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A Bug in the Bugging Statute: United States v. Whitaker

A BUG IN THE BUGGING STATUTE

In this paper the author will analyze the reasoning of the Whitaker holding and its ramifications with regard to the federal procedures for authorized electronic eavesdropping as prescribed in Title III of the Omnibus Crime Control and Safe Streets Acts of 1968. The author concludes that the procedural failing described by the Whitaker court can be corrected by mandatory judicial controls and more stringent post-seizure notification requirements.

CONSTITUTIONAL LAW—TITLE III, OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968[1] AND THE FOURTH AMENDMENT: *United States v. Whitaker.*[2]

On June 17, 1970, a federal grand jury in Philadelphia issued an indictment charging defendant Matthew F. Whitaker and a number of other people with using interstate telephone facilities for the purpose of gambling in violation of 18 U.S.C. § 1952 (1970). Whitaker, along with six other defendants (most of whom were not named in the first indictment), was the subject of a second indictment on September 17, 1970, charging defendants with conspiracy to use telephone facilities for the promotion of a gambling and bookmaking business, as well as other substantive offenses (not included in the first indictment) in violation of 18 U.S.C. § 2, § 371 and § 1952 (1970). During the course of its investigation, and pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[3] the government instituted a wiretap of defendant Whitaker's telephone. Prior to trial, the government notified defendants that it intended to introduce recordings of wiretaps into evidence,[4] and defendants moved to suppress the contents of the recordings and any other evidence derived from the wiretaps.[5] Despite a series of federal court decisions upholding the constitutionality of Title III,[6] the *Whitaker* court held the procedural safeguards of 18

1. 18 U.S.C. §§ 2510–2520 (1970).
2. 343 F. Supp. 358 (E.D. Pa. 1972).
3. In accordance with procedures set forth in 18 U.S.C. § 2518 (1970) for crimes specified in 18 U.S.C. § 2516 (1970).
4. As required by 18 U.S.C. § 2518(9) (1970).
5. 18 U.S.C. § 2518(10)(a) (1970).
6. United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972). In holding Title III to be constitutional, the court gave the following explanation:

> As we view it, Congress was seeking to deal realistically with highly complex problems in accordance with the demands of the Constitution. We are unable to say that the product fails to satisfy the Constitution. Every effort has been made

U.S.C. § 2518 inadequate under the fourth amendment, and therefore declared Title III unconstitutional on its face.[7]

As envisioned by Congress, Title III embodies a complex statutory scheme intended to preserve reasonable judicial control over the installation and maintenance of electronic surveillance. Under the Act, a government officer, upon a showing of probable cause, may obtain an *ex parte* order authorizing the interception of wire or oral communications for a period not to exceed 30 days.[8] The order must specify, however, ". . . 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 . . . ."[9] In addition, the order must direct the executing officers to minimize the scope and duration of surveillance,[10] and the issuing judge *may* require that periodic reports be submitted ". . . showing what progress has been made . . . and the need for continued interception."[11]

Title III also requires notice of the surveillance to be given to the person named in the order within a reasonable time after the order has been terminated or denied,[12] and also requires notification of the surveillance to be given to parties against whom such evidence is to be introduced in any trial, hearing or other proceeding.[13]

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to comply with the requirements of *Berger* and *Katz* (citations omitted). . . .

. . . .

In summary then, we uphold the statute on the basis that it demands an original authorization in accordance with the mandate of *Berger v. New York*, *supra*, and we do so upon the basis that the nature and probable consequences of authorized wiretapping is discovery of unanticipated and undescribed communications. The very nature of this form of invasion is conducive to producing unexpected information. If wiretapping is to be validated, and *Berger*, *Osborn* and *Katz* (citations omitted) recognize its validity, then the interception and use of information which is so related to the original search is not to be excluded. In other words, Congress has dealt with the problem about as well as could have been expected considering the nature and character of the subject matter and its consequential incidents.

449 F.2d at 687. *Accord*, United States v. Focarlie, 340 F. Supp. 1033 (D. Md. 1972); United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971); United States v. King, 335 F. Supp. 523 (S.D. Cal. 1971); United States v. Lawson, 334 F. Supp. 612 (E.D. Pa. 1971); United States v. Becker, 334 F. Supp. 546 (S.D.N.Y. 1971); United States v. Perillo, 333 F. Supp. 914 (D. Del. 1971); United States v. Leta, 332 F. Supp. 1357 (M.D. Pa. 1971); United States v. Scott, 331 F. Supp. 233 (D.D.C. 1971); United States v. Cantor, 328 F. Supp. 561 (E.D. Pa. 1971); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971); United States v. Escandar, 319 F. Supp. 295 (S.D. Fla. 1970), *rev'd on other grounds sub nom.*, United States v. Robinson, 468 F.2d 189 (5th Cir. 1972).

