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IS YOUR SPOUSE TAPING YOUR TELEPHONE CALLS?: TITLE III AND INTERSPOUSAL ELECTRONIC SURVEILLANCE

Scott J. Glick *

Title III of the Omnibus Crime Control and Safe Streets Act of 1968¹ prohibits the intentional interception of any telephone conversation² without the consent³ of one of the parties to the conversation.⁴ Although wiretapping⁵ evokes images of the Watergate scandal or commercial espionage, approximately 68 percent of all reported wiretapping matters involve one spouse's attempt to obtain evidence for use against the other spouse.⁶ Despite the prevalence of interspousal electronic surveillance, Title III fails to directly address the issue of whether such wiretapping activities are legal. The absence of an explicit statutory directive has given rise to the question of whether an implied interspousal immunity exception⁷ exists in Title III, thereby rendering the electronic surveillance legal.

* Mr. Glick is a trial attorney in the Criminal Division of the United States Department of Justice. The views expressed in this article are those of the author and do not necessarily reflect the views of the Justice Department. The author wishes to thank James S. Reynolds for his contributions to this Article, and Vic Stone and Paula A. Wolff, for their review of an earlier draft of this Article.

1. Pub. L. No. 90-351, § 802, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510-2521 (1968))[hereinafter Title III].

2. A telephone conversation is a "wire" communication. *See infra* note 50.

3. *See infra* note 52.

4. *See infra* note 53.

5. The terms "wiretapping" and "electronic surveillance" are used interchangeably in this Article.

6. NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 160 (1976) [hereinafter NWC REPORT]. "Another 11 percent were the result of other domestic surveillance, including parental and courtship eavesdropping." *Id.*

7. "Interspousal immunity" refers to the legal doctrine whereby an otherwise valid lawsuit between two parties is invalidated solely as a result of their relationship as husband and wife. *See* MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 66, at 144-45 (Edward W. Cleary ed., 2d ed. 1972) (explaining the common law and statutory background of interspousal immunity); William E. McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959) (addressing the question of interspousal immunity in tort actions between spouses). *See generally* Adena J. Adler, Note, *Husband and Wife—Interspousal Immunity for Intentional Torts is Unconstitutionally Irrational—Moran v. Buyer*, 58 TEMP. L.Q. 709 (1985)

During the last two decades, the federal circuit courts of appeals⁸ and the federal district courts⁹ have engaged in a sharp debate over whether the prohibitions in Title III extend to interspousal electronic surveillance.¹⁰ The resolution of this debate may have significant and wide-ranging legal conse-

(discussing that the Illinois statute allowing interspousal immunity in tort actions violates equal protection).

8. *Compare* *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977) (holding that the interspousal immunity doctrine applies where wiretaps are used between spouses in preparation for a divorce action) *and* *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.) (holding that the interspousal immunity doctrine applies where a wife seeks civil damages against a husband for wiretaps in the marital home), *cert. denied*, 419 U.S. 897 (1974) *with* *Platt v. Platt*, 951 F.2d 159 (8th Cir. 1989) (holding that the interspousal immunity doctrine does not apply to Title III actions) *and* *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991) (noting that the interspousal immunity doctrine does not apply to interspousal wiretapping in the marital home), *cert. denied*, 112 S. Ct. 1514 (1992) *and* *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989) (holding that the interspousal immunity doctrine does not apply to wiretapping the marital home) *and* *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984) (same) *and* *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976) (holding that the interspousal immunity doctrine does not apply irrespective of whether the wiretap was placed by a spouse or a third party). *Cf.* *White v. Weiss*, 535 F.2d 1067 (8th Cir. 1976) (holding that the interspousal immunity doctrine does not extend to private detectives, even though the wiretapping was instigated by one spouse against the other); *United States v. Rizzo*, 583 F.2d 907 (7th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (same).

