to privacy that Justices Holmes and Brandeis defended so memorably in 1928 still exists. Orwell's "1984" with its frightening picture of pervasive and inescapable surveillance continues to be largely an imaginative work and not a prophecy fulfilled. The struggle to maintain a free society has not yet been lost. But unless ambiguities in Title III are clarified, procedures carefully formulated, and practice more closely supervised, eavesdropping in the name of "law and order" will erode fundamental liberties and destroy freedom as Americans have perceived it for 200 years.

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[1] Holmes-Laski Letters, Vol. I, pp.529-530, quoted in Samuel J. Konefsky, The Legacy of Holmes and Brandeis (New York: The Macmillan Company, 1956), p.242, footnote 27.

APPENDIX I

QUESTIONNAIRE FOR INVESTIGATING AGENTS

1. By whom are you employed? Who pays your salary?
2. How long have you been assigned to . . . . . (prosecuting official)?
3. Are you assigned to . . . . . on a permanent basis? On a case-by-case basis?
4. Did you receive any special training for this particular type of work?
5. Where did you get your training? School? On the job?
6. What was the nature of the training?
7. Do you specialize in any particular type of investigation? Any particular type of work?

   Gambling . . . . Narcotics . . . . Other . . . . .
8. Do you have any special skills?

   Mechanical . . . . Language . . . . Wiretap . . . .

   Electronics . . . Other . . . . .
9. Do you carry on one investigation at a time or several at a time?
10. Have you ever acted as undercover agent?
11. Do you develop your own informers?
12. Is the same informer used in various investigations?
13. Do you maintain contact with specific informers?
14. Do you work directly with . . . .(prosecuting official)? Through a chief investigator? Who is your immediate superior?
15. Do you initiate any investigations? Suggest them to . . .?

16. How do you decide that a wiretap order may be needed?

17. How do you decide that normal investigative techniques are inadequate in a particular investigation?

18. How do you decide that there is sufficient "probable cause" to support an application for a wiretap order?

19. Do you prepare the first draft of your own affidavit to accompany the application for a wiretap order?

20. Do you appear before the judge personally when the application for a wiretap order is presented?

    Sometimes . . . . Always . . . .

21. Are you accompanied by a prosecuting official when you appear before the judge?

    Sometimes . . . . Always . . . .

22. Do you sign and swear to your affidavit before it is presented to the judge? In his chambers?

23. Do you furnish additional oral testimony before the judge?

    Sometimes . . . . Always . . . .

24. Does the judge question you about the identity and existence of the informer?

    Sometimes . . . . Always . . . .

25. Are you ever required to disclose the name of the informer?

26. Have you ever personally installed a wiretap or electronic device?

27. Do you serve a copy of the wiretap order on the Telephone Company?

28. Do you obtain information from the Telephone Company in order to instal a wiretap?

    Sometimes . . . . Always . . . . Never . . . .

29. Who selects the location for the "plant" where interceptions will be monitored?

30. Who makes the arrangements for use of the location?

31. Do you personally monitor the interceptions?

32. Do you use automatic monitoring? Sometimes? Never? Always?

33. Do you use live monitoring? Sometimes? Always?

34. Who decides when to turn off the recording device because a conversation is irrelevant or privileged?

35. To whom do you report periodically on the results of the wiretap?

36. How frequently do you make your reports?

37. How many copies of the "log" do you make?

38. Who keeps the copy of your "log"?

39. Do you make a complete transcript of the conversations intercepted?

40. Who decides when the wiretap shall terminate? When the conversation sought has been obtained?

41. Have any questions been raised in any proceeding as to the contents of your affidavit accompanying an application for a wiretap order?

42. Have you ever had to testify in any proceeding under oath in a matter where a wiretap order was obtained? Since June 1968?

43. About how many applications for wiretap orders have you participated in since June 1968?

44. Is your work as an investigator evaluated on a regular basis? By whom?

45. What is the basis of evaluation? Number of arrests? Number of convictions?

APPENDIX II

QUESTIONNAIRE FOR PROSECUTING OFFICIALS

1. Do you use the form supplied by the Administrative Office of the United States Courts in making annual reports under Section 2519(2) of Title III?

   Yes . . . . No . . . . Letter . . . . Statement . . .

2. Do you omit from your report to the Administrative Office the identifying name and address, as permitted by Section 202(4) of its regulations?

   Yes . . . . No . . . . Always . . . . Sometimes . . .

3. For the "general description" of each interception in your annual report, required by Regulations Section 202 (3)(b), do you include:

   Offense . . . . Nature of conversation . . . . Other . . .

   Example . . . . . .

4. Do you find the form of report to the Administrative Office satisfactory?

   Yes . . . . No . . . . Improvements . . . . . .

   . . . . . .

5. To show why normal investigative procedures are inadequate do you set forth facts in detail?

   Yes . . . . No . . . . Great detail . . . . Example:. .

   . . . . . .

6. To show "probable cause," do you set forth facts in detail?

   Always . . . . Generally . . . . Sometimes . . . . . .