7. Notice of appeal was filed by the government, June 28, 1972, in accordance with 18 U.S.C. § 2518(10)(b) (1970).
8. 18 U.S.C. § 2518(5) (1970).
9. 18 U.S.C. § 2518(4)(e) (1970).
10. 18 U.S.C. § 2518(5) (1970).
11. 18 U.S.C. § 2518(6) (1970).
12. 18 U.S.C. § 2518(8)(d) (1970).
13. 18 U.S.C. § 2518(9) (1970).

In formulating this scheme, Congress relied heavily on the decisions of the Supreme Court in *Osborn v. United States*,[14] *Katz v. United States*,[15] and *Berger v. New York*.[16] In *Osborn*, a government informer, acting pursuant to a court order, used a hidden tape recorder to corroborate his testimony that he was solicited by the defendant in an attempt to bribe a juror. The Court held that this recording did not violate the defendant's rights under the fourth amendment, because the use of this device, which was predicated upon ". . . a detailed factual affidavit alleging the commission of a specific criminal offense . . ." was ". . . for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations."[17]

In *Katz*, FBI agents attached an electronic listening and recording device to the outside of public telephone booth from which the defendant had placed frequent telephone calls. The agents confined their surveillance to the brief periods during which the defendant used the telephone booth, and they took great care to overhear only the defendant's end of the conversations. While holding that the particular search was in violation of the fourth amendment because of the lack of a warrant, the Court stated that electronic surveillance could be conducted in such a manner as to bring it within the allowable limits of a reasonable search. The Court indicated that the method of conducting the specific search in *Katz* would have been reasonable if a warrant had been issued.[18] But, clearly, the executing officer must not be left with the discretion to execute such a search without restraints imposed by a judicial officer.[19]

In *Berger*, the Court confronted for the first time the questions of electronic surveillance per se. The Court held the New York

14. 385 U.S. 323 (1966).
15. 389 U.S. 347 (1967).
16. 388 U.S. 41 (1967).
17. 385 U.S. at 330.
18. 389 U.S. at 354:

> Accepting this account of the Government's actions as accurate, it is clear that 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.

19. *Id.* at 356-57:

> It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. . . . In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . '" (citation omitted).

eavesdropping statute[20] unconstitutional because it was ". . . too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area. . . ."[21] Although the challenged statute permitted electronic surveillance only *after* a warrant had been obtained, the Court found numerous defects in its procedures: (1) a warrant could be issued based on an affidavit which failed to meet the requirements of "particularity" in describing the place to be searched,[22] and the conversations to be recorded;[23] (2) the surveillance was limited in neither scope nor duration, thus allowing general searches;[24] (3) termination of the surveillance was not required once the conversation sought had been seized, thus placing excessive discretion in the hands of the executing officers;[25] and (4) the act failed to require a showing of "special circumstances" sufficient to justify "secret" searches.[26]

DISCRETIONARY CONTROLS

Although Title III was designed to satisfy the commands of the fourth amendment as explicated in *Osborn*, *Katz*, and *Berger*, the

20. N.Y. CODE OF CR. PROC. § 813-a (McKinney 1958):

§ 813-a. Ex parte order for interception, overhearing or recording

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

21. 388 U.S. at 44.
22. *Id.* at 55-56.
23. *Id.* at 58-59.
24. *Id.* at 59:

"[A]uthorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." General searches have long been prohibited by the constitution. *See* Boyd v. United States, 116 U.S. 616 (1886).

25. 388 U.S. at 59-60.
26. *Id.* at 60.

Whitaker court held that Congress failed to achieve this goal. Specifically, the court was concerned that under Title III the judicial controls required by the fourth amendment were made discretionary rather than mandatory, thereby leaving the potential for excessive discretion in the hands of the executing officers. The court first turned its attention to 18 U.S.C. § 2518(4)(e) (1970) which provides that:

> Each [*ex parte*] order authorizing or approving the interception of any wire or oral communication shall specify—
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> . . . .
>
> (e) the period of time during which such interception is authorized [up to 30 days], including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

Although recognizing that this aspect of Title III ". . . is a significant improvement from the New York Statute found unconstitutional in Berger. . . ,"[27] the *Whitaker* court was nevertheless troubled by the fact that, at the discretion of the issuing judge, the surveillance need not terminate with interception of the described communication, but can continue even after such interception for the period of time allowed in the order. *Whitaker* held that this places too much discretion in the hands of the executing officers. Moreover, the court found no solace in the act's 30-day limit on interceptions. As Lord, C.J. stated:

> Title III's intrusion is not 'precise' nor 'carefully circumscribed' nor 'very limited'. The fact that it permits 30-day continuous searches which are only half as long as those condemned in *Berger* is a distinction without constitutional significance. This aspect of Title III alone renders the Act unconstitutional.[28]

The Court found similar defects in 18 U.S.C. § 2518(6) (1970), which states that:

> 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.

As with 18 U.S.C. § 2518 (4)(e) (1970), the judicial controls authorized by § 2518(6), are not mandatory. Thus, although the order might be constitutional as applied, if the issuing judge exercises this authority, his failure to do so leaves unduly broad discretion in the

27. 343 F. Supp. at 367.
28. *Id.* at 365-66.

hands of the executing officers. Such a result, the court held, would violate the fourth amendment's prohibition on general searches.