9. *Compare* *Nations v. Nations*, 670 F. Supp. 1432 (W.D. Ark. 1987) (holding that the interspousal immunity doctrine does not apply in a civil action by one spouse against another alleging wiretapping in the marital home) *and* *Flynn v. Flynn*, 560 F. Supp. 922 (N.D. Ohio 1983) (same) *and* *Heyman v. Heyman*, 548 F. Supp. 1041 (N.D. Ill. 1982) (same) *and* *Citron v. Citron*, 539 F. Supp. 621 (S.D.N.Y. 1982) (granting defendant spouse's motion to dismiss for lack of intent to violate the law or reckless disregard of the legal obligations necessary for a Title III action), *aff'd*, 772 F.2d 14 (2d Cir. 1983), *cert. denied*, 466 U.S. 973 (1984) *and* *Gill v. Willer*, 482 F. Supp. 776 (W.D.N.Y. 1980) (holding that the interspousal immunity doctrine does not apply in a Title III action alleging wiretapping within the marital home) *and* *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979) (same) *and* *Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975) (holding that the interspousal immunity doctrine does not apply) *with* *Perfit v. Perfit*, 693 F. Supp. 851 (C.D. Cal. 1988) (holding that the interspousal immunity doctrine applies in a Title III action where one spouse installs a telephone recording device in the marital home without the other spouse's knowledge or consent) *and* *Lizza v. Lizza*, 631 F. Supp. 529 (E.D.N.Y. 1986) (same) *and* *London v. London*, 420 F. Supp. 944 (S.D.N.Y. 1976) (same), *aff'd sub. nom. Anonymous*, 558 F.2d at 677.

10. State courts have also grappled with this issue. *Compare* *Robinson v. Robinson*, 499 So. 2d 152 (La. Ct. App. 1986) (admitting as evidence telephone taping done within the marital home in the course of a marital dispute and applying the interspousal immunity doctrine) *and* *Baumrind v. Ewing*, 279 S.E.2d 359 (S.C.) (same), *cert. denied*, 454 U.S. 1092 (1981) *with* *People v. Otto*, 831 P.2d 1178 (Cal. 1992) (refusing to admit as evidence in a criminal murder case, telephone conversations between the victim's wife and her lover, finding that the calls were unlawfully recorded under federal wiretapping statute) *and* *State v. Jock*, 404 A.2d 518 (Del. Super. Ct. 1979) (stating that the interspousal immunity doctrine does not apply in a wiretap prosecution) *and* *Burgess v. Burgess*, 447 So. 2d 220 (Fla. 1984) (finding that Title III provides an exception to the interspousal immunity doctrine).

quences. Prosecutors may risk losing the only evidence of a serious crime,¹¹ individuals engaging in such wiretapping may face felony convictions,¹² and attorneys who use the illegally intercepted telephone conversations may be subject to disciplinary proceedings.¹³

This Article examines the issue of whether an implied interspousal immunity exception exists in Title III. Part I provides a context for the analysis by discussing the traditional approach taken by courts in interpreting statutes: that is, where courts consider the plain meaning of the text of the statute and then consider its legislative history to determine whether the plain meaning should be superseded by contradictory legislative history.

Part II applies the traditional approach of statutory construction to Title III and concludes that neither the plain meaning of the text of Title III nor its legislative history support the existence of an implied interspousal immunity exception. Indeed, an examination of the entire legislative history of Title III, some of which has been ignored by those courts which have carved out an implied interspousal immunity exception, clearly demonstrates that Congress specifically intended to prohibit all electronic surveillance, including interspousal electronic surveillance, and specifically rejected a predecessor bill because it failed to prohibit such conduct.

Part III examines several policy considerations which undermine application of the interspousal immunity exception to Title III, including personal privacy concerns. Finally, this Article concludes that an implied interspousal immunity exception in Title III does not and should not exist, and that the creation of such an exception by the courts represents misapplied, extralegal policy making.

11. See *People v. Otto*, 277 Cal. Rptr. 596 (Ct. App. 1991), *rev'd*, 831 P.2d 1178 (Cal. 1992). In *Otto*, the State of California sought to introduce a secretly recorded telephone conversation into evidence in a murder conspiracy trial. The tape was made by a husband to confirm his suspicions that his wife was involved with another man. In addition to confirming the husband's suspicions, the tapes contained evidence that the wife and her lover were plotting the husband's murder. The trial court admitted the tapes into evidence and the jury convicted the wife and her lover. The California Court of Appeals affirmed the convictions, obviously influenced by the realization that the practical effect of finding that an implied interspousal immunity exception did not exist in Title III, would have been to deprive the State of crucial evidence, without which, the convicted murderers would have been set free. *Id.* at 607. The decision by the California Court of Appeal in *Otto* exemplifies Justice Holmes' maxim that "hard cases make bad law." *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting). The California Supreme Court, however, concluded that there was no implied interspousal immunity exception in Title III and reversed the appellate court's decision. *Otto*, 831 P.2d at 1178.

