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## NOTES

### ELECTRONIC INTELLIGENCE GATHERING AND THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

#### I. INTRODUCTION

In *Berger v. New York*<sup>1</sup> the Supreme Court reversed a bribery conspiracy conviction that was based on evidence obtained by means of a court authorized "bug"<sup>2</sup> installed in the defendant's office pursuant to a state statute. In *Katz v. United States*<sup>3</sup> the Supreme Court reversed a gambling conviction that was based on evidence obtained by means of a bug placed, without prior judicial authorization, upon the outside of a phone booth that the defendant had used. In both cases, the Court held electronic surveillance subject to the requirements of the fourth amendment.<sup>4</sup> The constitutional defect found in *Berger* was that the statute contained inadequate procedural standards and safeguards.<sup>5</sup> The *Katz* Court held that, although the bug would have been constitutional if prior judicial approval had been obtained, failure to obtain such approval was fatal.<sup>6</sup>

Title III of the Omnibus Crime Control and Safe Streets Act of 1968<sup>7</sup> was

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1. 388 U.S. 41 (1967).

2. A "bug" is a device used to intercept oral communications not transmitted by wire. It is to be distinguished from a wiretap which is used to intercept communications transmitted by wire. Both are included in the terms "electronic eavesdropping" and "electronic surveillance." For a discussion of the various devices that may be used to conduct surveillance see A. Westin, *Privacy and Freedom* 67-89 (1967).

3. 389 U.S. 347 (1967).

4. *Id.* at 353; 388 U.S. at 50-53.

5. 388 U.S. at 58-60. The following is a list of the defects found in the New York statute taken from Committee Report, *Judicial Procedures for National Security Electronic Surveillance*, 29 Record of N.Y.C.B.A. 751, 753 (1974) (analyzing S. 2820, an amendment to Title III proposed by Senator Nelson) [hereinafter cited as Committee Report]: "1. It failed to provide that a warrant could be issued only upon a showing of probable cause. 2. It failed to require a description with particularity of the place to be searched and the person or thing to be seized. 3. It failed to require a description with particularity of the crime that had been, was being, or was about to be committed. 4. It failed to require a description with particularity of the type of conversation to be seized. 5. It failed to place any limitations on the officer executing the eavesdropping order which would prevent his searching unauthorized areas, and prevent his searching further once the property sought had been seized. 6. It failed to require a showing of probable cause in seeking a renewal of the eavesdropping order. 7. It failed to require dispatch in executing the order. 8. It failed to require that the officer to whom the order was issued return to the issuing court and show what had been seized. 9. It failed to require a showing of exigent circumstances to overcome the defect of not giving prior notice to those whose privacy had been invaded. 10. It failed to limit such orders to a time period equivalent to a single search, but instead authorized eavesdropping for a two-month period, which amounted to a series of searches and seizures pursuant to a single showing of probable cause."

6. 389 U.S. at 358-59.

7. 18 U.S.C. §§ 2510-20 (1970). The Act has been referred to by at least one of its critics as

enacted in an attempt to comply with *Katz* and *Berger*.<sup>8</sup> Section 2518 of that title contains the procedural requirements for obtaining an "order"<sup>9</sup> authorizing electronic surveillance,<sup>10</sup> and section 2511(3) specifies some of the types of surveillance to which the title does not extend.<sup>11</sup>

In *United States v. United States District Court (Keith)*<sup>12</sup> the Supreme Court held that the fourth amendment requires that judicial approval be obtained before the government conducts electronic surveillance of domestic organizations for the purpose of gathering national security intelligence. Since no warrant had been obtained in that case, it was unnecessary to consider the question of whether the procedural requirements of Title III are applicable to such surveillances, and the Court declined to do so.<sup>13</sup> More recently, in *Zweibon v. Mitchell*,<sup>14</sup> the Court of Appeals for the District of Columbia was divided over the issue. In *Zweibon*, the Court of Appeals sat en banc to consider the legality of a warrantless wiretap placed on the telephones of members of the Jewish Defense League for the purpose of gathering intelligence information concerning activities of that group which might have been harmful to America's relations with the Soviet Union. The majority of the court was of the opinion that the fourth amendment requires that a judicial warrant be obtained before a wiretap is installed on a "domestic organization that is neither the agent of nor acting in collaboration with a foreign power"—even where the activities of such a group endanger the national security by antagonizing a foreign power.<sup>15</sup>

Judge Wright, speaking for the plurality, stated that, "Congress intended the procedures and remedies of Title III to apply to all Executive surveillance which, under the Constitution, must be initiated pursuant to judicial warrant."<sup>16</sup> Judge Wilkey, with whom Judge MacKinnon was in substantial agreement and who concurred with the plurality on the constitutional issues, "strongly disagree[d] with the plurality's view that the strict procedural requirements of Title III—and, concomitantly, the damages provision con-

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the "End to Privacy Act." S. Rep. No. 1097, 90th Cong., 2d Sess. 182 (1968) (Views of Senator Fong) [hereinafter cited as Senate Report].

8. Senate Report, *supra* note 7, at 66.

9. An "order" under the federal statute would be a "warrant" in most other contexts. For consistency "warrant" will be used herein except where the context requires otherwise.

10. 18 U.S.C. § 2518 (1970). In *United States v. Turner*, No. 73-2740 at 18-19 (9th Cir., July 24, 1975) (*per curiam*), the Ninth Circuit became the tenth of the circuits to uphold the constitutionality of Title III. The Tenth Circuit was the first, *United States v. Cox*, 449 F.2d 679 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972), and the First shall be last.

11. 18 U.S.C. § 2511(3) (1970). This includes the so-called "national security proviso." *Zweibon v. Mitchell*, 516 F.2d 594, 641 & n.219 (D.C. Cir. 1975) (plurality opinion); see text accompanying notes 19 & 34 *infra*.

12. 407 U.S. 297, 321 (1972). This decision is called the Keith case after District Judge Damon Keith against whom this mandamus proceeding was brought in order to prevent disclosure of electronic surveillance information to a criminal defendant.

13. *Id.* at 321-22; see Senate Report, *supra* note 7, at 94.

14. 516 F.2d 594 (D.C. Cir. 1975) (*en banc*).

15. *Id.* at 614 (plurality opinion); *id.* at 689 (Wilkey, J., concurring & dissenting).

16. *Id.* at 669 (plurality opinion).

tained in section 2520—are applicable to these special kinds of surveillance.”<sup>17</sup> In response to *Zweibon*, Attorney General Levi said that, “[i]t is the position of the Department of Justice . . . that such surveillance is not regulated by the special procedural provisions of Title III.”<sup>18</sup>

This Note will explore the arguments on both sides of the dispute regarding the applicability of Title III as well as the more important procedural requirements of section 2518. The analysis will encompass the underlying constitutional and policy considerations and the applicability of those considerations in the context of electronic surveillance that is intended to produce intelligence information rather than evidence of criminal activity.

## II. THE DISPUTE: THE APPLICABILITY OF TITLE III

### A. *Background: The Title III Disclaimer*<sup>19</sup>

Section 2511(3) of Title 18 of the United States Code provides:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 . . . 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.<sup>20</sup>

On its face, this provision would appear to anticipate that, once the courts resolved the questions related to the President's power to conduct electronic surveillance without a warrant—which questions were unresolved when the provision was written—the procedural requirements of the rest of Title III would apply in all cases in which, as a matter of constitutional law, the President must obtain a judicial warrant. The issue is not so easily resolved, however, since the procedural requirements of the rest of Title III were

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17. *Id.* at 692-93 (Wilkey, J., concurring & dissenting); see *id.* at 706 (MacKinnon, J., concurring & dissenting).

18. Department of Justice Release (July 9, 1975). The Justice Department is apparently in the process of developing its own guidelines, but it has declined to make them public. *N.Y. Times*, Aug. 14, 1975, at 1, col. 6; see Address by the Hon. Edward H. Levi, A.B.A. Convention, Department of Justice Release 9-18 (August 13, 1975) [hereinafter cited as Levi Address].

19. “Disclaimer” is the term ordinarily used to characterize 18 U.S.C. § 2511(3) (1970). E.g., *Zweibon v. Mitchell*, 516 F.2d 594, 663 (D.C. Cir. 1975) (plurality opinion); *id.* at 693 (Wilkey, J., concurring & dissenting). The term “saving clause” has also been used. Levi Address, *supra* note 18, at 12.

20. 18 U.S.C. § 2511(3) (1970).

designed for use in the context of criminal investigations,<sup>21</sup> and some of those provisions may be inapplicable in an intelligence gathering context. For example, under section 2518(3)(a), the judge who issues a warrant authorizing the interception of wire or oral communications must first determine that "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 . . ." <sup>22</sup> Since section 2516 lists only criminal offenses,<sup>23</sup> this provision is obviously not designed for use by a judge authorizing a wiretap intended to afford government officials advance warning of non-criminal activities of domestic groups that may antagonize foreign powers.