Finally, the *Whitaker* court held that the defects in §§ 2518(4)(e) and (6) could not be cured by § 2518(5), which provides in relevant part that:

> . . . Every order and extension thereof . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.

Whitaker construed this section as requiring that a general direction be inserted in every order instructing the executing officers to limit the scope and duration of the surveillance as much as possible. Noting that reliance upon such an instruction leaves the executing officer with the difficult task of determining their relevance to the investigation, the court concluded that a mere direction to use self-restraint ". . . is not a constitutional substitute for specific pre-search controls imposed by a judge."[29] It should be noted that *Whitaker* did not hold that the issuing judge could have *no* discretion whatever. Rather, the court feared that the impact of a judge's failure to impose any of the controls would violate the fourth amendment.

The following situation illustrates the court's objections to the judicial control aspect of Title III. An application is submitted to a judge of competent jurisdiction in accordance with the procedures prescribed in Title III, requesting an *ex parte* order for an electronic surveillance not to exceed 30 days. The application further requests that the order not be limited to a single conversation, but rather leave open the authorization to intercept several communications relating to the particular offense described in the application. In approving the application and authorizing the *ex parte* order, the authorizing judge is silent as to interim progress reports. The executing officers, in accordance with the authorization of the *ex parte* order, have installed surveillance devices at the authorized location, and, on the third day, intercept a communication of the type described in the order. Since the order does not require automatic termination upon the interception of a communication of the type described in the authorization, the executing officers continue the search for the remainder of the 30-day period. Although no conversations of the type described in the order are obtained after the first interception, a conversation relating to criminal activities not described in the order is subsequently in-intercepted. With the exception of the time involved, this hypothetical case, lawful under Title III, parallels the objectionable situation permitted under the New York statute which was held unconstitutional in *Berger*.

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29. *Id.* at 367-68.

The fact that such a situation can arise while following the procedures delineated in Title III led the *Whitaker* court to hold Title III unconstitutional, on its face. The cases discussed below holding Title III to be constitutional, on the other hand, draw no distinction between discretionary and mandatory judicial controls. These courts deemed the mere fact that such controls could be utilized by the issuing judge to maintain judicial control to be sufficient to satisfy the "reasonable search and seizure" requirement of the fourth amendment.

In the *United States v. Escandar* case[30] for example, the court went through a paragraph by paragraph analysis of § 2518 and concluded that ". . . judicial control, which is necessary to any valid scheme under the fourth amendment, is amply provided for in Title III."[31] *Escandar* misconceives the problem: framed properly, the significant question is not whether judicial controls are *possible*, but rather, whether they are *required*.

This rather basic proposition may be demonstrated by an analogy to the area of search warrants. Suppose Congress were to enact the following statute:

> In the absence of exigent circumstances, no federal law enforcement officer shall conduct any search of any person or place unless authorized by a warrant issued by a magistrate. A magistrate may refuse to issue a warrant if the officer fails to make a showing of probable cause.

As with Title III, the magistrate under our hypothetical statute has discretion to exercise judicial control. Yet few would doubt that such a statute, which purports to allow the magistrate to exercise his discretion in such a way as to issue a warrant *not* based on probable cause, would violate the fourth amendment.

Other courts, recognizing at least implicitly the need for greater judicial control than that mandated by the Act, have strained to construe Title III in such a way as to avoid constitutional difficulties. In *United States v. King*,[32] for example, the court upheld Title III at least in part on the premise that the controls authorized in § 2518(6) are in fact mandatory.[33] Such an interpretation, however, is contrary not

30. 319 F. Supp. 295 (S.D. Fla. 1970).

31. *Id.* at 299. While it is true that the court in *Escandar* recognized the implications of valid judicial control, it did not specifically deal with the question of whether the reasonable search and seizure afforded by the fourth amendment necessitates mandatory judicial control or is satisfied by discretionary judicial control.

32. 335 F. Supp. 523 (S.D. Cal. 1971).

33. *Id.* at 532. The court stated as one of its reasons for holding Title III to be constitutional on its face the requirement that "frequent progress reports must be made to the authorizing judge." It can be inferred from this language that the court presumed mandatory judicial controls with regard to interim reports whereas the *Whitaker* court interpreted 18 U.S.C. § 2518(6) as being merely an expression of discretionary control available to the issuing judge.

only to the words of the statute, but also to explicit legislative intent.[34]

In *United States v. Perillo*,[35] the court treated the 30-day authorization on a single showing of probable cause as reasonable because the judicial officer could limit the electronic intrusion to a period of time less than the full 30-day maximum and because, as construed by *Perillo*, the Act requires termination of the surveillance "*. . . when the authorized objective has been accomplished.*"[36] Similarly, the court in *United States v. Leta*,[37] in upholding Title III, reasoned that ". . . since a wiretap under Title III is to last *no longer than necessary 'to achieve the objective of the authorization'*, and in any event no longer than 30 days without a new showing of presently existing probable cause, the length of the search authorized by the statute is reasonable."[38] What both of these cases failed to recognize is that without required interim reports, these controls are more illusory than real.[39]

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34. SENATE COMM. ON THE JUDICIARY, OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1967, S. REP. No. 1097, 90th Cong., 2nd Sess. 103–04 (1968). The majority report states:

> Paragraph (6) sets out a procedure for periodic judicial supervision during a period of surveillance. . . . It provides that when an order to intercept is entered 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. The reports are intended as a check on the continuing need to conduct the surveillance. . . . This provision will serve to insure that it is not unthinkingly or automatically continued without due consideration.