   Example: . . . . . .

7. How many copies of the application, affidavits, and order are made?

   Original and two . . . . and three . . . . More . . . .

8. Do you use printed forms of applications, orders, or other documents?

   Yes . . . No . . . Which are printed? . . . . . .

9. In your County, are you permitted to submit an application for an eavesdrop order to any judge in the County?

   Yes . . . No . . . Must submit to . . . . . .

10. Have any judges in your County indicated opposition to eavesdropping and been reluctant to sign orders?

    Yes . . . One judge . . . Two judges . . .

    More . . . None . . .

11. Has any judge refused to grant an application for court-ordered eavesdropping submitted to him?

    Yes . . . No . . . In how many instances? . . . . .

12. Does the judge require that the investigating agent appear before him in person?

    Always . . . Sometimes . . . Never . . .

13. Is the eavesdrop order served on the Telephone Company?

    Yes . . . No . . . Always . . . Sometimes . . .

14. Has the Telephone Company ever refused to cooperate in a wiretap for which an order was signed?

    Yes . . . No . . . How many times? . . . . . .

15. Where are the original documents kept after they are sealed by the judge?

    In the D.A.'s office . . . In the Court Clerk's

    office . . . In the judge's office . . . Elsewhere . .

    . . . . . .

16. Do you use automatic monitoring, as distinct from live monitoring, of recorded interceptions?

    Never . . . Always . . . Sometimes . . . Rarely . . . .

17. Who owns the wiretapping equipment and other electronic devices?

    Investigating agency . . . D.A. . . . Other . . . . . .

18. Have any interceptions been terminated before expiration of the period fixed by the court order?

Yes . . . No . . . How many? . . . . . .

19. Who decides when interceptions shall terminate?

Monitoring agents . . . Asst. D.A. . . . D.A. . . .

20. Who decides which parts of recorded conversations shall be transcribed?

Monitoring agents. . . Asst. D.A. . . . D.A. . . .

21. Have individuals against whom eavesdrop orders were obtained been known members of organized crime syndicates?

Top echelon . . . Middle . . . Lower echelon . . .

Generally unknown . . . . Sometimes known . . . . . .

22. In obtaining extensions of orders, are new facts included in written affidavits to show new "probable cause"?

Yes . . . No . . . Occasionally . . . Oral . . . .

23. Has any judge required a progress report?

Yes . . . No . . . How many judges? . . . . . .

24. Where are the recording tapes kept after they are sealed by the judge?

In the D.A.'s office . . . In the judge's office . . .

By the investigating agency . . . Elsewhere . . . . . .

25. Have orders resulted in overhearing conversations of persons suspected of crime other than the individuals against whom the order was directed?

Yes . . . No . . . In some cases . . . Example: . .

. . . . . .

26. Do you object to giving notice within 90 days after expiration of the order?

Yes . . . No . . . In some cases . . . Example: . .

. . . . . .

27. Have you given any notices 10 days before trial, as required by Section 2518(9) of Title III?

Yes . . . No . . . In how many cases? . . . . . .

28. Have any motions been made to suppress evidence obtained through court-ordered eavesdropping?

Yes . . . No . . . Granted . . . Denied . . . .

How many? . . . .

29. Have any convictions been obtained in your County as a result of court-ordered eavesdropping?

Yes . . . No . . . After trial . . . On guilty

plea . . . How many? . . .

30. How do you estimate cost of a wiretap or bug?

Manpower . . . . . Rental . . . . . Equipment . . . . .

Other . . . . . .

31. Have any complaints been made to your office of <u>private</u> eavesdropping, banned by Title III?

Yes . . . How many . . . None . . . Action taken . . .

. . . . . .

32. Since enactment of Title III in June 1968, has cooperation been extended to you by Federal or State officials?

Same as always . . . Increased . . . Federal . . . . .

State . . . Which agencies?. . . . . .

Decreased . . .

33. Do you find Title III and State requirements on court-ordered eavesdropping too onerous to be used effectively?

Yes . . . No . . . With qualifications . . . . . .

. . . . . .

34. Do you find Title III and State requirements not restrictive enough to protect the right of privacy of innocent individuals?

Yes . . . No . . . In what respect? . . . . . .

35. What changes, if any, would you propose in Title III and State law on court-ordered eavesdropping?

. . . . . .

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. . . . . .

. . . . . .

APPENDIX III

QUESTIONNAIRE FOR JUDGES--STATE AND FEDERAL

1. Are applications for eavesdrop orders required to be submitted to a judge sitting in a special "Part"?

   Yes . . . No . . .

2. Do you require the investigating agent to appear before you personally?

   Yes . . . No . . . Always . . . Sometimes . . .

3. Does the prosecuting official appear before you personally?

   Yes . . . No . . . Always . . . Sometimes . . .

4. Are the affidavits accompanying the applications signed in your presence?

   Yes . . . No . . . Sometimes . . . Never . . . .