### B. *Background: The Keith/Zweibon Gap*

In *Keith*, the Supreme Court held that a warrant is required in cases involving the domestic aspects of national security intelligence gathering,<sup>24</sup> and in *Zweibon* the Court of Appeals extended that requirement to cases with a foreign affairs aspect.<sup>25</sup> These cases, and perhaps others, fall within a gap between ordinary criminal surveillance to which Title III plainly applies and that category of surveillance, which the courts have not yet defined,<sup>26</sup> for which no warrant need be obtained. The issue becomes, therefore, what standards and procedures must be complied with in order to obtain the requisite warrant in the *Keith/Zweibon* situation?

There are three possibilities: the courts could apply Title III, making such modifications as are found necessary to reconcile the intent of Congress with

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21. See *Zweibon v. Mitchell*, 516 F.2d 594, 695-96 (D.C. Cir. 1975) (Wilkey, J., concurring & dissenting); Hearings on Practices and Procedures of the Department of Justice for Warrantless Wiretapping and Other Electronic Surveillance Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess. 8 (1972) (remarks of Senator Kennedy) [hereinafter cited as 1972 Hearings]; Levi Address, *supra* note 18, at 12; note 54 *infra* and accompanying text.

22. 18 U.S.C. § 2518(3)(a) (1970).

23. *Id.* § 2516(1)(a)-(g) (1970).

24. 407 U.S. at 314-21; accord, *United States v. Smith*, 321 F. Supp. 424, 429 (C.D. Calif. 1971).

25. 516 F.2d at 653-55.

26. Assuming that *Zweibon* is upheld, the only category left is national security surveillance of foreign powers, their agents and collaborators. The *Zweibon* plurality expressed, in dictum, the view that the warrant requirement applies even to that category of surveillance. *Zweibon v. Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (plurality opinion); accord, Joint Hearings on Warrantless Wiretapping and Electronic Surveillance Before the Subcomm. on Administrative Practice and Procedure & the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and the Subcomm. on Surveillance of the Senate Comm. on Foreign Relations, 93d Cong., 2d Sess. 72 (1974) (testimony of Ramsey Clark) [hereinafter cited as 1974 Hearings]; *id.* at 310 (testimony of William Ruckelshaus). *Contra*, *United States v. Butenko*, 494 F.2d 593, 606 (3d Cir.), cert. denied, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); *United States v. Hoffman*, 334 F. Supp. 504, 507 (D.D.C. 1971). See generally Note, Foreign Security Surveillance and the Fourth Amendment, 87 *Harv. L. Rev.* 976 (1974) [hereinafter cited as *Harv. Note*].

the unique requirements of intelligence gathering;<sup>27</sup> the courts could disregard Title III and begin to develop constitutional requirements on an ad hoc basis as was done in *Berger* and *Katz* prior to the enactment of Title III;<sup>28</sup> or, finally, the Congress could enact legislation amending Title III. This last alternative was suggested in *Keith*,<sup>29</sup> and some movement has been made in that direction.<sup>30</sup>

### C. *The Zweibon Plurality's Position*

The *Zweibon* plurality took the position that Title III applies to all electronic surveillance which must be initiated by a warrant. The plurality explained that section 2511 makes all electronic surveillance illegal except as provided elsewhere in Title III.<sup>31</sup> It interpreted the disclaimer in subsection three to be an expression of Congress' intent to make the application of Title III dependent upon future constitutional adjudication by the courts.<sup>32</sup> In other words, in the plurality's view, Congress intended Title III to apply to any electronic surveillance which the courts might hold to be constitutionally subject to a warrant requirement. Four factors weighed in favor of this conclusion. First, Title III represents an attempt by Congress to treat the field of electronic surveillance in a comprehensive manner.<sup>33</sup> The creation or recognition of exceptions to the requirements of that title would therefore be in derogation of congressional intent.<sup>34</sup> Second, one of the policies underlying

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27. This was suggested by the *Zweibon* plurality, 516 F.2d at 669, and criticized by the minority. *Id.* at 697 (Wilkey, J., concurring & dissenting); *id.* at 707 (MacKinnon, J., concurring & dissenting).

28. See notes 5-6 *supra* and accompanying text. See also notes 36, 44 *infra* and accompanying text.

29. 407 U.S. at 322-33.

30. See Report on Warrantless Wiretapping and Electronic Surveillance by the Subcomm. on Surveillance of the Senate Comm. on Foreign Relations & the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 11 n.1 (Comm. Print 1975); 1974 Hearings, *supra* note 26, at 4 (opening statement of Senator Kennedy); *id.* at 7 (opening statement of Senator Muskie).

31. 516 F.2d at 659.

32. *Id.* at 665-66.

33. *Id.* at 667-68; see *United States v. United States Dist. Ct.*, 407 U.S. 297, 302 (1972); Senate Report, *supra* note 7, at 69.

34. Congress was careful to specify the exceptions it sought to create. They include: the national security proviso, FCC personnel in the normal course of their duties and switchboard operators and telephone company personnel in the normal course of their duties. 18 U.S.C. §§ 2511(2), 2511(3) (1970). There is apparently only one judicially recognized exception. *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.), cert. denied, 419 U.S. 897 (1974) (no civil cause of action for wiretapping by former husband—congressional intent was directed at organized crime). The exception is a limited one however. See *Remington v. Remington*, 393 F. Supp. 898, 901 (E.D. Pa. 1975) (court could not, as a matter of law, hold gross invasions of individual privacy by unknown persons representing spouse to be not included in statutory proscription). On the danger of creating exceptions, see 1974 Hearings, *supra* note 26, at 234-35 (testimony of Nicholas Katzenbach); *id.* at 293 (testimony of Senator Nelson); 1972 Hearings, *supra* note 21, at 60-62 (statement of Nathan Lewin, former Assistant to Solicitor General).

the statute is uniformity.<sup>35</sup> Congress sought to establish one uniform set of standards and procedures that would apply to all electronic surveillance. This policy might easily be frustrated if the courts were to embark upon a program that would require the district courts to formulate their own standards and procedures on an ad hoc basis.<sup>36</sup> Third, the plurality recognized the need, on the part of the courts and the Executive, for clear guidance.<sup>37</sup> Finally, the plurality stated that the Title III standards and procedures are "salutary prophylactic measures designed to protect privacy interests while still accommodating the legitimate Executive need to conduct surveillance,"<sup>38</sup> and noted, later in its opinion, that these standards and procedures were probably the same as those which the courts would develop in any event.<sup>39</sup> This is particularly likely in view of the fact that the standards and procedures derive in large part from *Berger* and *Katz*.

#### D. *The Minority Position*

Judge Wilkey was unpersuaded by the plurality's reasoning. In his view the section 2511 disclaimer represented the intent of Congress to avoid legislating with respect to national security surveillance, whether or not subject to a constitutional warrant requirement.<sup>40</sup> He explained that in many instances the primary purpose of electronic surveillance is not the gathering of evidence of criminal activity, but rather, the gathering of information necessary to protect the national security.<sup>41</sup> Judge Wilkey pointed out that "the interrelated provisions of the Act are often totally inapposite to informational surveillances."<sup>42</sup>

Judge Wilkey focused on the last sentence of the disclaimer which makes "reasonableness" the test for admission into evidence of information gathered pursuant to the President's national security and foreign affairs powers.<sup>43</sup> He construed this provision to require the kind of ad hoc determinations of reasonableness which the plurality sought to avoid.<sup>44</sup> The legislative history of the provision is ambiguous:<sup>45</sup> it supports Judge Wilkey's view that reason-

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35. 516 F.2d at 667; accord, Senate Report, *supra* note 7, at 66, 69.

36. The ad hoc approach has been criticized because: first, very few national security surveillances become the subject of litigation; second, since most judicial decisions will be made in camera there will be few precedents; and third, judges will perforce constantly be confronting national security surveillance as an original question. See Harv. Note, *supra* note 26, at 995-96.

37. 516 F.2d at 667-68.

38. *Id.* at 668.

39. *Id.* at 668-69 & n.263.

40. *Id.* at 693 (Wilkey, J., concurring & dissenting).

41. *Id.* (Wilkey, J., concurring & dissenting).

42. *Id.* at 696 (Wilkey, J., concurring & dissenting).

43. 18 U.S.C. § 2511(3) (1970); see 516 F.2d at 696-97 (Wilkey, J., concurring & dissenting), citing Senate Report, *supra* note 7, at 94.

44. 516 F.2d at 697 (Wilkey, J., concurring & dissenting); see note 36 *supra* and accompanying text. See generally Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 Mich. L. Rev. 455, 490-93 (1969) [hereinafter cited as Schwartz I].