12. See *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976) (rejecting an interspousal immunity exception to the federal wiretapping statute and making the spouse chargeable with a criminal offense).

13. See *In re Wuliger*, 583 N.E.2d 1317 (Ohio 1992); *Gunter v. Virginia State Bar*, 385 S.E.2d 597 (Va. 1989).

I. JUDICIAL APPROACHES TO STATUTORY CONSTRUCTION

The "traditional approach"¹⁴ to statutory interpretation requires courts to begin their inquiry by first examining the text of the statute. As the Supreme Court recently stated, "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself."¹⁵ Under this approach, the plain meaning of the text governs the interpretation of the statute when the language of the statute is unambiguous.¹⁶ The plain meaning is derived from the court's examination of the "natural reading of the phrase" at issue and the "grammatical structure of the statute."¹⁷ Where "the statute's language is plain, the 'sole function of the courts is to enforce it according to its terms.'"¹⁸ Thus, when Congress has expressed itself in "reasonably plain terms, that language must ordinarily be regarded as conclusive."¹⁹

On many occasions, however, the Supreme Court has taken a broader view of its role and sought to effectuate the original intent and purpose of the Congress that enacted the statute. The Court's more expansive view has lead some commentators to describe the Court's traditional approach as the " 'soft' plain meaning rule."²⁰ Under the soft plain meaning rule, the plainest of meaning can be "trumped" by contradictory legislative history.²¹ The Supreme Court has described these situations as "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds

14. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990).

15. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)); *accord* *Rubin v. United States*, 449 U.S. 424, 430 (1981).

16. Eskridge, *supra* note 14, at 626-27.

17. *Ron Pair Enters.*, 489 U.S. at 241.

18. *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). See *Caminetti*, 242 U.S. at 485 ("Where the language [of a statute] is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."). See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 2.2, at 75-76 (2d ed. 1986) (discussing interpretation of criminal statutes).

19. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *accord* *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says . . .").

20. Eskridge, *supra* note 14, at 626.

21. *Id.*; see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (While the "ordinary and obvious meaning of the phrase is not to be lightly discounted," the Court will look to legislative history to be certain that it did not misread the legislature's intent.); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173-74 (1978) (engaging in a lengthy "examination of the language, history, and structure of the legislation" to determine what "Congress intended"); see also *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 448 (1989) (stating that the court searches for "evidence of congressional intent" only when the plain meaning of the statute yields an "odd result").

with the intention of its drafters."²² In such circumstances, "the intention of the drafters, rather than the strict language, controls."²³

Leading commentators preferring competing theories of statutory interpretation have challenged the traditional or soft plain meaning approach.²⁴ Indeed, recently there has been a challenge from within the Supreme Court itself. In *Immigration & Naturalization Service v. Cardoza-Fonseca*,²⁵ Justice Scalia criticized²⁶ the Court for examining the legislative history of the Immigration and Nationality Act²⁷ to confirm or rebut the plain meaning of the statute. In Justice Scalia's view, it was "ill-advised" for the Court to deviate from giving "effect" to the express language of the statute, because the result was not "a patent absurdity."²⁸ In many opinions since *Cardoza-Fonseca*, Justice Scalia has continued to advance what one leading commen-

22. *Griffin*, 458 U.S. at 571; accord *Demarest v. Manspeaker*, 111 S. Ct. 599, 604 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.")

23. *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). However, some commentators and courts have pointed out that divining the intentions of the drafters may be difficult because the legislative record almost never reveals why a vote was cast or what the legislator's understanding of the bill actually was. See William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 326 (1990). They argue:

To talk about the "intent" of the legislature, as that term is normally used, multiplies the [] difficulties, because we must ascribe an intention not only to individuals, but to a sizeable group of individuals—indeed, to two different groups of people (the House and the Senate) whose views we only know from the historical record.