5. Do you require disclosure to you of the name of the informant on whose information the facts in the affidavits are based?

   Occasionally . . . Always . . . Never . . .

6. Have you found the documents submitted to you prepared properly and adequately?

   Yes . . . Generally . . . Could be better . . . . .

7. Have you found it necessary to request additional information before signing an eavesdrop order?

   Often . . . Occasionally . . . Never . . .

8. Do you examine the application and affidavits immediately on presentation, in the presence of the prosecuting official?

   Yes . . . Sometimes . . . Always . . . No . . . . . .

9. Are the affidavits and applications for eavesdrop orders left with you for examination and signature of order?

   Yes . . . No . . . Sometimes . . .

10. How much time is generally needed for examination of the documents and signature of the order?

    Minutes . . . Hours . . . Days . . .

11. Are you personally acquainted with the prosecuting official who presents the application to you?

    Generally . . . Sometimes . . . Well acquainted . . .

12. Have you ever refused to sign an order for eavesdropping?

    Yes . . . No . . . How many? . . . Under what circumstances? . . . . . .

13. Do you keep the original application, affidavit, and order in your own custody after sealing?

    Yes . . . No . . . In whose custody? . . . . . .

14. Do you keep a copy of the application, affidavits, and order?

    Yes . . . No . . . Only a copy of . . . . . .

15. Have you asked for progress reports?

    Sometimes . . . Always . . . Never . . . Oral . . .

    Written . . .

16. Do you feel that a 30-day period for interceptions is too long?

    Yes . . . No . . . Generally . . . Sometimes . . .

    Under what circumstances? . . . . . .

17. On application for extension of an eavesdrop order, do you require written affidavits showing new "probable cause"?

    Yes . . . No . . . Accept oral testimony . . . . . .

    Sometimes . . . Always . . .

18. Has any application for extension been presented to you of an eavesdrop order signed by some other judge?

Yes . . . No . . . How many? . . . Granted . . . .

Denied . . .

19. Has any application been made to you to postpone giving notice as permitted by Section 2518(7)(d) of Title III?

Yes . . . No . . . How many? . . .

20. Have any motions to suppress evidence obtained through an eavesdrop order been presented before you?

Yes . . . No . . . How many? . . . Granted . . .

Denied . . .

21. Have you ever ordered opening of a seal?

Yes . . . No . . . Under what circumstances? . . . .

. . . . . .

22. Have you presided at any trial in which evidence obtained through court-ordered eavesdropping under Title III was offered?

Yes . . . No . . . Date . . . . . .

23. Do you approve of court-ordered eavesdropping?

Yes . . . No . . . Strongly in favor . . .

Strongly opposed . . . Only against organized crime . .

Only for serious crimes . . . . . .

24. What changes in court-ordered eavesdropping would you recommend? To Congress? To the Executive? To the Supreme Court?

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. . . . . .

25. What changes would you recommend to prosecuting officials, investigating agents, and others, in procedure and practice followed by them under Title III and State statutes:

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APPENDIX 4.

Table 4

Average Cost Per Intercept Installed January 1, 1969 to December 31, 1969, by State and County

Reporting Jurisdiction	Authorized Intercepts		Average Cost Per Intercept		
	Total number Installed	Cost Reported	Manpower	Other	Total
Federal	30	30	$8,071.14	$ 813.93	$8,885.07
Arizona					
Pima County.....	5	5	800.00	360.00	1,160.00
Colorado					
Denver County.....	2	2	850.00	30.00	880.00
Florida					
Broward County.....	1	1	2,000.00	15.00	2,015.00
Georgia					
Fulton County.....	1	1	2,672.65	1,409.00	4,081.65
Henry County.....	1				
Maryland					
Baltimore County...	10	10	720.14	40.00	760.14
Prince Georges Co..	5	5	126.80	91.00	217.80
New Jersey					
Essex County.....	4	4	1,037.75	466.50	1,504.25
Mercer County.....	35	35	2,217.16	103.14	2,320.30
Rhode Island					
Providence County..	1	1	5,640.00	175.00	5,815.00
New York					
(New York City)					
Bronx County.....	23	23	2,672.83	154.04	2,826.87
Kings County.....	19	19	2,749.95	55.35	2,805.30
New York County....	18	18	4,034.72	**	4,034.72
Queens County.....	49	49	761.09	54.44	815.53

Table 4

Average Cost Per Intercept Installed
January 1, 1969 to December 31, 1969
by State and County
Concluded

Reporting Jurisdiction	Authorized Intercepts		Average Cost Per Intercept		
	Total number Installed	Cost Reported	Manpower	Other	Total
Other New York Counties					
Clinton	5	5	$ 300.00	$115.00	$ 415.00
Columbia	1	1	400.00	None	400.00
Dutchess	4	None	-	-	-
Erie	3	1	1,000.00	150.00	1,150.00
Nassau	3	3	3,716.67	**	3,716.67
Oneida	11	11	190.45	93.82	284.27
Onondaga	18	18	177,83	111.28	289.11
Orange	2	2	3,500.00	-	3,500.00
Suffolk	6	4	968.00	25.75	993.75
Westchester	13	13	3,117.85	127.46	3,245.31
Ulster	1	1	1,070.00	-	1,070.00

*Not reported.
**Included with manpower costs.