45. Senate Report, *supra* note 7, at 94. Both the plurality and Judge Wilkey quoted extensively

ableness is the test of admission of all national security intelligence, but it also supports the position that reasonableness is the test of admission only where no warrant is constitutionally required.

Both Judge Wilkey and Judge MacKinnon emphasized what is probably the weakest link in the plurality's argument, *i.e.*, the probable cause standard set up in Title III. The plurality had suggested that section 2511(3) should be read to incorporate the appropriate standard of probable cause into section 2518 when intelligence gathering is involved.<sup>46</sup> Judge MacKinnon, on the other hand, pointed out that "Congress certainly did not intend the statute to be dissected in this manner."<sup>47</sup> Judge Wilkey remarked that, "[i]f Congress had intended to legislate with regard to information-gathering surveillances . . . it would not have left it to the courts to guess which sections to enforce."<sup>48</sup> These arguments are particularly convincing in light of the fact that the probable cause provisions lie "at the heart of Title III."<sup>49</sup>

### E. *The Basic Disagreement*

At the core of the disagreement over the applicability of Title III to informational surveillance lies the difference between the problems involved in gathering national security intelligence by means of electronic surveillance and those involved in uncovering evidence of criminal activity by the same means. The plurality believed this difference to be sufficiently slight to require only a minor modification of the statute's probable cause requirement.<sup>50</sup> But Judges Wright and MacKinnon believed it to be so great as to require the courts to rewrite much of the statute.<sup>51</sup> The difference, whatever its magnitude, was recognized in *Keith*:

[D]omestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some

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from this page. 516 F.2d at 665-66 n.240 (plurality opinion); *id.* at 693-94 (Wilkey, J., concurring & dissenting).

46. 516 F.2d at 669-70 (plurality opinion). The plurality's theory was that, since under 18 U.S.C. § 2511(3) (1970) nothing in Title III may disturb the President's constitutional power, and since the probable cause standard in section 2518 and the list of crimes in section 2516 would impair the President's power to conduct non-criminal surveillance, those sections should be read so as to include, implicitly, an appropriate standard of probable cause under section 2518 and national security intelligence gathering as a legitimate objective under section 2516.

47. 516 F.2d at 707 (MacKinnon, J., concurring & dissenting).

48. *Id.* at 698 (Wilkey, J., concurring & dissenting).

49. *Id.* at 697 (Wilkey, J., concurring & dissenting).

50. *Id.* at 669-70 (plurality opinion).

51. *Id.* at 696-97 (Wilkey, J., concurring & dissenting); *id.* at 706-07 (MacKinnon, J., concurring & dissenting).



possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.<sup>52</sup>

It should be pointed out, however, that Title III did not result from concern over "conventional types of crime." When conventional crimes such as assault, robbery, murder, rape or others are under investigation, electronic surveillance is of limited value because these crimes involve relatively little advance planning between co-conspirators.<sup>53</sup> Indeed, this kind of crime is frequently committed by individuals acting alone. Electronic surveillance is most useful in the investigation of organized crime and offenses such as gambling or narcotics, and it is organized crime to which Title III primarily addresses itself.<sup>54</sup>

The use of intelligence gathering surveillance is by no means unique to the national security field. In fact, the sort of surveillance techniques used in the investigation of organized crime frequently involve what is referred to as the gathering of "'strategic' intelligence,"<sup>55</sup> *i.e.*, the surveillance of "known" criminals in order to obtain advance information regarding criminal enterprises in which they may be involved. The purpose of such surveillance is analogous to that of national security surveillance in that both are intended to produce intelligence information.<sup>56</sup>

It is likely that Congress was aware of the nature of "strategic intelligence" gathering and of its value in the investigation of organized crime when it enacted Title III.<sup>57</sup> Yet the probable cause requirement clearly outlaws the unfocused gathering of "strategic intelligence" in a criminal context.<sup>58</sup> One

52. *United States v. United States Dist. Ct.*, 407 U.S. 297, 322 (1972).

53. *Schwartz I*, *supra* note 44, at 469, quoting Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 957-58 (1967) (testimony of Prof. G. Robert Blakey).

54. *United States v. Kahn*, 415 U.S. 143, 151 (1974); *Simpson v. Simpson*, 490 F.2d 803, 806 (5th Cir.), cert. denied, 419 U.S. 897 (1974); Senate Report, *supra* note 7, at 70-74; *Schwartz*, Six Years of Tapping and Bugging, 1 Civ. Lib. Rev. 26 (Summer 1974) [hereinafter cited as *Schwartz II*].

55. *Zweibon v. Mitchell*, 516 F.2d 594, 648 (D.C. Cir. 1975) (plurality opinion); *Schwartz I*, *supra* note 44, at 468.

56. See *Schwartz II*, *supra* note 54, at 30-31; *Schwartz I*, *supra* note 44, at 469-70 & n.65. "Strategic intelligence" gathering is to be distinguished from the situation where law enforcement authorities have probable cause with respect to one or more individuals and employ electronic surveillance in order to learn who else is involved as well as the extent of the criminal enterprise. Such a situation occurs most often in cases involving minimization which is discussed in part III, section D, *infra*. See, e.g., *United States v. Quintana*, 508 F.2d 867, 874-75 (7th Cir. 1975); *United States v. James*, 494 F.2d 1007, 1019 (D.C. Cir. 1974); *United States v. Cox*, 462 F.2d 1293, 1300-01 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974).

57. See *Schwartz II*, *supra* note 54, at 31; *Schwartz I*, *supra* note 44, at 469-70 & n.65.

58. *United States v. Bernstein*, 509 F.2d 996, 999 (4th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3030 (U.S. July 22, 1975) (No. 74-1486); *United States v. Tortorello*, 480 F.2d 764, 779 (2d Cir.), cert. denied, 414 U.S. 866 (1973). The Department of Justice once took the position that under Keith domestic intelligence gathering is prohibited, and that Title III would have to be amended in order to permit it. 1972 Hearings, *supra* note 21, at 23-24 (testimony of Mr. Maroney). In 1969 Professor Schwartz presciently inquired, "if the Act does not grant law

might well argue that the policy underlying Title III prohibits intelligence gathering surveillance regardless of who it is directed against, unless it falls within the category of surveillance for which no warrant is necessary. Of course, under this interpretation of the statute mere intelligence gathering, even with a warrant, would be impermissible, and it seems unlikely that the courts will construe the statute so as to prohibit entirely a category of surveillance with respect to which Congress sought not to legislate.<sup>59</sup>

If intelligence gathering surveillance is not banned completely by Title III, and if the applicability of the Title III safeguards depends upon the magnitude of the difference between national security surveillance and ordinary criminal surveillance, then it becomes important to examine the Title III safeguards in order to determine whether the difference is great enough to make them inappropriate in the national security context.

### III. THE TITLE III SAFEGUARDS AND NATIONAL SECURITY INTELLIGENCE GATHERING

In addition to the probable cause requirement, section 2518 contains several safeguards which may be either inappropriate, not constitutionally required or in need of modification for national security intelligence gathering. The balance of this Note will be devoted to an examination of the most significant of those safeguards which include:

- 1) the particularization requirements:
  - a) identity of the subject
  - b) nature of the communication
- 2) the time provisions
- 3) the minimization requirement
- 4) the record keeping and warehousing provisions
- 5) the notice requirement

#### A. *Particularization: The Subject*

The particularization requirement derives from the fourth amendment.<sup>60</sup> In *Berger* this fourth amendment requirement was said to be of peculiar impor-

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enforcement officers the power to obtain allegedly crucial strategic information, will we not again experience the same kind of widespread flouting of clear legal limitations that has recently come to light?" Schwartz I, *supra* note 44, at 471 (footnote omitted). In 1974 the Roscoe Pound-American Trial Lawyers Foundation adopted, by a substantial majority, the following recommendation: "There should be no electronic surveillance for domestic intelligence purposes." Annual Chief Justice Earl Warren Conference on Advocacy in the United States, June 7-8, 1974, Privacy In A Free Society, Final Report 11 (1974).

59. Even the Zweibon plurality conceded its legitimacy. 516 F.2d at 669-70 & n.268; see Senate Report, *supra* note 7, at 69; Schwartz I, *supra* note 44, at 490.