Although it is clear that this section is intended to provide a method of control over the surveillance activities, in no way can it be read to command the authorizing judge to require the filing of progress reports by the executing officers. It merely allows the issuing judge, in his discretion, to require the filing of interim reports.

35. 333 F. Supp. 914 (D. Del. 1971).

36. *Id.* at 923. The court further stated:

> The word "unreasonable" is certainly an ambiguous word; therefore, this Court should be slow to upset the Congressional determination of what constitutes a reasonable search and seizure as expressed in the terms of this statute in the absence of a strong conviction that the judgment of Congress was erroneous.

Id. at 919.

37. 332 F. Supp. 1357 (M.D. Pa. 1971).

38. *Id.* at 1360–61.

39. United States v. Scott, 331 F. Supp. 233 (D.D.C. 1971). While finding Title III to be constitutional, the court granted the defendant's motion to suppress evidence gathered through electronic surveillance because the executing officers failed to minimize the intrusion. In this case, the court held that the monitoring and recording of 100% of the conversations on a 24-hour-a-day basis for the full duration authorized in the *ex parte* order was, in this particular situation, unreasonable. The court recognized that there might be some situations which necessitate the recording of 100% of the conversations over a particular telephone, while in other situations this broad intrusion would be unreasonable. The burden of proof, however, rests with the government to show that the executing officers attempted in good faith to minimize the intrusion, thus making the search reasonable under the fourth amendment. But, in this case, no such showing was made.

King tangentially treated this issue while discussing the constitutionality of Title III. The court held that the Act was not unconstitutional on its face merely because the executing officers could abuse its provisions. Rather, the court assumed compliance with

Finally, a rather unique argument propounded in *Leta* merits brief attention. In upholding Title III's authorization of 24-hour-a-day monitoring for up to 30 days, the *Leta* court suggested that such continuous surveillance may be justified as a safeguard for the subject of the interception. The reasons given for this unique point of view are that a complete monitoring and recording of all of a subject's phone conversations would insure that his conversations would not be edited to his detriment, thus protecting his statements from being taken out of context.[40]

POST-SEARCH NOTICE

Aside from the broad-discretion argument raised in the opinion, the *Whitaker* court also held Title III to be in violation of the Constitution in that "... it provides for unreasonable searches and seizures by not requiring prompt notice after authorized surveillance has been completed to those people whose conversations have been intercepted."[41]

It has been held that the requirement for pre-search notice can be legally waived in a situation where the disclosure would defeat the purpose of the search.[42] Title III requires a showing of such circumstances in the application for the *ex parte* order,[43] and requires

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the requirement to minimize interceptions, stating: "On the assumption that surveilling agents will comply with the mandate and devise appropriate means to effect minimization, a general provision ... does not serve to invalidate the order." 335 F. Supp. at 538. Such an assumption must be accepted if we are to view our system of law as a safeguard of individual rights in a free society.

It is interesting to note that in the *Scott* case, the *ex parte* order required progress reports to be submitted to the issuing judge every five days until the order expired. The court pointed out that while this requirement was technically complied with, the reports merely listed a log showing the time at which calls were intercepted, and a synopsis of those conversations relating to the particular type of crime described in the order. The court reasoned that the judicial officer's power to terminate the search was nullified by the insufficiency of information to make such a determination.

40. 332 F. Supp. at 1360–61. Such statements fail to recognize that constitutional rights cannot and must not be taken from individuals without their voluntary consent. Such a decision rests in the people and is not abdicated to the government. The *Leta* court further supported the constitutionality of Title III because it does not have many of the other objectionable features of the New York statute in *Berger*, N.Y. CODE OF CR. PROC. § 813-a (McKinney 1958), and the maximum time for which a surveillance can be conducted without a new showing of probable cause is only half as long as in the *Berger* case.
41. 343 F. Supp. at 368.
42. Ker v. California, 374 U.S. 23, 37–41 (1963).
43. 18 U.S.C. § 2518(18)(c) (1970):
Each application shall include the following information:

> ....
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> (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;

the authorizing judge to make a determination that, to his satisfaction, such circumstances do exist.[44]

The *Whitaker* court conceded that the purpose of electronic surveillance would be nullified if the subject was cognizant of it. But the failure to give prompt and adequate notice *after* the search has been terminated violates both ". . . basic decency and the prohibition against unreasonable searches and seizures . . . ."[45] embodied in the fourth amendment.