Id.; Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 353 n.5 (1989) (noting that the traditional approach which is guided by legislative history, presupposes that the courts are capable of discovering the collective intent of the enacting Congress); see also Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985) ("The discussion of legislative intention is complicated by the fact that we must deal with a group of persons, each of whom may have different intentions."); cf. *Kratz v. Kratz*, 477 F. Supp. 463, 469 (E.D. Pa. 1979) (observing that the legislative history is "at best an imprecise barometer of congressional intent").

24. See Eskridge & Frickey, *supra* note 23, at 324; Zeppos, *supra* note 23, at 355; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 233 (1986); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430 (1989) (noting that while "it is proper to look at a statute's background in the form of actually enacted and repealed provisions, the legislative history, which was never enacted, should rarely be permitted to supplant the statutory words as they are ordinarily understood"); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 216-17 (1980) (asserting that the adopters of the Constitution may have contemplated broad interpretation to accommodate a changing society).

25. 480 U.S. 421 (1987).

26. *Id.* at 452 (Scalia, J., concurring).

27. 8 U.S.C. § 1253(h) (1992).

28. *Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring).

tator terms "the new textualism"²⁹ theory of statutory interpretation.³⁰ Under this theory, "once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. . . . [The meaning of a statute is confirmed] from [an] examination of the structure of the statute, interpretations given similar statutory provisions, and [the] canons of statutory construction."³¹

Recently it appeared as though Justice Scalia had convinced a majority of the Supreme Court to accept his methodology of statutory interpretation³² and not to consider the legislative history of a statute. In *West Virginia University Hospitals, Inc. v. Casey*,³³ at issue was the interpretation of the Civil Rights Attorney's Fees Awards Act.³⁴ In an opinion authored by Justice Scalia, the Court stated:

[t]he best evidence [to be examined] is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.³⁵

Justice Scalia's view, however, has not been accepted by the majority. Two months after *West Virginia University Hospitals* was decided, a majority of the Court retreated significantly from an exclusive analysis of the text of the statute. In *Chisom v. Roemer*,³⁶ the Court interpreted certain terms in the Voting Rights Act of 1965³⁷ after considering what the "intent [of] Con-

29. Eskridge, *supra* note 14, at 623.

30. See, e.g., *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 252 (1989) (Scalia, J., concurring); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring in part and dissenting in part); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring); *United States v. Stuart*, 489 U.S. 353, 371-77 (1989) (Scalia, J., concurring); *Blanchard v. Bergeron*, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring); *United States v. Taylor*, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 318-29 (1988) (Scalia, J., concurring in part and dissenting in part); *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring); *Rose v. Rose*, 481 U.S. 619, 640-44 (1987) (Scalia, J., concurring).

31. Eskridge, *supra* note 14, at 623-624.

32. Justice Scalia relies, in part, on the same theory of statutory interpretation postulated by Oliver Wendell Holmes, who wrote that "[w]e do not inquire what the legislature meant; we ask only what the statute means." Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899); see *Chisom v. Roemer*, 111 S. Ct. 2354, 2369 (1991) (Scalia, J., dissenting).

33. 111 S. Ct. 1138 (1991).

34. 42 U.S.C. § 1988 (1992).

35. *West Va. Univ. Hosp., Inc.*, 111 S. Ct. at 1147.

36. 111 S. Ct. 2354 (1991).

37. 42 U.S.C. § 1973 (1992).

gress would have" been if the issue had been presented to the enacting Congress.³⁸ Justice Scalia's sharp dissent stated:

I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning. Today, however, the Court adopts a method quite out of accord with that usual practice.³⁹

The debate within the Supreme Court has continued into this past term. In *Connecticut National Bank v. Germain*,⁴⁰ at issue was the interpretation of the statute which governs the jurisdictional basis of appeals from the Bankruptcy Court.⁴¹ Justice Thomas, writing for the majority, stated that the:

canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."⁴²

The majority in *Connecticut National Bank* concluded that the inquiry was "complete" after an examination of the plain meaning of the text of the statute. Four members of the Court, however, while concurring in the judgment, concluded that an examination of the legislative history was equally as important. Justice Stevens stated in his concurring opinion that "[w]henver there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history."⁴³ Justice O'Connor also wrote a concurring

38. *Chisom*, 111 S. Ct. at 2367.