60. U.S. Const. amend. IV, provides, in part, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." If a warrant describes a particular conversation to be intercepted from a particular location, then the constitution is probably satisfied notwithstanding a failure to name the person to be overheard. See *United States v. Fiorella*, 468 F.2d 688, 691 (2d Cir. 1972), cert. denied, 417 U.S. 917 (1974). Title III goes beyond the constitutional requirement and provides that the speaker must be named if that person is "known." *Id.*

tance in the context of electronic surveillance.<sup>61</sup> Section 2518(1)(b)(iv) provides that an application for a warrant must include the name of the persons to be overheard, and section 2518(4)(a) requires that each authorizing order specify the identity of the person subject to the surveillance. As the Supreme Court noted in *Keith*, however, "[t]he exact targets of [security intelligence] surveillance may be more difficult to identify than in surveillance operations"<sup>62</sup> of a conventional nature. It can be argued, on the basis of that language, that the identification requirement should be relaxed or dispensed with when intelligence gathering is involved. In view of the construction which the Supreme Court has placed on the identification requirement, however, it is doubtful whether a relaxation of the requirement is necessary.

In *United States v. Kahn*<sup>63</sup> the Supreme Court considered a warrant authorizing the tapping of telephones used by Irving Kahn and "others as yet unknown."<sup>64</sup> Kahn and his wife were later indicted on gambling charges. The evidence against Mrs. Kahn included an intercepted conversation between herself and a "known gambling figure."<sup>65</sup> At a suppression hearing this conversation was ruled inadmissible as being outside the scope of the warrant on the ground that Mrs. Kahn was not a person "as yet unknown."<sup>66</sup> A divided Court of Appeals affirmed, but the Supreme Court reversed,<sup>67</sup> holding that the statute requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is "committing the offense" for which the wiretap is sought.<sup>68</sup>

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61. 388 U.S. at 56, citing *Osborn v. United States*, 385 U.S. 323 (1966) (informer recorded his own planned conversation with suspect); *Silverman v. United States*, 365 U.S. 505 (1961) ("spike mike" used to monitor conversation in alleged gambling premises); *On Lee v. United States*, 343 U.S. 747 (1952) (informer wore transmitter during conversation with suspect); *Goldman v. United States*, 316 U.S. 129 (1942) (detectaphone used to record conversations between informer and suspect); see *Schwartz I*, supra note 44, at 464-65 & n.45. On the importance of the identification requirement, see *United States v. Curreri*, 368 F. Supp. 757, 760 (D. Md. 1973), aff'd sub nom. *United States v. Bernstein*, 509 F.2d 996, 999-1001 (4th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3030 (U.S. July 22, 1975) (No. 74-1486).

62. 407 U.S. at 322 (1972).

63. 415 U.S. 143 (1974).

64. *Id.* at 145.

65. *Id.* at 147.

66. *Id.* at 149.

67. *Kahn v. United States*, 471 F.2d 191 (7th Cir. 1972), aff'd & rev'd in part, 415 U.S. 143 (1974).

68. 415 U.S. at 155; accord, *United States v. Doolittle*, 507 F.2d 1368 (5th Cir.), aff'd en banc, 518 F.2d 500 (5th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3230 (U.S. Oct. 14, 1975) (No. 75-513); *United States v. Martinez*, 498 F.2d 464 (6th Cir. 1974), cert. denied, 419 U.S. 1056 (1975); see *United States v. Donovan*, 513 F.2d 337 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3094 (U.S. Aug. 19, 1975) (75-212) (suspect should have been named); *United States v. Bernstein*, 509 F.2d 996 (4th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3030 (U.S. July 22, 1975) (No. 74-1486) (at time of first application probable cause existed with respect to suspect, but he was not "known" so failure to name him was not violative of the statute; at time of extension the suspect was "known" and failure to name him required suppression).

Thus, the identification requirement would seem to be a flexible one. So that in an intelligence gathering situation, when "[t]he exact targets . . . may be . . . difficult to identify,"<sup>69</sup> the failure to identify the target will not violate the statute. On the other hand, where the target is identifiable, there seems little reason why he or she should not be named.

The identification requirement is not just an important part of the fourth amendment, it is also a part of an integrated statute.<sup>70</sup> Under present law notice must be given to those named in the warrant,<sup>71</sup> but notice need be given to the unnamed subjects of surveillance only in the discretion of the court.<sup>72</sup> Justice Department officials have argued that the notice requirement should be abrogated in the national security field.<sup>73</sup> If their arguments are rejected by the courts, then they would naturally want the identification requirement limited in order to reduce the impact of the notice requirement.

If the only justification for limiting the identification requirement is to avoid giving notice, then it is likely that the argument for limitation would fail,<sup>74</sup> and in view of the flexibility of the identification requirement it is difficult to justify a limitation on any other ground. A warrant that fails to identify its subject would look a great deal like a general warrant, and considerably more authority than unsupported dictum from *Keith* should be required before it is permitted.

### B. Particularization: The Conversation

Title III also requires particularity with respect to the conversations to be overheard.<sup>75</sup> Like the identification requirement, this requirement derives from the fourth amendment which provides that warrants specify the "things

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69. 407 U.S. at 322.

70. See notes 74-75 *infra*.

71. 18 U.S.C. § 2518(8)(d) (1970).

72. *Id.*; see *United States v. Curreri*, 368 F. Supp. 757, 760 (D. Md. 1973), *aff'd sub nom. United States v. Bernstein*, 509 F.2d 996 (4th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3030 (U.S. July 22, 1975) (No. 74-1486); *United States v. Ianelli*, 339 F. Supp. 171, 173-74 (W.D. Pa. 1972), *aff'd*, 480 F.2d 907 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974).

73. See note 129 *infra* and accompanying text.

74. See *United States v. Moore*, 513 F.2d 485, 497-98 & n.34 (D.C. Cir. 1975), and *United States v. Bernstein*, 509 F.2d 996, 1000-01 (4th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3030 (U.S. July 22, 1975) (No. 74-1486), for discussions of the importance of, and relationship between, the notice and identification requirements. In *Moore*, the court explained that the government may not wait until there is absolutely no doubt as to probable cause before it must name a known individual. 513 F.2d at 496-97. Good faith is not an adequate justification for omission. *Id.* at 497. It has been held, however, that omission can be excused if those who should have been named were given notice and an opportunity to inspect the tapes and transcripts. *United States v. Kilgore*, 518 F.2d 496 (5th Cir. 1975).

75. 18 U.S.C. §§ 2518(1)(b)(iii), (4)(c) (1970). There exists a close relationship between the particularization and minimization requirements because what must be minimized is determined by reference to what has been specified. See Note, *Minimization and the Fourth Amendment*, 19 N.Y.L.F. 861, 870 (1974), in which the "plain view" doctrine, discussed in notes 79-81 *infra* and accompanying text, is considered in the context of minimization.

to be seized."<sup>76</sup> The requirement is thought to be an important one because it prevents the "seizure of one thing under a warrant describing another."<sup>77</sup> Language in *Keith* supports an argument that it is inapplicable to national security intelligence gathering surveillance.<sup>78</sup> Again, however, the judicial gloss on Title III may make a relaxation of this requirement unnecessary. The rule against "seizure of one thing under a warrant describing another" has been eroded in the conventional search and seizure situation by the "plain view" doctrine which permits seizure of items in the plain view of law enforcement authorities during the course of an otherwise lawful arrest<sup>79</sup> or search.<sup>80</sup> Section 2517(5) contains a statutory "plain view" provision which permits a retroactive judicial approval of the interception of conversations unrelated to those described in the warrant as long as the warrant was otherwise lawful.<sup>81</sup>

*United States v. Denisio*<sup>82</sup> is an extreme example of how "plain view" can operate. The warrant in that case authorized the interception of conversations related to robbery, bribery and conspiracy. The first few days of surveillance proved unproductive with respect to those offenses, but produced evidence of illegal bookmaking. On the basis of that evidence a search warrant was obtained, and a search of the defendant's residence produced, in addition to evidence of bookmaking, firearms for the possession of which the defendant was convicted. An attempt to suppress the wiretap evidence was unsuccessful. The result is entirely consistent with the "plain view" doctrine, but it is difficult to reconcile with the prohibition against seizure of one thing under a warrant describing another. It is difficult to quarrel with "plain view" because it usually comes up in situations where, as in *Denisio*, the individual involved has been engaged in a wide range of illegal activities. Nevertheless, the existence of the rule makes it difficult to justify the relaxation of the

76. U.S. Const. amend. IV; see notes 60-61 *supra* and accompanying text.

77. *Marron v. United States*, 275 U.S. 192, 196 (1927). The *Marron* case was relied upon in *Berger*. 388 U.S. at 58. See generally *United States v. Tortorello*, 480 F.2d 764, 778-81 (2d Cir.), cert. denied, 414 U.S. 866 (1973); *United States v. Vega*, 52 F.R.D. 503, 505-07 (E.D.N.Y. 1971).

78. 407 U.S. at 322-23.

79. *Harris v. United States*, 331 U.S. 145 (1947). The *Marron* case contributed to its own demise for, although it held that a search warrant could not be used to seize things other than those it described, it also held that when police officers made an arrest based on what they found pursuant to a legal search they could seize things in the arrestee's possession and control.