In raising this objection, the *Whitaker* court directed its criticism to 18 U.S.C. § 2518(8)(d) and (9) (1970). These provisions outline the disclosure procedures required under Title III. It is the contention of the *Whitaker* court that these provisions, in effect, permit the government to conduct secret searches which ". . . by definition reach the outer limits of what is permissible . . . "[46] under the fourth amendment; but the failure to give prompt post-seizure notice of the electronic surveillance to those persons whose conversations were intercepted is ". . . well beyond the bounds of the Constitution."[47]

> 18 U.S.C. § 2518(8)(d) (1970) states:
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> Within a reasonable time but no later than ninety days after the filing of an application for an order of approval under § 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:
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> (1) the fact of the entry or the order of the application;
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> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
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> (3) the fact that during the period wire or oral communications were or were not intercepted.
>
> The judge, upon 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

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44. 18 U.S.C. § 2518(3)(c) (1970):
> Upon such application the judge may enter an *ex parte* order . . . if the judge determines on the basis of the facts submitted by the applicant that—
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> . . . .
>
> (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;

45. 343 F. Supp. at 368.
46. *Id.* at 369.
47. *Id.*

> jurisdiction the serving of the inventory required by this subsection may be postponed.

Not all persons whose conversations have been intercepted are required to be given notice under this section. Only the person named in the order is required to be given notice and this notice need not be prompt. For example, notification can be delayed indefinitely, at a judge's discretion, upon a showing that the investigation is still in progress, even though the interception of communications of the person named in the order has been terminated.[48] In addition, the notification when given requires only disclosure of the fact that an interception has taken place, but does not require an inventory of the contents of the seizure to be given.

18 U.S.C. § 2518(9) (1970) states:

> 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.[49]

Again, this section requires only notification of the search, but not an inventory of the contents of the seizure. The notification is limited to those parties against whom the contents are to be used, but does not require notification to persons whose conversations have been intercepted but who are not involved in the proceeding. Thus, if the government intercepts communications and, pursuant to 18 U.S.C.

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48. SENATE COMM. ON THE JUDICIARY, OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1967, S. REP. No. 1097, 90th Cong., 2nd Sess. 105 (1968). The majority report states:

> On an *ex parte* showing of good cause, the serving of the inventory may be, not dispensed with, but postponed. For example, where interception is discontinued at one location, when the subject moves, but is reestablished at the subject's new location, or the investigation itself is still in progress, even though interception is terminated at any one place, the inventory due at the first location could be postponed until the investigation is complete... the intent of the provision is that the principle of postuse notice will be retained.

49. *Id.*:

> "Proceeding" is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing.

§ 2517(1) (1970),[50] distributes the contents to other law enforcement agencies, and these communications are not introduced in a proceeding, no notice is required.

The *Whitaker* court held that these provisions violate ". . . a basic right to know whenever the government has invaded an area in which a person has a reasonable expectation of privacy. . . ."[51] Additionally, the usefulness of these purported safeguards is destroyed when the individual is notified of the search months and perhaps years after the fact. "When the memory of the speaker or listener has long since dimmed, it is difficult to see how an effective challenge can be made to the accuracy of a partially garbled recording or an assertion made that a conversation was taken out of context by the government."[52] In essence, the argument in *Whitaker* rests on the contention that postseizure disclosure falls within the *res gestae* of the reasonable search and seizure requirement of the fourth amendment. The failure to remove the veil of secrecy after the search and seizure has been terminated is certainly the kind of secret search prohibited by the fourth amendment.

There is an overwhelming lack of judicial treatment of this point, and understandably so. In conventional searches and seizures with a warrant, the parties whose privacy is being invaded are made aware of the intrusion by the physical presence of the executing officers. Moreover, statutory requirements on both the federal and state levels require the service of a copy of the warrant on the parties. In those situations when the warrant is executed in their absence, a copy of the warrant must remain on the premises.

Intentional attempts to conduct the search at a time when it is known that the subject is not present have been held to be in violation of the fourth amendment. A recent case, *United States v. Gervato*,[53] held that such action by the executing officers ". . . was unreasonable and unlawful and rendered the search and resulting seizures unreasonable in violation of the fourth amendment . . ., and that. . . all evidence procured as a result of that unlawful entry, search and seizure must be . . . rendered inadmissible in any criminal proceeding against the defendant. . . ."[54] Noting that the fourth amendment ". . . not only speaks of unreasonable searches and seizures, but also of '[t]he

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50. 18 U.S.C. § 2517(1) (1970):
> 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.