NOTE: This table is based on reports received from prosecuting officials.

Table 6

SUMMARY REPORT ON AUTHORIZED INTERCEPTS GRANTED PURSUANT TO TITLE 18, UNITED STATES CODE, SECTION 2518
June 20 - December 31, 1968 and January 1 - December 31, 1969

Reporting Period	TYPE OF FACILITY						
	Total	Residence	Apartment	Multiple dwelling	Business	Business and living quarters	Not indicated and other
June 20-Dec. 31, 1968	174	67	49	10	45	-	3
Jan. 1-Dec. 31, 1969	302	135	68	14	71	5	9

Reporting Period	INTERCEPTS AUTHORIZED						
	Total		Number of Extensions	Average Length (in days)			
	Author-ized	In-stalled		Original authorization	Extension	Actual Use Days	Actual Use Hours
June 20-Dec. 31, 1968	174	147	128	20	20	NA	NA
Jan. 1-Dec. 31, 1969	302	271	194	26	22	9,019	3½

Reporting Period	MAJOR OFFENSE SPECIFIED IN APPLICATION								
	Total	Drugs	Extortion	Gambling	Hijacking	Homicide	Larceny	Robbery	All other
June 20-Dec. 31, 1968	174	71	13	20	-	21	19	8	22
Jan. 1-Dec. 31, 1969	302	88	10	102	4	19	10	24	45

Reporting Period	Intercepts		AVERAGE NUMBER PER AUTHORIZED INTERCEPT		
	Total*	In-stalled	Persons involved	Intercepts	Incriminating Intercepts
June 20-Dec. 31, 1968	174	147	29	454	98
Jan. 1-Dec. 31, 1969	302	271	116	641	252

Reporting Period	Total where cost reported	AVERAGE COST PER AUTHORIZED INTERCEPT		
		Manpower	Other	Total cost
June 20-Dec. 31, 1968	120	$1,305.00	$ 53.00	$1,358.00
Jan. 1-Dec. 31, 1969	262	$2,455.00	$179.00	$2,634.00

*Authorized by judges.

APPENDIX 6.

Table B. Reports by State Prosecuting Officers, Pursuant to Title 18, United States Code, Sec. 2519, Concerning Court Authorized Intercepts of Wire or Oral Communications, Calendar Year 1969

State, County and Reporting Number	Name of Prosecutor	Nature of Intercepts		Number of			Cost			Number of Persons Arrested	Number of Trials	Motions to Suppress Intercepts	Number of Persons Convicted
		Type	Average Frequency*	Persons	Intercepts	Incriminating Intercepts	Manpower	Other Resources	Total Cost				
Arizona													
1 Maricopa	Nelson	Never installed					$ -	$ -	$ -				
2 Pima	Schafer	Phone call	Twice weekly	4	47	1	800.00	350.00	1,150.00	none	-	-	-
3 Pima	Schafer	Never installed											
4 Pima	Schafer	Phone call	20-30 times	6	435	none	450.00	400.00	850.00	none	-	-	-
5 Pima	Schafer	Phone call	7-10	22	170	10	850.00	350.00	1,200.00	none	-	-	-
6 Pima	Schafer	Phone call	9	9	178	3	1,800.00	350.00	2,150.00	none	-	-	-
7 Pima	Silver	Phone call	24	6	77	4	100.00	350.00	450.00	none	-	-	-
8 Pima	Silver	Never installed											
Colorado													
1 Denver	McKevitt	Phone call	10-15	30	400	30	400.00	60.00	460.00	none	-	-	-
2 Denver	McKevitt	Phone call	25	40	1,500	30	1,300.00	-	1,300.00	none	-	-	-
Florida													
1 Broward	Geiger	Phone call	No interceptions due to equipment problems										
2 Broward	Geiger	Phone call	10	15	202	202	2000.00	15.00	2015.00	1	Pending	Pending	-
Georgia													
1 Fulton	Bolton	Phone call	27	467	548	84	[2672.65	1409.00	4081.65	27	none	(Denied)	-]
2 Henry	Bolton	Phone call	20	202	202	78							
3 Fulton	Slaton	Phone call	No prosecutor report received										
4 Fulton	Slaton	Phone call	No prosecutor report received										
5 Fulton	Slaton	Phone call	No prosecutor report received										
Maryland													
1 Baltimore	Moylan	Phone call	78	1,397	1,316	206	5,763.50	358.00	6121.50	4	none	none	none
2 Baltimore	Moylan	Oral	1	1	1	none	56.00	-	56.00	none	-	-	-
3 Baltimore	Moylan	Oral	12	69	60	11	641.85	42.00	683.85	4	none	none	none
4 Baltimore	Moylan	Oral	1	1	1	none	100.00	-	100.00	none	-	-	-
5 Baltimore	Moylan	Oral	1	1	1	none	100.00	-	100.00	none	-	-	-

*Per day unless otherwise indicated.