39. *Id.* at 2369 (Scalia, J., dissenting) (citations omitted). See also *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (1992) (Scalia, J., dissenting) ("Almost point for point, today's opinion is the methodological antithesis of *Ron Pair*—and I have the greatest sympathy for the Courts of Appeals who must predict which manner of statutory construction we shall use for the next . . . case.").

40. 112 S. Ct. 1146 (1992).

41. 28 U.S.C. §§ 158, 1291, 1292 (date).

42. *Connecticut Nat'l Bank*, 112 S. Ct. at 1149 (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); accord *United States v. Giordano*, 416 U.S. 505, 514 (1974) (stating that the underlying presumption is that "Congress meant what it said").

43. *Connecticut Nat'l Bank*, 112 S. Ct. at 1150 (Stevens, J., concurring).

opinion, in which Justices White and Blackmun concurred, stating that it was also important to examine what "Congress probably did not intend."⁴⁴

Based on the Court's decision in *Connecticut National Bank*, it would appear that the debate within the Court is far from resolved. However, regardless of which theory of statutory interpretation is utilized, the result with respect to the correct interpretation of Title III is the same: an examination of both the plain meaning and the legislative history of the statute leads to the conclusion that there is no implied interspousal immunity exception in Title III.⁴⁵

II. THE STATUTORY CONSTRUCTION OF TITLE III

A. *The Plain Meaning of Title III*

Congress intended Title III to be a forceful weapon in the war on organized crime.⁴⁶ In enacting Title III, Congress balanced the needs of law enforcement against an individual's right to privacy and concluded that in order for the police to effectively combat organized crime, court-approved⁴⁷ electronic surveillance must be an available resource. Congress, however, intended to prohibit all other electronic surveillance unless there was a specific statutory exception.⁴⁸ To make explicit the intended scope of Title III, Congress enacted statutory provisions which state that "[e]xcept as other-

44. *Id.* at 1151 (O'Connor, J., concurring).

45. *See infra* parts II.A., B.

46. *See* S. REP. NO. 1097, 90th Cong., 2d Sess. 1, 186-88, 209-19, 224-34 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2245-47, 2259-69, 2273-84 [hereinafter SENATE REPORT]; *see also Giordano*, 416 U.S. at 514.

47. *See* 18 U.S.C. § 2516(1) (1968) ("[T]he Attorney General . . . may authorize an application to a Federal judge of competent jurisdiction for . . . an order authorizing or approving the interception of wire or oral communications . . .").

48. SENATE REPORT, *supra* note 46, at 66, *reprinted in* 1968 U.S.C.C.A.N. at 2153 (noting that Title III "delineat[es] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized").

wise specifically provided in this chapter," it is unlawful for any person to "intentionally intercept"⁴⁹ any "wire"⁵⁰ or "oral"⁵¹ communication without the "consent"⁵² of one of the parties to the communication.⁵³ There are only six enumerated statutory exceptions⁵⁴ found in Title III, none of which directly, or even impliedly, authorizes or addresses nonconsensual interspousal wiretapping. Consideration of the plain meaning of Title III therefore leads to the conclusion that there is no statutory exception for interspousal electronic surveillance.

Notwithstanding this conclusion, some courts have found the result unsatisfactory and view the omission of an interspousal wiretapping exception as

49. As defined in Title III, " 'intercept' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4).

50. A "wire communication" is defined in Title III as:

any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.

18 U.S.C. § 2510(1).

51. An "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." 18 U.S.C. § 2510(2).

52. Pursuant to 18 U.S.C. § 2511(2)(c), it is not "unlawful" for a person to intercept a wire or oral communication when one of the parties to the communication has "given prior consent to such interception." *Id.*

53. 18 U.S.C. § 2511(1)(a). Section 2511(1)(a) states, in pertinent part, that: "[e]xcept as otherwise specifically provided in this chapter any person who— . . . intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . [shall be subject to criminal and civil penalties]." *Id.* Title III provides penalties of up to five years in prison, *see* 18 U.S.C. § 2511(4)(a), and also provides that in a civil lawsuit, a person may recover actual damages, punitive damages, "reasonable attorney's fee[s] and other litigation costs reasonably incurred." 18 U.S.C. § 2520.