51. 343 F. Supp. at 369.
52. *Id.*
53. 340 F. Supp. 454 (E.D. Pa. 1972).
54. *Id.* at 464.

right of people to be secure in their persons, *houses*, papers, and effects . . .' ",[55] *Gervato* held that "[t]here is a basic violation of our traditional sensibilities in such a secret and *ex parte* procedure taking place in a man's home, with him left to discover it for himself and imagine what he will about its true purpose and procedure afterwards."[56]

Gervato used this strong language in a situation where the subject became aware of the search shortly after it had taken place. *Whitaker* argues that the fears created by not knowing if, in fact, a search has been conducted or is presently being conducted is just as repugnant (if not more),". . . considering a heritage which does not include secret searches. . . ."[57] Thus, although recognizing that electronic surveillance must be conducted in secret, without pre-search notification, the *Whitaker* court maintained that the *Gervato* decision commands prompt post-seizure disclosure to all parties involved; failure to comply with the requirement extends the surveillance beyond the scope permissible under the fourth amendment.[58]

The federal statutory requirement for post-seizure disclosure in conventional searches and seizures is contained in Rule 41(d).[59] Similar statutory provisions are found on the state level.[60]

Rule 41(d) states:

> EXECUTION AND RETURN WITH INVENTORY. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon

55. *Id.* at 462.
56. *Id.* The court went on to state:
> Many if not most of us have in our homes something secret which we wish to remain secret, and which we think will injure or embarrass us if it becomes known. It may not be illegal. Our fears regarding the effects of disclosure may be groundless. But we still have the right not to come home to find our doors hanging open, and the agents of the state come and gone from their search of our home, never knowing for sure where they searched or what they found. A man's home is still more his castle than this.

57. 343 F. Supp. at 369.
58. *Id.*
59. FED. R. CRIM. P. 41(d).
60. *See* N.J.S.A. 33: 1-61 (1937) and MD. R. P. 707§b.

> request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

The cases, both federal[61] and state[62] have held that if the search warrant is valid and the entry lawful, the search is not rendered unlawful by failure to leave a copy of a warrant or a receipt for the property seized, since those duties are ministerial.

In *Fitez v. State*,[63] the court reasoned that the purposes of such a rule are: "... (1) to allow the defense to prepare properly by preventing surprise; (2) to identify the property admitted as in fact the same property as that which was seized; and (3) to protect the property owner's rights if his property should be returned to him."[64] Unless there is a showing that any of the above purposes was violated or that there was actual prejudice to the defendant's case, the failure to comply technically with the rule should not invalidate an otherwise reasonable search and seizure.[65]

Whitaker argues, however, that these cases are not controlling with regard to electronic surveillance. In each of these cases the court pointed out that the defendant was present when the search was conducted or was at least cognizant that it had taken place. Moreover, upon request, the defendant could obtain both a copy of both the warrant and the inventory. This does not hold true for searches and seizures of conversations through electronic surveillance. *Whitaker* therefore concludes that the purposes of Rule 41(d) are necessarily violated and the defendant's case prejudiced by the inadequate post-seizure disclosure requirements of Title III.

CONCLUSION

The *Whitaker* decision, if upheld, will compel Congress to reexamine the constitutional requirements for conducting electronic surveillance in a reasonable manner.[66] Like the courts in *Berger* and *Katz*, the

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61. McGuire v. United States, 273 U.S. 95 (1927); United States v. Haskins, 345 F.2d 111 (6th Cir. 1965); Evans v. United States, 242 F.2d 534 (6th Cir. 1957); United States v. Klapholz, 17 F.R.D. 18 (1955), *aff'd*, 230 F.2d 494 (2d Cir. 1956); United States v. Harmon, 317 F. Supp. 923 (E.D. Tenn. 1970); United States v. Hooper, 320 F. Supp. 507 (E.D. Tenn. 1969).
62. *See* Mills v. State, 12 Md. App. 449, 279 A.2d 473 (1971); Fitez v. State, 9 Md. App. 137, 262 A.2d 765 (1970); State v. Parsons, 83 N.J. Super. 430 (App. Div. 1964).
63. 9 Md. App. 137, 262 A.2d 765 (1970).
64. *Id.* at 142, 262 A.2d 768.
65. *Id.*
66. Since the procedures delineated in 18 U.S.C. § 2518 (1970) are controlling in state proceedings under state electronic surveillance statutes, it will not be necessary for Maryland to amend its wiretapping sections to conform to any amended procedures required by the Whitaker decision. 18 U.S.C. §2516(2) (1970) states in part:
> 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*

Whitaker court did not find electronic surveillance to be a violation per se of the fourth amendment; rather, the scope of the decision is limited to the constitutional deficiencies of the procedural aspects embodied in Title III.

To satisfy the requirements enunciated by the *Whitaker* court, the judicial controls prescribed by Title III must be mandatory. Additionally, prompt and adequate post-seizure disclosure of the surveillance, which is now discretionary, should be mandatory and should be given to all parties whose conversations have been intercepted.

As was stated in *United States v. United States District Court for the Eastern District of Michigan, Southern Division*,[6 7] "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive direction may be reasonably exercised." To facilitate such judicial control, the judge authorizing or approving the request for interception of wire or oral communications must require the executing officers to file progress reports at specified intervals during the running of the order. These reports must include, but not be exclusively limited to, the following: (1) a statement as to what efforts are being made to minimize the interception of conversations not subject to the surveillance; (2) a log of all communications intercepted, showing the time of the interception, the length of time it was monitored, and, if possible, identifying the parties to the conversation; and (3) a statement

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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 . . . , 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. (emphasis added)

Maryland now has in effect statutes dealing with the interception of communications, MD. CODE ANN., art. 35 §§ 92-99 (Supp. 1971) and MD. CODE ANN., art. 27 § 125A-D (Supp. 1971).