<sup>80</sup>. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

81. 18 U.S.C. § 2517(5) (1970); see *United States v. Moore*, 513 F.2d 485, 502 & n.53 (D.C. Cir. 1975); *United States v. Capra*, 501 F.2d 267 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975) (court suppressed evidence where government failed to seek judicial approval promptly); *United States v. Tortorello*, 480 F.2d 764, 781-83 (2d Cir.), cert. denied, 414 U.S. 866 (1973); *United States v. Mainello*, 345 F. Supp. 863, 874-77 (E.D.N.Y. 1972); *United States v. Sklaroff*, 323 F. Supp. 296, 307 (S.D. Fla. 1971), *aff'd*, 506 F.2d 837 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3205 (U.S. Oct. 7, 1975) (No. 74-1249); *United States v. Escandar*, 319 F. Supp. 295, 300 (S.D. Fla. 1970); *People v. Sher*, 68 Misc. 2d 917, 923-24, 329 N.Y.S.2d 2, 9-10 (Greene County Ct. 1972) (Werker, J.).

82. 360 F. Supp. 715 (D. Md. 1973).

particularization requirement. Furthermore, the retention of the particularization requirement will help to assure that when individual privacy is to be invaded, law enforcement authorities will at least have something specific in mind when the warrant is sought.<sup>83</sup>

### C. The Time Provisions

In *Berger*, the Supreme Court found that the time provisions of the New York statute were defective because they permitted what was, in effect, a series of intrusions pursuant to a single showing of probable cause.<sup>84</sup> The statute permitted interceptions up to 60 days in duration. Title III now limits electronic surveillance to 30 days,<sup>85</sup> and the courts of appeals have upheld this provision.<sup>86</sup> Although both statutes permit, or permitted, an unlimited number of extensions, and thus extremely long periods of surveillance, there is little objection to these provisions so long as a renewed showing of probable cause is required in order to obtain an extension. The important issue, with respect to time, is whether judicial review of continuing surveillance should occur often or seldom.<sup>87</sup>

Law enforcement officials assert that a 30 day limitation is excessively burdensome in the national security field, and suggest that 90 days would be more appropriate.<sup>88</sup> Legislation proposed by Senator Gaylord Nelson would

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83. "Given the possibility of such long-term eavesdropping, Berger's requirement that the 'property' sought—the conversation—be described with particularity in the warrant becomes all the more important, at least theoretically. The wider the possible temporal or spatial area of a permissible search, the more important it is that the description of what is sought be precise, for imposing such a limitation may be the only way to discourage indiscriminate searches of extensive areas." Schwartz I, *supra* note 44, at 463. Compare *United States v. Perillo*, 333 F. Supp. 914, 921-22 (D. Del. 1971).

84. "[T]he Court in *Berger* reserved its strongest criticism of the New York law for the section allowing a dragnet-like surveillance for periods of sixty days and longer, saying it was, like the odious general warrants of colonial times, 'the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause.'" *United States v. Cox*, 462 F.2d 1293, 1303 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974) (footnotes omitted), quoting *Berger v. New York*, 388 U.S. 41, 59 (1967); see note 146 *infra* and accompanying text (a copy of a writ of assistance [general warrant] is provided in the appendix). A single showing of probable cause probably justifies more than one interception. See Schwartz I, *supra* note 44, at 463-64.

85. 18 U.S.C. § 2518(5) (1970).

86. See note 10 *supra*.

87. See *United States v. Cox*, 462 F.2d 1293, 1303-04 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974); *United States v. Cafero*, 473 F.2d 489, 497 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); *United States v. Mainello*, 345 F. Supp. 863, 872-73 (E.D.N.Y. 1972); Harv. Note, *supra* note 26, at 998.

88. "Unlike conventional criminal investigations [domestic intelligence inquiries] have no built-in necessary, automatic conclusion. They continue as long as there is a perceived threat." Levi Address, *supra* note 18, at 9; see 1974 Hearings, *supra* note 26, at 498-99 (testimony of William B. Saxbe) (Justice Department regulation provides for reauthorization every ninety days); 1972 Hearings, *supra* note 21, at 55 (testimony of Ramsey Clark) (three months is "often

limit surveillance to 15 days, but would permit extensions of national security surveillance without a de novo showing of probable cause.<sup>89</sup> It is doubtful whether either suggestion would be permitted under *Berger*, for both permit long-term interception on the basis of a single showing of probable cause.

Nevertheless, the Executive branch has a legitimate need to conduct effective national security intelligence gathering, and if the thirty day limit is too short to satisfy that need, then it should be changed. The *Keith* Court recognized that national security surveillance is often long-range in nature, and suggested that this might affect the standards to be applied in such cases.<sup>90</sup>

Whether the long-range nature of national security surveillance is unique is subject to question. Criminal investigations are often long-range enterprises,<sup>91</sup> and yet many judges require, pursuant to the discretion granted to them in Title III, progress reports as frequently as every five days.<sup>92</sup> This places a burden on the government and the courts, but it is a commendable practice: one indicative of the caution and concern for individual privacy that should be the hallmark of effective judicial supervision of electronic surveillance.<sup>93</sup> There is no evidence that this practice has decreased the effectiveness of surveillance directed at conventional crime, and there is no evidence that it will have such an effect in the national security context.

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enough"). The ninety day regulation was still in effect when *Zweibon* was decided. 516 F.2d at 610 & n.26.

89. S. 2820, 93d Cong., 1st Sess. § 5(b)(5) (1973). A section analysis of the bill is found in 1974 Hearings, supra note 26, at 271-78. The bill is examined in Committee Report, supra note 5. Compare American Bar Association Project on Standards for Criminal Justice, *Electronic Surveillance* § 5.9 (1974) which suggests a fifteen day limit with a thirty day extension available only on showing of probable cause. It is difficult to understand why less should be required for renewal than for authorization. Logically, renewal should be more difficult. If the initial period has been fruitful, then it will be easy to make a stronger showing, but if it produced nothing, then some explanation should be required. See Harv. Note, supra note 26, at 998-99.

90. 407 U.S. at 322.

91. See *Schwartz I*, supra note 44, at 470. Between 1968 and 1973 the average federal criminal wiretap lasted for thirteen and a half days. On 3,492 installations during that period, 1,323 extensions were granted. This would indicate that many installations lasted for considerable periods of time. See *Schwartz II*, supra note 54, at 29. Between 1968 and 1970 the average national security tap lasted from 78.3 to 290.7 days. There was an average of about 100 such taps each year. *Id.* at 34.

92. See, e.g., *United States v. Quintana*, 508 F.2d 867, 875 (7th Cir. 1975); *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974).

93. The Act is constitutional because it requires strict judicial supervision. *United States v. Martinez*, 498 F.2d 464, 468 (6th Cir. 1974), cert. denied, 419 U.S. 1056 (1975). Section 801(d) of the original Act, which contained legislative fact finding, acknowledged the important role played by the judiciary in the protection of individual privacy. In the six years since Title III became effective only five or six requests for warrants have been denied by the judiciary. *Schwartz II*, supra note 54, at 33. A good example of close judicial supervision may be found in *United States v. Bynum*, 360 F. Supp. 400, 407-19 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974) (frequently referring to District Judge Travia's continuing review of the wiretap involved).

Frequent judicial supervision provides a bulwark against unjustified intrusions into the sensitive areas of privacy and first amendment rights.<sup>94</sup> The innocent targets of national security surveillance are no less deserving of the protection afforded by time limitations than are innocent targets of conventional surveillance. Indeed, they may be more deserving of protection because they will be subjected to intrusions when there is no probable cause to believe they are committing a crime.

#### D. *Minimization*

Few of section 2518's provisions have been litigated more frequently than the minimization provision of subsection 5.<sup>95</sup> In a national security intelligence gathering context, good arguments can be made that minimization will be difficult if not impossible. Since there may be uncertainty regarding the targets of the surveillance, it may be difficult to decide to whom to listen.<sup>96</sup> Uncertainty regarding the nature of the conversations to be overheard may make it difficult to separate the relevant from the irrelevant.<sup>97</sup> Codes or foreign languages may be employed to confuse or mislead those conducting the surveillance.<sup>98</sup> Finally, the targets of surveillance may attempt to deceive law enforcement authorities by beginning their conversations in an innocent manner in the hope that after a few minutes the tap will be turned off.<sup>99</sup>

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94. Former Assistant to the Solicitor General Nathan Lewin considers the time provisions to be a "substantial restraint," and to be among the "more effective practical checks" on abuses. 1972 Hearings, *supra* note 21, at 61.