54. Exceptions are provided for: (1) switchboard operators and employees of providers of wire and electronic communication services, who "in the normal course of [their] employment" intercept communications while engaged in activities incidental to their employment, or intercept communications to protect the property rights of the provider of the service, or provide assistance to persons authorized by law to intercept communications, 18 U.S.C. §§ 2511(2)(a)(i)-(ii); (2) employees of the Federal Communications Commission who "in the normal course of [their] employment" intercept communications, 18 U.S.C. § 2511(2)(b); (3) persons acting under color of law who intercept communications, "where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception," 18 U.S.C. § 2511(1)(c); (4) persons who consent to the interception of their communications, or one of the parties to the communication [who] has given prior "consent to such interception," 18 U.S.C. § 2511(1)(d); (5) agents of the United States who conduct government foreign intelligence activities, 18 U.S.C. §§ 2511(1)(e)-(1)(f); and (6) persons who intercept communications through the use of extension telephone being used "in the ordinary course of business." 18 U.S.C. § 2510(5)(a).

puzzling, in light of the fact that Congress was aware of widespread electronic surveillance in domestic relations cases.⁵⁵ Thus, the question that the federal courts of appeals and the federal district courts have grappled with is: what did Congress intend with respect to interspousal electronic surveillance?

The United States Court of Appeals for the Fifth Circuit was the first federal circuit court of appeals to address this issue in *Simpson v. Simpson*.⁵⁶ In *Simpson*, the plaintiff sought to maintain a civil cause of action for damages based upon alleged unlawful electronic surveillance conducted by her spouse.⁵⁷ The court conceded that the "naked language" of the statute "by virtue of its inconclusiveness, reaches this case."⁵⁸ However, the court chose to examine the legislative history of Title III because of the potentially "far-reaching result" in an area that Congress "normally left to the states."⁵⁹ After conducting what it characterized as a "long, exhaustive, and inconclusive" search of the legislative history,⁶⁰ the court concluded that Congress did not intend to encompass a prohibition against interspousal electronic surveillance in Title III.⁶¹ The *Simpson* court opined that "Congress did not intend such a far-reaching result [and that Congress did not demonstrate] its positive intent to reach so far [into the privacy of the marital relationship] or an awareness that it might be doing so."⁶² Although the court expressed some "doubts" about the correctness of its decision, the Fifth Circuit held that a civil cause of action for monetary damages could not be maintained for interspousal wiretapping.⁶³

Three years later, the Court of Appeals for the Second Circuit followed the Fifth Circuit's decision in *Simpson* and reached a similar conclusion in *Anonymous v. Anonymous*,⁶⁴ a case focusing on the "telephone extension" exception.⁶⁵ The case involved a husband who had recorded telephone con-

55. See *infra* notes 81-122 and accompanying text.

56. 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

57. *Id.* at 809.

58. *Id.* at 805.

59. *Id.*

60. *Id.* at 806.

61. *Id.* at 809.

62. *Id.* at 805-06.

63. *Id.* at 810. In a subsequent decision, the Fifth Circuit expressed doubt about the decision it reached in *Simpson*, and refused to apply its reasoning to a different, albeit similar, set of facts. See *United States v. Schrimsher*, 493 F.2d 848, 850 (5th Cir. 1974) (refusing to apply the interspousal immunity doctrine to a defendant who had a relationship with, but was not married to, the woman whose telephone conversations he intercepted).

64. 558 F.2d 677 (2d Cir. 1977).

65. The telephone extension exception derives from the definitions of several words. The prohibited conduct under Title III is the interception of oral and wire communications. See *supra* note 53. "'Intercept' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other

versations between his wife and daughter.⁶⁶ The court found that Congress did not intend to provide a civil cause of action for interspousal electronic surveillance when the interception took place over an extension telephone located within the home.⁶⁷ The court reasoned that since there would be no violation of the law if the activity “consisted merely of listening . . . [to the] telephone conversations from an extension phone,”⁶⁸ the conduct was not unlawful since the taped conversations were obtained from a “telephone answering machine . . . [which was] plugged into the standard Telephone Company jack.”⁶⁹