In State v. Siegel, 13 Md. App. 444, 285 A.2d 671 (1971), both Title III and the Maryland eavesdropping statutes were held constitutional. In so doing, the *Siegel* court stated:

> We conclude from the provisions referring to a state statute that all that is required for a state validly to permit interception of wire and oral communications is to have in effect a statute authorizing its principal prosecuting attorney or the principal prosecuting attorney of any of its subdivisions to apply to one of its judges of competent jurisdiction for an order of interception. Without this authorization any interception of communications by the State would be in violation of the federal act. With this authorization the federal act takes over and controls the state action. . . . We construe the language of §2516(2) . . . to mean that the state *may* require procedures that are more restrictive than those spelled out in §2518 of the federal act but in the absence of such statutory provisions the procedures are pursuant to § 2518.

Id. at 460, 285 A.2d at 680.

67. 407 U.S. 297, 317 (1972).

as to the percentage of all calls occurring during the period that have been recorded. Such reports will insure judicial supervision throughout the period of authorization; they will provide the judicial officer with information sufficient for him to determine whether there is presently existing probable cause to continue the surveillance.

The order must automatically terminate upon the interception of a single communication of the type described in the authorization. This requirement will not preclude the possibility of continuing the interception under a new authorization. The intercepted conversation would, in most cases, be sufficient to establish a present showing of probable cause for the issuance of a new *ex parte* order. But, by requiring termination of the authorization at the first interception, the determination as to whether the surveillance should be continued rests with the judicial officer instead of with the executing officer.

These requirements would insure that the surveillance itself would be conducted in a reasonable manner. Reasonableness is the ultimate criterion of both the scope of the intrusion and the degree of judicial control. As the scope increases, so necessarily must the controls become more extensive. Since electronic surveillance is by its very nature a broad invasion into a constitutionally protected area, greater judicial supervision must be exercised so as not to intrude unreasonably into this protected area of individual freedom. These requirements would not obviate the purpose of the search: rather, they would insure the legality of the government's actions.

Upon the termination of electronic surveillance of a particular subject, prompt and complete post-seizure disclosure must be required. Disclosure of the surveillance and the contents seized must be made to all parties whose conversations have been intercepted. Notification should be given by the issuing judge rather than by the executing agencies. Such a requirement is in accord with Rule 41(d), as well as similar state rules. It complies with judicial interpretation that the fourth amendment serves to protect the privacy of the citizenry by barring unreasonable searches and seizures wholly apart from any question of potential incrimination.[68] The notification must contain an inventory of the contents of communications seized, along with copies of the application and the authorization for the surveillance.

The argument that such post-seizure notification requirements would hamper police investigations has no constitutional merit.[69] Since this proposed requirement would be effective only after the surveillance has been terminated, the technical termination of the surveillance at one location, caused by the subject's relocation, would not force disclosure

68. Camara v. Municipal Court, 387 U.S. 523, 530 (1967); Griswold v Connecticut, 381 U.S. 479, 484-85 (1965).

69. Similar arguments were raised before the passage of Title III. However, since its passage, 1,887 orders have been approved out of the 1,889 applications submitted to judges of competent jurisdiction. *See* Appendix p. 93 *infra*.

at that time. Only when the surveillance of the person named in the order has been terminated (including new authorizations based on new showings of probable cause) will disclosure be required. But to permit the government to withold notification of an electronic surveillance on the pretext that an investigation is continuing involving someone not named in the order clearly exceeds the permissible limits of the fourth amendment. "We cannot forgive the requirements of the fourth amendment in the name of law enforcement."[70] If this procedure is permitted to continue, the logical extension is for conventional searches and seizures to be conducted in secret and kept secret when possible.

As *Whitaker* recognized, "[i]f *Berger* and *Katz* were an invitation to Congress to write a wiretapping statute that could pass constitutional muster, we think that Congress unfortunately has exceeded the scope of that invitation."[71] The failure of the legislators to limit the use of electronic eavesdropping devices properly through statute has transformed a potentially valuable law enforcement tool into nothing more than an electronic fishing rod which the courts must condemn. But the legislatures can cure these defects through corrective legislation which would be compatible with both law enforcement needs and the requirements of the constitution.

To facilitate these changes, it is suggested that 18 U.S.C. § 2518 be amended in the following manner: (words in italics to be added, words in brackets to be deleted, words in caps are new section to be added)

18 U.S.C. § 2518(5):

> . . . Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as [practicable] *possible*, shall be conducted in such a way as to [minimize] *limit* the interception [of communications not otherwise subject to interception under this chapter] *to only those communications related to the objective of the surveillance*, and must terminate upon the [attainment of the authorized objective] *interception of a conversation of the type described in the order*, or in any event in thirty days.