Table A. Reports by State Judges Pursuant to Title 18, United States Code, Sec. 2519, on Applications for Court Orders to Authorize the Interception of Wire or Oral Communications. Calendar Year 1969

State, County and Reporting Number	Name of Judge	Applicant	Offense Specified	Kind (PW) Phone Wire (M/E) Microphone/ Eavesdrop (O) Other	Date of Application	Original Period Authorized*	Number of Extensions	[1]Actual Period device in operation*	Total Authorized Length of Intercepts*	Place
New York										
1 Cayuga	Blauvelt	Lipski	Gambling	PW	12-23-68	20	1	No report	40	Residence
2 Cayuga	Blauvelt	Lipski	Gambling	PW	1-7-69	20	none	No report	20	Taxi office
3 Cayuga	Blauvelt	Lipski	Gambling	PW	1-18-69	20	none	No report	20	Restaurant
New York										
1 Clinton	Postel	North	Narcotics	PW	10-10-68	20	none	20	20	Residence
2 Clinton	Widlitz	North	Narcotics	PW	10-10-68	20	1	40	40	Residence
3 Clinton	Postel	North	Narcotics	PW	10-10-68	20	1	40	40	Residence
4 Clinton	McDonald	North	Narcotics	PW	10-10-68	20	none	20	20	Residence
5 Clinton	McDonald	North	Narcotics	PW	10-10-68	20	2	60	60	Business
New York										
1 Columbia	Casey	Miner	Possession of Stolen property	PW	11-7-69	30	none	6	30	Used Car lot
New York										
1 Dutchess	Jiudice	Rosenblatt	Robbery, Grand Larceny	PW	1-19-69	20	none	NI	20	Residence
2 Dutchess	Jiudice	Rosenblatt	Robbery, Grand Larceny	PW	1-18-69	20	none	NI	20	Tavern
3 Dutchess	Jiudice	Rosenblatt	Gambling	PW	10-28-69	30	none	NI	30	Residence
4 Dutchess	Jiudice	Rosenblatt	Gambling	PW	11-6-69	30	none	NI	30	Residence
New York										
1 Nassau	Christ	Delin	Murder	PW	1-15-69	20	1 denied	20	20	Apartment
2 Nassau	Young	Cahn	Gambling, Usury	PW	7-3-69	20	Application denied			Pizza Parlor
3 Nassau	Kelly	Cahn	Narcotics, Gambling	PW	11-3-69	30	none	20	20	Apartment
4 Nassau	Kelly	Cahn	Gambling	PW	11-7-69	30	none	11	30	Residence
New York										
1 Erie	Heffron	Dillon	Gambling	PW	2-4-69	20	1	40	40	Residence
2 Erie	Heffron	Dillon	Bribery, Gambling	PW	6-24-69	14	none	Device never used	14	Residence
3 Erie	Heffron	Dillon	Gambling	PW	9-9-69	20	1	10	40	Apartment
4 Erie	Heffron	Dillon	Gambling	PW	10-2-69	30	none	30	30	Restaurant
New York										
1 Orange	Hoyt	Ingrassia	Possession of Stolen Property, Grand Larceny	PW	1-30-69	20	3	NI	80	Residence
2 Orange	Isseks	Ingrassia	Gambling	PW	10-11-69	20	1	11	50	Residence
New York										
1 Rockland	Hoyt	Meehan	Gambling	PW	4-2-69	20	none	No report	20	Business
2 Rockland	Hoyt	Meehan	Narcotics	PW	5-14-69	20	2	No report	60	Residence
3 Rockland	Hoyt	Meehan	Narcotics	PW	6-2-69	20	1 for 2 days	No report	22	Residence
4 Rockland	Hoyt	Meehan	Narcotics	PW	11-26-69	30	none	No report		Residence
New York										
1 Ulster	Mino	Torrace	Murder	PW, M/E	11-12-69	30	none	7	30	Residence

*Days unless otherwise indicated.
NI-Not Indicated
[1]As reported by prosecuting officials.

Table B. Reports by State Prosecuting Officers, Pursuant to Title 18, United States Code, Sec. 2519, Concerning Court Authorized Intercepts of Wire or Oral Communications, Calendar Year 1969