95. See, e.g., *United States v. Turner*, No. 73-2740 (9th Cir., July 24, 1975) (per curiam); *United States v. Armocida*, 515 F.2d 29, 42-46 (3d Cir. 1975); *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975); *United States v. Cafero*, 473 F.2d 489 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); *United States v. King*, 335 F. Supp. 523, 540-45 (S.D. Cal. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir.), cert. denied, 414 U.S. 826 (1973). See generally Note, *Minimization and the Fourth Amendment*, 19 N.Y.L.F. 861 (1974).

96. *United States v. Turner*, No. 73-2740 at 12, 15-17 (9th Cir., July 24, 1975) (per curiam); *United States v. Capra*, 501 F.2d 267, 274 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975); *United States v. James*, 494 F.2d 1007, 1019-20 (D.C. Cir. 1974); *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974); *United States v. Falcone*, 364 F. Supp. 877, 882 (D.N.J. 1973), aff'd, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).

97. *United States v. Turner*, No. 73-2740, at 12 (9th Cir., July 24, 1975) (per curiam); *United States v. Cirillo*, 499 F.2d 872, 880 & n.6 (2d Cir.), cert. denied, 419 U.S. 1056 (1974); *United States v. James*, 494 F.2d 1007, 1020 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1975); *United States v. Bynum*, 485 F.2d 490, 500 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974); *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974); *United States v. LaGorga*, 336 F. Supp. 190, 196 (W.D. Pa. 1971).

98. *United States v. Turner*, No. 73-2740 at 17 (9th Cir., July 24, 1975) (per curiam); *United States v. Capra*, 501 F.2d 267, 273 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975); *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir.), cert. denied, 419 U.S. 1056 (1974); *United States v. James*, 494 F.2d 1007, 1019 (D.C. Cir. 1974); *United States v. Bynum*, 360 F. Supp. 400, 412-13 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974); *United States v. Focarile*, 340 F. Supp. 1033, 1048 (D. Md.), aff'd sub nom. *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), aff'd on other grounds, 416 U.S. 505 (1974).



These considerations are by no means unique to the national security field. They have been successfully advanced and accepted in cases involving ordinary criminal surveillance. In *United States v. Quintana*,<sup>100</sup> the government intercepted all incoming and outgoing calls from the defendant's store and home for a period of 35 days. "Some 2000 calls were intercepted, while only 153 were ultimately found germane enough to be worth transcribing, and only 47 were used at trial."<sup>101</sup> The Court of Appeals for the Seventh Circuit held that surveillance of this kind was not a per se violation of the statute.<sup>102</sup> The Court explained that whether the minimization requirement has been complied with depends on a "case-by-case analysis of the reasonableness of [each] particular interception."<sup>103</sup> The Court held that the government had made a prima facie showing of reasonableness based upon the following factors: the criminal enterprise under investigation was a large and sophisticated narcotics conspiracy, and the surveillance was designed as much to learn the identity of co-conspirators and the extent of the conspiracy as it was to incriminate the defendant whose phone was tapped;<sup>104</sup> many conversations contained a mix of relevant and irrelevant conversations and there was no pattern of innocent conversation that would indicate to the agents monitoring the tap that the conversation should not be intercepted;<sup>105</sup> the authorizing judge exercised continuing supervision of the tap and required the government to submit reports at five-day intervals.<sup>106</sup>

Thus, although it is clear that national security surveillance can pose difficult minimization problems for law enforcement authorities, it is not at all clear that these difficulties will be any greater than in many criminal cases—unless it be assumed that members of organized crime or narcotics conspiracies are somehow less proficient at eluding law enforcement authorities than their counterparts in the fields of espionage and subversion. In addition, it is far from clear that, under present law, the minimization requirement is sufficiently inflexible to impose any substantial burden on law

Cir. 1974), cert. denied, 420 U.S. 955 (1975); *United States v. Bynum*, 360 F. Supp. 400, 412-13 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974); cf. *United States v. Cirillo*, 499 F.2d 872, 880 n.6 (2d Cir.), cert. denied, 419 U.S. 1056 (1974).

100. 508 F.2d 867 (7th Cir. 1975). The Third Circuit appears to be in complete accord with *Quintana*. See *United States v. Armocida*, 515 F.2d 29, 42-46 (3d Cir. 1975).

101. 508 F.2d at 873.

102. *Id.*

103. *Id.* at 873-74.

104. *Id.* at 874; see *United States v. Falcone*, 364 F. Supp. 877, 885 (D.N.J. 1973), aff'd, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); *United States v. Focarile*, 340 F. Supp. 1033, 1047 (D. Md.), aff'd sub nom. *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), aff'd on other grounds, 416 U.S. 505 (1974); *United States v. Escandar*, 319 F. Supp. 295, 303 (S.D. Fla. 1970).

105. 508 F.2d at 875.

106. *Id.*; accord, *United States v. Bynum*, 485 F.2d 490, 501 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974) (summaries and logs submitted at intervals of four to eight days); *United States v. Escandar*, 319 F. Supp. 295, 303 (S.D. Fla. 1970); see note 92 *supra* and accompanying text.

enforcement.<sup>107</sup> Indeed, the contrary appears to be the fact because under *Quintana* and similar cases all that is required is a good faith attempt to minimize<sup>108</sup>—a requirement that can hardly be expected to place an undue burden on any kind of surveillance.

### E. Warehousing and Record Keeping

Under section 2518(8)(a), the fruits of electronic surveillance must, if possible, be recorded on tape in such a way as to prevent editing or alteration. Immediately after the warrant expires, the tapes must be presented to the issuing judge for sealing, and they must be preserved for ten years.<sup>109</sup> These provisions serve two functions: they preserve the integrity and accuracy of the recordings,<sup>110</sup> and they insure that a record will be available if the legality of the interception is later challenged.<sup>111</sup>

In *Zweibon* the original recordings were destroyed, and only summaries were available to the court.<sup>112</sup> Although the Justice Department has made conflicting representations regarding government policy with respect to record keeping,<sup>113</sup> it is clear that it would prefer to produce its own summaries of

107. The statute merely "requires that measures be adopted to reduce the extent of such interception to a practical minimum while allowing the legitimate aims of the Government to be pursued." *United States v. Turner*, No. 73-2740 at 15 (9th Cir., July 24, 1975) (per curiam).

108. *United States v. Armocida*, 515 F.2d 29, 44 (3d Cir. 1975); *United States v. Quintana*, 508 F.2d 867, 875 (7th Cir. 1975) (citing cases which stand for the proposition that frequent judicial review of surveillance makes it easier to find that a good faith attempt has been made); see *United States v. Tortorello*, 480 F.2d 764, 784 (2d Cir.), cert. denied, 414 U.S. 866 (1973) ("on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion."); *United States v. Falcone*, 364 F. Supp. 877, 886-87 (D.N.J. 1973), aff'd, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); *United States v. Scott*, 331 F. Supp. 233, 248 (D.D.C. 1971), vacated & remanded, 504 F.2d 194 (D.C. Cir. 1974) (subsequent order on remand, not reported officially, was reversed at 516 F.2d 751 (D.C. Cir. 1975) [District Court suppressed all conversations intercepted in view of what it considered the agent's failure to observe minimization requirements—Court of Appeals found the minimization standard to be one of reasonableness which was comported with in all interceptions]).

109. 18 U.S.C. § 2518(8)(a) (1970).

110. *United States v. Sklaroff*, 506 F.2d 837 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3205 (U.S. Oct. 7, 1975) (No. 74-1249); Senate Report, supra note 7, at 104. The sealing and warehousing provisions also serve to preserve the confidential nature of the recordings. *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); Senate Report, supra note 7, at 104. Nathan Lewin ranks the record keeping and warehousing provisions among the more effective practical checks on abuses. 1972 Hearings, supra note 21, at 61. A moderate delay in sealing can be excused if the government was acting in good faith. *United States v. Poeta*, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972).

111. *United States v. Huss*, 482 F.2d 38, 47-48 (2d Cir. 1973); Senate Report, supra note 7, at 104; see *United States v. Bryant*, 439 F.2d 642, 650-53 (D.C. Cir. 1971) (criminal conviction remanded because government had lost tapes sought by defendants).

112. 516 F.2d at 605 n.10 (plurality opinion).