18 U.S.C. § 2518(6):

> Whenever an order authorizing interception is entered pursuant to this chapter, the order [may] *must* 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] *must be made every three days the order is operative.*

18 U.S.C. § 2518(8) (d):

> (d) Within a reasonable time but no later than ninety days

70. Berger v. New York, 388 U.S. 41, 62 (1967).
71. 343 F. Supp. at 369-70.

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 all other persons whose conversations have been intercepted*, an inventory which shall include (notice of)--

. . . .

. . . and;

(4) THE CONTENTS OF ALL INTERCEPTED CONVERSATIONS. THE TERMINATION OF AN INTERCEPTION AT ONE LOCATION CAUSED BY THE MOVEMENT OF THE SUBJECT TO A NEW LOCATION WILL NOT FOR THE PURPOSE OF THIS SECTION BE CONSIDERED A TERMINATION IF THE INTERCEPTION IS TO BE CONTINUED ON THE SUBJECT UNDER A NEW AUTHORIZATION AT THE NEW LOCATION.

. . . .

18 U.S.C. § 2518(9):

. . . 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 trial, hearing or proceeding) *only upon a showing of exigent circumstances* and that the party will not be prejudiced by the delay in receiving such information.

APPENDIX

18 U.S.C. § 2519(3) (1970) requires that in April of each year, the Director of the Administrative Office of the United States Courts 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 the orders and extensions granted or denied during the preceding calendar year, together with other data required by law.

The first report was submitted to the Congress on April 30, 1969 and covered the period June 20, 1968 to December 31, 1968. The second, third and fourth reports, submitted April 30, 1970. April 30, 1971 and April 30, 1972, respectively, covered calendar years 1969, 1970, and 1971.

Chart I, extracted from the above-mentioned reports, lists those jurisdictions which have enacted electronic surveillance procedures similar to Title III. Listed by year are the number of authorized surveillances approved out of the number of applications submitted to judges of competent jurisdiction.

During the report periods since the passage of Title III, there have been 1,889 reported applications for electronic eavesdropping orders of

CHART 1
A—APPROVALS R—REQUESTS

Jurisdiction Statutory Authorization	1968 A R	1969 A R	1970 A R	1971 A R
Federal 18 U.S.C. §§ 2510-2520 (1970)		33—34	182—182	285—285
Arizona A.R.S. §§13-1051 to 13-1059 (Supp. 1971—2)	2—2	8—8	7—7	6—6
Colorado C.R.S. 39-24—39-24-2 (Supp. 1971)		2—2	1—1	9—9
Connecticut C.G.S.A. §54-41a-R (Supp. 1972)				
Florida F.S.A. 934.01-934.10 (Supp. 1972)		2—2	12—12	15—15
Georgia GA. Code Ann. §26-3004 (Supp. 1971)	3—3	4—4	11—11	12—12
Kansas K.S.A. 22-2513 (Supp. 1971)				
Maryland Md. Code Ann. Art. 35 §§92-99 (Supp. 1971)		15—15	24—24	27—27
Massachusetts M.G.L.A. c. 272 §99 (1970)	2—2		7—7	6—6
Minnesota M.S.A. §§626A.01-626A.23 (Supp. 1972)			3—3	1—1
Nebraska R.R.S. §§86-701 to 86-707				
Nevada N.R.S. 200.610-200.690 (Supp. 1971)				1—1
New Hampshire R.S.A. 570A: 1-11 (Supp. 1971)			1—1	
New Jersey N.J.S.A. 2A: 156A 1-26 (1971)		45—45	132—132	187—187
New York Code of Cr. Proc. 813.J-813.M: (McKinney 1958, Supp. 1970—71)	167—167	191—192	215—215	254—254
Oregon O.R.S. §§141.720-141.990 (Supp. 1971)				

CHART 1 (Continued)
A—APPROVALS R—REQUESTS

Jurisdiction Statutory Authorization	1968 A R	1969 A R	1970 A R	1971 A R
Rhode Island B.L.R.H. 12-5.1-1 (Supp. 1971)		1—1		6—6
South Dakota S.D.C.L. (1967) 23-13A 1-11 (Supp. 1972)				
Washington R.C.W.A. 9.73.030-9.73.080 (Supp. 1971)				
Wisconsin W.S.A. 968.27-968.33 (1971)			1—1	6—6
TOTAL	174—174	301—303	596—596	816—816

which all but two were approved. This phenomenally high approval rate clearly dispels police arguments that the current procedural requirements for an electronic surveillance are too restrictive.

There is a logical explanation for this high approval rate. All applications for *ex parte* orders must have prior approval by the Attorney General of the United States or his counterpart in state and local jurdisdictions before submission to the courts. This screening process would tend to eliminate those applications which fail to meet the requirements for the issuance of authorizations by judges of competent jurisdiction. The figures in the reports reflect only those applications which have been submitted to judicial officers, but do not include the requests denied by the head of the executing agencies.

The increased use of electronic surveillance is not necessarily explained by the fact that more jurisdictions have enacted electronic surveillance procedures. While it is true that the number of such statutes has increased from 5 in 1968 to 20 in 1971, the bulk of the increased use has occurred on the Federal level and in New Jersey and New York, where organized crime task forces have been most active.

SNA