State, County and Reporting Number	Name of Prosecutor	Nature of Intercepts: Type	Nature of Intercepts: Average Frequency*	Number of: Persons	Number of: Intercepts	Number of: Incriminating Intercepts	Cost: Manpower	Cost: Other Resources	Cost: Total Cost	Number of Persons Arrested	Number of Trials	Motions to Suppress Intercepts	Number of Persons Convicted
Maryland													
6 Baltimore	Moylan	Oral	1	1	1	none	$ 100.00	$ -	$ 100.00	none	-	-	-
7 Baltimore	Moylan	Oral	1 per hr.	4	2	2	160.00	-	160.00	2	Still pending		none
8 Baltimore	Moylan	Oral	2 per hr.	4	4	1	200.00	-	200.00	2	Still pending		none
9 Baltimore	Moylan	Phone call	1	1	1	1	40.00	-	40.00	1	none	none	none
10 Baltimore	Moylan	Oral	1	1	1	1	40.00	-	40.00	1	none	none	none
11 Prince George's	Marshall	Phone call	NI	1	9	9	300.00	-	300.00	2	1	none	1
12 Prince George's	Marshall	Oral	1	2	1	1	125.00	-	125.00	1	1	none	1
13 Prince George's	Marshall	Phone call	7 in 2 hrs.	5	13	8	54.00	80.00	134.00	3	2	none	3
14 Prince George's	Marshall	Phone call	NI	1	1	none	100.00	-	100.00	none	none	none	none
15 Prince George's	Marshall	Phone call	30 per hr.	10	123	121	55.00	375.00	430.00	12	Still pending		none
New Jersey													
1 Essex	Lordi	Phone call	25	Unknown	303	152	3192.00	1368.00	4560.00	5	NI	NI	NI
2 Essex	Lordi	Phone call	27	Unknown	244	73	756.00	324.00	1080.00	(Contributed to 5 arrests in other jurisdictions)			
3 Essex	Lordi	Phone call	29	Unknown	119	95	91.00	78.00	169.00	none	-	-	-
4 Essex	Lordi	Phone call	43	Unknown	87	71	112.00	96.00	208.00	3 (Includes 2 in other jurisdictions)			
5 Mercer	Sills	Phone call	9	41	145	5	3163.00	18.00	3181.00	6	NI	NI	NI
6 Mercer	Sills	Phone call	34	42	553	414	2264.00	52.00	2316.00	6	NI	NI	NI
7 Mercer	Sills	Phone call	10	8	20	18	508.00	7.00	515.00	4	NI	NI	NI
8 Mercer	Sills	Phone call	14	17	153	144	1995.00	33.00	2028.00	2	NI	NI	NI
9 Mercer	Sills	Phone call	27	46	1,585	1,096	10263.00	199.00	10462.00	(Contributed to 6 arrests shown in number 6 above)			
10 Mercer	Sills	Phone call	14	13	29	29	688.00	10.00	698.00	4	NI	NI	NI
11 Mercer	Sills	Phone call	32	22	65	64	979.00	13.00	992.00	(Contributed to 4 arrests shown in number 10 above)			
12 Mercer	Sills	Phone call	23	16	188	168	493.00	16.00	509.00	5	NI	NI	NI
13 Mercer	Sills	Phone call	6	11	133	131	3180.00	45.00	3225.00	8	NI	NI	NI
14 Mercer	Sills	Phone call	13	43	265	104	2449.00	59.00	2508.00	(Contributed to 8 arrests shown in number 13 above)			
15 Mercer	Sills	Phone call	59	35	593	579	933.00	94.00	1027.00	1	NI	NI	NI
16 Mercer	Sills	Phone call	37	26	753	634	2061.00	62.00	2123.00	13	NI	NI	NI
17 Mercer	Sills	Phone call	36	22	727	605	2361.00	72.00	2433.00	(Contributed to 13 arrests shown in number 16 above)			
18 Mercer	Sills	Phone call	28	18	257	218	1392.00	321.00	1713.00	(Contributed to 13 arrests shown in number 16 above. One motion to suppress made.)			
19 Mercer	Sills	Phone call	18	14	161	127	1357.00	20.00	1377.00	(Contributed to 8 arrests shown in number 13 above. One motion to suppress made.)			
20 Mercer	Sills	Phone call	71	60	213	197	414.00	16.00	430.00	2	NI	NI	NI
21 Mercer	Sills	Phone call	5	52	142	32	6722.00	20.00	6742.00	2	NI	NI	NI
22 Mercer	Sills	Phone call	7	45	204	127	4141.00	194.00	4335.00	none	-	-	-
23 Mercer	Sills	Phone call	19	21	38	9	766.00	67.00	833.00	1	NI	NI	NI
24 Mercer	Sills	Oral	4	37	200	90	13761.00	430.00	14191.00	3	NI	NI	NI
25 Mercer	Sills	Phone call	3	5	3	none	185.00	53.00	238.00	(Contributed to 1 arrest shown in number 23 above.)			

*Per day unless otherwise indicated.
NI-Not Indicated

APPENDIX 8 (cont.)