113. *Id.*; cf. 1974 Hearings, supra note 26, at 449 (statement of John Shattuck and Leon Friedman of American Civil Liberties Union).

conversations for court inspection rather than original tapes. Apparently, the only justification advanced in favor of destruction is a concern for warehousing space.<sup>114</sup>

Despite its primary purpose, national security intelligence is often sought to be introduced in evidence in criminal trials. The *Zweibon* case is a classic example.<sup>115</sup> In the context of a criminal trial it becomes vitally important that accurate and complete records be made available. For example, if the government failed to minimize its interceptions, that fact would be unlikely to appear in summaries because summaries would not be made of irrelevant conversations. Another example of the importance of having original recordings rather than summaries may be found in *United States v. Huss*.<sup>116</sup> That case arose from a contempt proceeding that developed out of the same Jewish Defense League wiretaps involved in *Zweibon*.<sup>117</sup> At trial, a witness refused to answer questions posed by government attorneys on the ground that the questions were based on information gathered pursuant to an illegal wiretap. The issue became whether the questions were based on wiretap information or on an independent source untainted by the wiretap.<sup>118</sup> The trial judge concluded that there had been an independent, untainted source.<sup>119</sup> However, the witness claimed that actual tape recordings, which the government had destroyed, would prove the contrary, and that the destruction made it impossible for him to rebut the government's case.<sup>120</sup> His own case was particularly strong because he had his own tapes of conversations with one of the government's agents that indicated that he had been "fingered" by wiretaps.<sup>121</sup> The contempt order was vacated because the government had placed the witness in the absurd position of having to prove taint without all of the means necessary to do so.<sup>122</sup> A Second Circuit case decided after *Huss*<sup>123</sup> indicates that, where a strong showing of independent source is made, the destruction of tapes will not result in the suppression of evidence allegedly obtained through illegal wiretaps.<sup>124</sup>

Even if intelligence surveillance were not used in criminal trials, the warehousing provisions would still be important. There are both statutory and common law causes of action for illegal electronic surveillance.<sup>125</sup> In order to

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114. See *United States v. Huss*, 482 F.2d 38, 48 (2d Cir. 1973).

115. Others are *United States v. Butenko*, 494 F.2d 593 (3d Cir.), cert. denied, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974).

116. 482 F.2d 38 (2d Cir. 1973). See also *United States v. Bryant*, 439 F.2d 642, 650-53 (D.C. Cir. 1971).

117. 516 F.2d at 668 n.256.

118. *United States v. Huss*, 482 F.2d 38, 42 (2d Cir. 1973).

119. *Id.* at 45.

120. *Id.* at 46-47. Under *Alderman v. United States*, 394 U.S. 165, 183 (1969), the government has the burden of persuasion to show lack of taint, but the defendant bears a burden of going forward with evidence of taint.

121. *United States v. Huss*, 482 F.2d 38, 49 (2d Cir. 1973).

122. *Id.* at 51.

123. *United States v. Garcilaso de la Vega*, 489 F.2d 761 (2d Cir. 1974).

124. *Id.* at 764-65.

125. The statutory provision is contained in 18 U.S.C. § 2520 (1970). Under *Zweibon* this

prevail in such an action, the plaintiff must show that the surveillance violated either the fourth amendment or Title III. To require such a plaintiff to carry his burden of proof without accurate records of the surveillance would be just as absurd as requiring the witness in *Huss* to show taint under the same conditions.

#### F. Notice

One of the constitutional flaws the *Berger* Court found in the New York statute was its failure to afford notice to the targets of surveillance.<sup>126</sup> Section 2518(8)(d) represents an attempt to comply with *Berger*.<sup>127</sup> Subjects of surveillance must be given notice within a reasonable time from the termination of the period of the warrant. Absent judicial approval, notice may not be postponed beyond 90 days.<sup>128</sup> Former Attorneys General Richardson and Saxbe and former Deputy Attorney General Ruckelshaus have all asserted that this requirement is "obviously inappropriate for national security intelligence gathering surveillances."<sup>129</sup> The rationale behind this assertion appears to be that notice will "blow the cover" of the government, and impair or destroy the usefulness of the wiretap.<sup>130</sup> It is important to define the kind of notice involved. The notice required by *Berger* and the statute is post-search notice, not prior notice. Prior notice is neither constitutionally nor statutorily required.<sup>131</sup> Post-search notice is required after the surveillance terminates so that the subject of the surveillance will be able to vindicate his rights if the surveillance was illegal.<sup>132</sup>

In a large-scale, long-range intelligence operation, law enforcement authorities may be conducting a series of surveillances and may be relying on a broad range of sources of information.<sup>133</sup> Such an operation could be severely jeopardized by premature notification of even one target of surveillance, for

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provision of Title III applies to national security surveillance. A common law cause of action was recognized in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

126. 388 U.S. at 60.

127. See Senate Report, *supra* note 7, at 105.

128. 18 U.S.C. § 2518(8)(d) (1970). The Nelson bill, discussed at note 89 *supra* and accompanying text, contains a stricter provision that is examined in depth in Committee Report, *supra* note 5, at 764-66.

129. 1974 Hearings, *supra* note 26, at 17 (testimony of Elliot Richardson); see *id.* at 331 (testimony of William Ruckelshaus) (discussing surveillance of foreigners); *id.* at 493-94 (testimony of William Saxbe). But see 1972 Hearings, *supra* note 21, at 51-52 (testimony of Ramsey Clark).

130. 1974 Hearings, *supra* note 26, at 494 (testimony of William Saxbe).

131. See *United States v. Martinez*, 498 F.2d 464, 468 (6th Cir. 1974), cert. denied, 419 U.S. 1056 (1975).

132. *United States v. Bernstein*, 509 F.2d 996, 1000-01 (4th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3030 (U.S. July 22, 1975) (No. 74-1486); Committee Report, *supra* note 5, at 764; Senate Report, *supra* note 7, at 105; Schwartz II, *supra* note 54, at 33; Schwartz I, *supra* note 44, at 484; Harv. Note, *supra* note 26, at 999-1000; 1972 Hearings, *supra* note 21, at 61-62 (statement of Nathan Lewin) (notice is one of the more effective practical checks on abuses).

133. *United States v. United States Dist. Ct.*, 407 U.S. 297, 322 (1972).

that person is likely to inform all of the others involved.<sup>134</sup> Similarly, a fruitful source of intelligence may be used for a period of time, and then terminated, in the hope that when future intelligence is needed the source will again be available. Such a source would be rendered useless if notice were given after the first surveillance because the target would always be suspicious thereafter.

The Act itself, of course, permits notice to be postponed upon an *ex parte* showing of good cause,<sup>135</sup> and the Senate Committee Report points out that in a national security context, notice could be postponed almost indefinitely<sup>136</sup>—an indication that the notice requirement was expected to be applied to such surveillance. Even if postponement were not available, however, the flexibility of the notice provision supports an argument that it be applied to intelligence gathering surveillances.

The courts have explained that the notice requirement "is not meaningless. It eliminates, insofar as practicable, the possibility of completely secret electronic eavesdropping and grants to the person involved an opportunity to seek redress . . ." <sup>137</sup> and that it is "an absolutely necessary link in the chain of protective measures built into the statute."<sup>138</sup> In practice the provision has not been strictly enforced, however, and seldom does a failure to serve notice within 90 days or within the period permitted by any extension result in suppression.<sup>139</sup> The cases refer to the notice requirement as a "ministerial"<sup>140</sup> provision, and absent a deliberate attempt to flout the statute<sup>141</sup> there may be no remedy for a failure to give notice. If the defendant has actual knowledge,<sup>142</sup> or if he was not prejudiced by the delay,<sup>143</sup> suppression may be

134. See *United States v. John*, 508 F.2d 1134, 1139 (8th Cir.), cert. denied, 421 U.S. 962 (1975).

135. 18 U.S.C. § 2518(8)(d); see *United States v. John*, 508 F.2d 1134 (8th Cir.), cert. denied, 421 U.S. 962 (1975); *United States v. Wolk*, 466 F.2d 1143 (8th Cir. 1972).

136. Senate Report, *supra* note 7, at 105.

137. *United States v. Eastman*, 326 F. Supp. 1038, 1039 (M.D. Pa. 1971), *aff'd*, 465 F.2d 1057 (3d Cir. 1972).

138. *Id.*

139. *E.g.*, *id.*; *United States v. Chun*, 386 F. Supp. 91 (D. Hawaii 1974).

140. *United States v. Smith*, 463 F.2d 710 (10th Cir. 1972); *United States v. Lawson*, 334 F. Supp. 612 (E.D. Pa. 1971). But see *United States v. Eastman*, 465 F.2d 1057, 1062 (3d Cir. 1972).

141. *United States v. Eastman*, 465 F.2d 1057, 1062 (3d Cir. 1972). But see *United States v. Donovan*, 513 F.2d 337, 343 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3094 (U.S. Aug. 19, 1975) (75-212).

142. *United States v. Wolk*, 466 F.2d 1143, 1146 (8th Cir. 1972). But see *United States v. Bernstein*, 509 F.2d 996, 1004 (4th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3030 (U.S. July 22, 1975) (No. 74-1486).