Table B. Reports by United States Department of Justice, Pursuant to Title 18, United States Code, Sec. 2519, Concerning Court Authorized Intercepts of Wire or Oral Communications.
Calendar Year 1969-Continued

United States District Court and Reporting Number	Assistant Attorney General[1]	Nature of Intercepts		Number of			Cost			Number of Persons Arrested	Number of Trials	Motions to Suppress Intercepts	Number of Persons Convicted
		Type	Average Frequency*	Persons	Intercepts	Incriminating Intercepts	Manpower	Other Resources	Total Cost				
16 District of Columbia	Wilson		Never installed										
17 New Jersey	Wilson	Phone call	28	54	682	308	$6,558.00	$ 123.00	$ 6,681.00	55 for gambling violations.			
18 Pennsylvania, Western	Wilson	Phone call	No record maintained				492.45	-	492.45	none	-	-	-
19 Ohio, Northern	Wilson	Phone call	1 per 3 mins.	Approx. 126	Approx. 2,677	Approx. 2,547	9,881.00	1,078.00	10,959.00	none	-	-	-
20 Pennsylvania, Eastern	Wilson	Phone call	83	24	668	660	6,944.40	717.50	7,661.90	none	-	-	-
21 New York	Wilson	Phone call	9	4	128	15	4,000.00	384.00	4,384.00	Related to 55 arrests noted in number 17 above.			
22 New Jersey	Wilson	Phone call	19										
			8a.m. to mid-night	59	386	304	5,911.00	71.00	5,982.00	Related to 55 arrests noted in number 17 above.			
23 Connecticut	Wilson	Phone call	1.5 per hr.	1	90	none	805.00	500.00	1,305.00	none	-	-	-
24 New Jersey	Wilson	Phone call	3	12	19	10	2,375.00	79.00	2,454.00	none	-	-	-
25 New Jersey	Wilson	Phone call	63	317	884	126	7,196.00	138.00	7,334.00	none	-	-	-
26 New Jersey	Wilson	Phone call	80	140	2,175	1,337	7,414.00	205.00	7,619.00	none	-	-	-
27 Ohio, Northern	Wilson	Phone call	Approx. 1 call per 7 minutes	Approx. 45	Approx. 1,407	Approx. 1,087	5,528.00	465.00	5,993.00	none	-	-	-
28 Pennsylvania, Eastern	Wilson	Phone call	Approx. 60	20	500	450	2,546.60	148.00	2,694.60	none	-	-	-
29 Pennsylvania, Eastern	Wilson	Phone call	101	47	823	815	1,512.00	154.60	1,666.60	none	-	-	-
30 Florida, Southern	Wilson	Phone call	55	10	820	710	6,739.00	458.00	7,197.29	5	-	-	-

*Per day unless otherwise indicated.

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TITLE III—WIRETAPPING AND ELECTRONIC SURVEILLANCE

FINDINGS

SEC. 801. On the basis of its own investigations and of published studies, the Congress makes the following findings:

(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.

SEC. 802. Part I of title 18, United States Code, is amended by adding at the end the following new chapter: 62 Stat. 684.

"Chapter 119. WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

"Sec.
"2510. Definitions.
"2511. Interception and disclosure of wire or oral communications prohibited.
"2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.
"2513. Confiscation of wire or oral communication intercepting devices.
"2514. Immunity of witnesses.
"2515. Prohibition of use as evidence of intercepted wire or oral communications.
"2516. Authorization for interception of wire or oral communications.
"2517. Authorization for disclosure and use of intercepted wire or oral communications.
"2518. Procedure for interception of wire or oral communications.
"2519. Reports concerning intercepted wire or oral communications.
"2520. Recovery of civil damages authorized.

"§ 2510. Definitions

"As used in this chapter—

"(1) 'wire communication' means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connec-

tion 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;

"(2) '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;

"(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

"(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

"(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than—

"(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

"(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

"(6) 'person' means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

"(7) 'Investigative or law enforcement officer' means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

"(8) 'contents', when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

"(9) 'Judge of competent jurisdiction' means—

"(a) a judge of a United States district court or a United States court of appeals; and

"(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

"(10) 'communication common carrier' shall have the same meaning which is given the term 'common carrier' by section 153(h) of title 47 of the United States Code; and

"(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

"§ 2511. Interception and disclosure of wire or oral communications prohibited

"(1) Except as otherwise specifically provided in this chapter any person who—

"(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

"(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

"(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

"(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

"(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

"(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

"(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;"

"(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

"(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"(2)(a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

"(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

"(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.

"(3) 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.

"§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

"(1) Except as otherwise specifically provided in this chapter, any person who willfully—

"(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

"(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

"(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

"(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

"(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"(2) It shall not be unlawful under this section for—

"(a) a communications common carrier or an officer, agent,

or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

"(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

§ 2513. Confiscation of wire or oral communication intercepting devices

"Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

§ 2514. Immunity of witnesses

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

"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.

§ 2516. Authorization for interception of wire or oral communications

"(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

"(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

"(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

"(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

"(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

"(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

"(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

"(g) any conspiracy to commit any of the foregoing offenses.

"(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

"§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

"(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

"(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

"(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

"(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

"(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

"§ 2518. Procedure for interception of wire or oral communications

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) 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.

"(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(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;

"(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.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

"(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

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

"(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

"(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

"(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

"(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. 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 of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

"(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

"(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

"(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

"(1) the fact of the entry of the order or the application;

"(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

"(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

"(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial,

hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

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

"(i) the communication was unlawfully intercepted;

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

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

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

"(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

"§ 2519. Reports concerning intercepted wire or oral communications

"(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

"(a) the fact that an order or extension was applied for;

"(b) the kind of order or extension applied for;

"(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

"(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

"(e) the offense specified in the order or application, or extension of an order;

"(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

"(g) the nature of the facilities from which or the place where communications were to be intercepted.

"(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

"(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

"(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

"(d) the number of trials resulting from such interceptions;

"(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

"(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

"(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

"(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

"§ 2520. Recovery of civil damages authorized

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

"(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

"(b) punitive damages; and

"(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter."

SEC. 803. Section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) is amended to read as follows:

"UNAUTHORIZED PUBLICATION OF COMMUNICATIONS

"SEC. 605. Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress."

SEC. 804. (a) There is hereby established a National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (hereinafter in this section referred to as the "Commission").

(b) The Commission shall be composed of fifteen members appointed as follows:

(A) Four appointed by the President of the Senate from Members of the Senate;

(B) Four appointed by the Speaker of the House of Representatives from Members of the House of Representatives; and

(C) Seven appointed by the President of the United States from all segments of life in the United States, including lawyers, teachers, artists, businessmen, newspapermen, jurists, policemen, and community leaders, none of whom shall be officers of the executive branch of the Government.

(c) The President of the United States shall designate a Chairman from among the members of the Commission. Any vacancy in the Commission shall not affect its powers but shall be filled in the same manner in which the original appointment was made.

(d) It shall be the duty of the Commission to conduct a comprehensive study and review of the operation of the provisions of this title, in effect on the effective date of this section, to determine the effectiveness of such provisions during the six-year period immediately following the date of their enactment.

(e) (1) Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to—

(A) appoint and fix the compensation of an Executive Director,

and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title; and

(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $100 a day for individuals.

(2) In making appointments pursuant to paragraph (1) of this subsection, the Chairman shall include among his appointment individuals determined by the Chairman to be competent social scientists, lawyers, and law enforcement officers.

(f)(1) A member of the Commission who is a Member of Congress shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission.

(2) A member of the Commission from private life shall receive $100 per diem when engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

(g) Each department, agency, and instrumentality of the executive branch of the Government, including independent agencies, is authorized and directed to furnish to the Commission, upon request made by the Chairman, such statistical data, reports, and other information as the Commission deems necessary to carry out its functions under this section. The Chairman is further authorized to call upon the departments, agencies, and other offices of the several States to furnish such statistical data, reports, and other information as the Commission deems necessary to carry out its functions under this section.

(h) The Commission shall make such interim reports as it deems advisable, and it shall make a final report of its findings and recommendations to the President of the United States and to the Congress within the one-year period following the effective date of this subsection. Sixty days after submission of its final report, the Commission shall cease to exist.

(i)(1) Except as provided in paragraph (2) of this subsection, any member of the Commission is exempted, with respect to his appointment, from the operation of sections 203, 205, 207, and 209 of title 18, United States Code.

(2) The exemption granted by paragraph (1) of this subsection shall not extend—

(A) to the receipt of payment of salary in connection with the appointee's Government service from any source other than the private employer of the appointee at the time of his appointment, or

(B) during the period of such appointment, to the prosecution, by any person so appointed, of any claim against the Government involving any matter with which such person, during such period, is or was directly connected by reason of such appointment.

(j) There is authorized to be appropriated such sum as may be necessary to carry out the provisions of this section.

(k) The foregoing provisions of this section shall take effect upon the expiration of the six-year period immediately following the date of the enactment of this Act.

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2511. Interception and disclosure of wire or oral communications prohibited

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(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

As amended Pub.L. 91-358, Title II, § 211(a), July 29, 1970, 84 Stat. 654.

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§ 2514. Immunity of witnesses

REPEAL

Pub.L. 91-452, Title II, §§ 227(a), 260, Oct. 15, 1970, 84 Stat. 930, 931, repealed this section effective four years following the sixtieth day after the date of the enactment of Pub.L. 91-452, which was approved Oct. 15, 1970, with such repeal not to affect any immunity to which any individual is entitled hereunder by reason of any testimony or other information given before such day. See section 260 of Pub.L. 91-452, set out as a note under section 6001 of this title.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a

Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

* * * * * * * * * *

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations);

As amended Pub.L. 91-452, Title VIII, § 810, Title IX, § 902(a), Title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959.

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§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

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(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.
As amended Pub.L. 91–452, Title IX, § 902(b) Oct. 15, 1970, 84 Stat. 947.

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§ 2518. Procedure for interception of wire or oral communications

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(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

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An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.
As amended Pub.L. 91–358, Title II, § 211(b), July 29, 1970, 84 Stat. 654.

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§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

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.
As amended Pub.L. 91–358, Title II, § 211(c), July 29, 1970, 84 Stat. 654.