143. *United States v. Rizzo*, 492 F.2d 443, 447 (2d Cir.), cert. denied, 417 U.S. 944 (1974); *United States v. Smith*, 463 F.2d 710 (10th Cir. 1972); *United States v. LaGorga*, 336 F. Supp. 190, 194 (W.D. Pa. 1971); *United States v. Lawson*, 334 F. Supp. 612, 616-17 (E.D. Pa. 1971); *United States v. Cantor*, 328 F. Supp. 561 (E.D. Pa. 1971), *aff'd*, 470 F.2d 890 (3d Cir. 1972). But see *United States v. Bernstein*, 509 F.2d 996, 1004 (4th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3030 (U.S. July 22, 1975) (No. 74-1486). In the *Chun* case, the court examined the

denied. Whether a failure to give notice gives rise to a civil cause of action is unknown—probably because those who have the right to bring such actions are unaware of the fact.

Perhaps the most insidious feature of electronic surveillance is its secrecy. The target's unawareness of the surveillance is at once the feature that makes it valuable and the feature that makes it susceptible of great abuse. Although it is important that the value of such surveillance be preserved for as long as necessary, it is equally important that the target be notified when secrecy is no longer necessary. Section 2518(8)(d) with its notification and postponement provisions is nothing more than a device by means of which both interests can be accommodated.<sup>144</sup>

#### IV. CONCLUSION

An analysis of the problems that law enforcement authorities are likely to face in the context of national security intelligence gathering reveals that these problems are usually not any greater than those faced in difficult criminal investigations. This analysis suggests that, at least until Congress can develop something better, it is desirable that the Justice Department proceed under, and that the courts apply, Title III to all surveillances to which the warrant requirement applies. Even Justice Department officials have conceded that, in the criminal context, "Title III works well,"<sup>145</sup> and there is little reason to believe that its provisions will be any less workable in the national security context. Perhaps the best argument in favor of applying Title III to national security intelligence gathering would be a warrant that failed to comply with the provisions discussed above. It would not contain the names of those whose conversations are expected to yield information. It would not describe the types of conversations anticipated. It would last as long as there was a perceived threat. The officials executing the warrant would not be required to minimize the intrusion. After the interception few records would remain, and recordings would be destroyed instead of being sealed by the issuing judge. Finally, the only targets of surveillance who would be notified would be those who were subsequently prosecuted—and then only in response to defense discovery motions.

It is instructive to recall that the writ of assistance against which James Otis unsuccessfully argued in 1761<sup>146</sup> contained similar features and became a

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notice requirement closely and concluded that prejudice is a constitutional test, i.e., if there has been prejudice, then the Constitution has been violated notwithstanding compliance with the statute. *United States v. Chun*, 386 F. Supp. 91, 94 (D. Hawaii 1974).

144. The Nelson bill has been criticized because its postponement provision is not sufficiently flexible. Committee Report, *supra* note 5, at 765.

145. 1974 Hearings, *supra* note 26, at 494 (testimony of William Saxbe).

146. There exists no formal record of James Otis' Speech Against the Writs of Assistance. John Adams took notes of the speech however and G. R. Minot later expanded these notes into the version of argument which Adams revised. H. Commager, *Documents of American History* 45 (3d ed. 1947). Otis argued that the writ, which is reprinted in the appendix to this Note, contained the following illegal features (parenthetical indications after each refer to the numbers corresponding to the numbers of the constitutional shortcomings of the New York statute

major tool for oppression. The fourth amendment was fashioned to prohibit the use of such general writs, and Title III does not purport to be anything more than an attempt to conform with the requirements of the fourth amendment. Until it can be shown that Title III is in fact too burdensome and too inflexible to be applied in the context of national security intelligence gathering, its provisions should prevail.

*Thomas I. Sheridan III*

### APPENDIX

#### *Writ of Assistance*

The following is a copy of the Writ of Assistance that was issued to "Surveyor & Searcher" Charles Paxton at the request of Thomas Lechmere, the "Surveyor General" of the Port of Boston, on December 2, 1761. The copy is taken from W. MacDonald, *Documentary Source Book of American History 1606-1898*, at 106-09 (1908). Although the writ does not indicate the fact, MacDonald, in his prefatory notes, informs us that the writ was effective until the demise of the Crown and for six months thereafter. *Id.* at 106. It was legalized by the Townshend Revenue Act of 1767 which is reprinted in *id.* at 143-46. This general warrant is included here for two reasons: first, the fourth amendment was largely an attempt to outlaw the Writ of Assistance and it is therefore important to understand what that document said; second, despite its importance, it is a difficult document to find. The reader should note that, in the manuscript MacDonald used, the words in brackets are interlined, and those in italics erased.

Prov. of Mass. Bay	}	George the third by the grace of God of Great Britan France & Ireland King Defender of the faith &c.
SEAL		To All & singular our Justices of the peace Sheriffs Constables and to all other our Officers and Subjects within our said Province and to each of you Greeting.

Know Ye that whereas in and by an Act of Parliament made in the *thir*[four]teenth year of [the reign of] the late King Charles the second *it is declared to be* [the Officers of our Customs & their Deputies are authorized and impowered to go & enter aboard any Ship or Vessel outward or inward bound for the purposes in the said Act mentioned and it is *also* in & by the said Act further enacted & declared that it shall be] lawful [to or] for any person or persons authorized by Writ of assistants under the seal of our Court of Exchequer to take a Constable Headborough or other publick

involved in Berger listed in note 5 supra): 1) it was directed to everyone; anyone could exercise the power it conferred; 2) it was perpetual (10); 3) probable cause was not required (1); 4) it was a general warrant, i.e., it authorized a search of any place for any things (2 & 4); 5) no oath was required; 6) there was no return (8).

Officer inhabiting near unto the place and in the day time to enter & go into any House Shop Cellar Warehouse or Room or other place and in case of resistance to break open doors chests trunks & other package there to seize and from thence to bring any kind of goods or merchandize whatsoever prohibited & uncustomed and to put and secure the same in *his Majestys* [our] Storehouse in the port next to the place where such seizure shall be made.

And Whereas in & by an Act of Parliament made in the seventh & eighth year of [the reign of the late] King William the third there is granted to the Officers for collecting and managing our revenue and inspecting the plantation trade in any of our plantations [the same powers & authority for visiting & searching of Ships & also] to enter houses or warehouses to search for and seize any prohibited or uncustomed goods as are provided for the Officers of our Customs in England by the said last mentioned Act made in the fourteenth year of [the reign of] King Charles the Second, and the like assistance is required to be given to the said Officers in the execution of their office as by the said last mentioned Act is provided for the Officers in England.

And Whereas in and by an Act of our said Province of Massachusetts bay made in the eleventh year of [the reign of] the late King William the third it is enacted & declared that our Superior Court of Judicature Court of Assize and General Goal delivery for our said Province shall have cognizance of all matters and things within our said Province as fully & amply to all intents & purposes as our Courts of King's Bench Common Pleas & Exchequer within our Kingdom of England have or ought to have.

And Whereas our Commissioners for managing and causing to be levied & collected our customs subsidies and other duties have [by Commission or Deputation under their hands & seal dated at London the 22d day of May in the first year of our Reign] deputed and impowered Charles Paxton Esquire to be Surveyor & Searcher of all the rates and duties arising and growing due to us at Boston in our Province aforesaid and [in & by said Commission or Deputation] have given him power to enter into [any Ship Bottom Boat or other Vessel & also into] any Shop House Warehouse Hostery or other place whatsoever to make diligent search into any trunk chest pack case truss or any other parcell or package whatsoever for any goods wares or merchandize prohibited to be imported or exported or whereof the Customs or other Duties have not been duly paid and the same to seize to our use In all things proceeding as the Law directs.

Therefore we strictly Injoin & Command you & every one of you that, all excuses apart, you & every one of you permit the said Charles Paxton according to the true intent & form of the said commission or deputation and the laws & statutes in that behalf made & provided, [as well by night as by day from time to time to enter & go on board any Ship Boat or other Vessel riding lying or being within or coming to the said port of Boston or any Places or Creeks thereunto appertaining such Ship Boat or Vessel then & there found to search & oversee and the persons therein being strictly to examine touching the premises aforesaid & also according to the form effect and true intent of the said commission or deputation] in the day time to enter & go into the vaults cellars warehouses shops & other places where any prohibited goods wares or merchandizes or any goods wares or merchandizes for which the customs or other duties shall not have been duly & truly satisfied and paid lye concealed or are suspected to be concealed, according to the true intent of the law to inspect & oversee & search for the said goods wares & merchandize, And further to do and execute all things which of right and according to the laws & statutes in this behalf shall be to be done. And we further strictly Injoin & Command you and every one of you that to the said Charles Paxton Esqr you & every one of you from time to time be aiding assisting



& helping in the execution of the premises as is meet. And this you or any of [you] in no wise omit at your perils. Witness Thomas Hutchinson Esq at Boston the        day of December in the Second year of our Reign Annoque Dom 1761

By order of Court  
N. H. Cler.