In the past two decades, the Fifth Circuit’s decision in *Simpson* has been severely criticized by four other federal appellate courts: the Fourth Circuit in *Pritchard v. Pritchard*,⁷⁰ the Sixth Circuit in *United States v. Jones*,⁷¹ the Eighth Circuit in *Kempf v. Kempf*,⁷² and the Tenth Circuit in *Heggy v. Heggy*.⁷³ Several federal district courts⁷⁴ have also declined to follow the *Simpson* reasoning. These courts, after analyzing the plain meaning of Title III and its legislative history, have concluded that in the absence of a specific statutory exception for interspousal electronic surveillance in Title III, they could not and would not create an implied exception by judicial fiat. The judicial disagreement over the intended scope of Title III makes apparent the need to reexamine the legislative history of the statute to determine whether the plain meaning of Title III should be “trumped” by contradic-

device.” 18 U.S.C. § 2510(4) (1968). “Electronic, mechanical, or other device” is defined as “any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than” an extension telephone used “in the ordinary course of . . . business.” 18 U.S.C. § 2510(5).

66. *Anonymous*, 558 F.2d at 679.

67. *Id.* at 678-79.

68. *Id.* at 678. In addition to misreading the legislative history of Title III, *see infra* notes 77-122 and accompanying text, the Second Circuit’s decision in *Anonymous* was flawed because the telephone extension exception should never apply in situations where the listening device that is used is capable of secretly monitoring all incoming and outgoing telephone calls without the consent of one of the parties to the conversation, because such a device would not be used “in the ordinary course of business.” *United States v. Jones*, 542 F.2d 661, 673 n.24 (6th Cir. 1976); *see United States v. Harpel*, 493 F.2d 346, 351 (10th Cir. 1974).

69. *Anonymous*, 558 F.2d at 678-79. The Second Circuit also found dispositive a portion of the legislative history originally cited by the *Simpson* court. *See Simpson v. Simpson*, 490 F.2d 803, 809 n.17 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). Professor Herman Schwartz, of the State University of New York at Buffalo School of Law, testifying before Congress regarding the proposed telephone extension provision, stated, “I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem.” *Anti-Crime Program: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 901, 989 (1967) [hereinafter *Anti-Crime Hearings*]

70. 732 F.2d 372 (4th Cir. 1984).

71. 542 F.2d 661 (6th Cir. 1976).

72. 868 F.2d 970 (8th Cir. 1989).

73. 944 F.2d 1537 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1514 (1992).

74. *See supra* note 9.

tory legislative history, to prevent a result "demonstrably at odds with the intention of the drafters."⁷⁵

B. *The Legislative History of Title III*

Prior to the passage of Title III, the Federal Communications Act of 1934⁷⁶ governed the interception of communications by law enforcement officers and private individuals. The acknowledgement by many of the insufficiency of the 1934 Act was an important factor motivating Congress to pass Title III.⁷⁷ During the consideration of several predecessor bills which ultimately evolved into Title III, Congress debated how to improve the 1934 Act to "effectively" protect individual privacy.⁷⁸ As expressed by Senator Edward Long, Chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Congress sought to "fill[] the gaps and plug[] the loopholes of existing law."⁷⁹ At no time during the Congressional debate over the issue, however, was there a call to narrow the scope of the 1934 Act. Nor was any member critical on the record of the judicial determination that the 1934 Act prohibited electronic surveillance in domestic relations cases.⁸⁰

Beginning in 1965, Congress conducted many hearings on the invasion of privacy where the widespread use of wiretapping in marital disputes was clearly noted.⁸¹ For example, Subcommittee Chairman, Senator Long, in-

75. *United States v. Ron Pair Enters*, 489 U.S. 235, 241-42 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); see *infra* notes 20-23 and accompanying text.

76. 47 U.S.C. § 605 (1934) ("No person . . . shall divulge or publish the existence, contents, substance, purport, effect, or meaning of [any intercepted wire communication].").

77. See e.g., SENATE REPORT, *supra* note 46, at 67, reprinted in 1968 U.S.C.C.A.N. at 2154 ("The present status of the law (relating to wiretapping and electronic surveillance) is intolerable.") (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 202-03 (1967)).

78. Congress made a number of findings with respect to Title III. One of those findings stated that Title III was passed "[i]n order to protect effectively the privacy of wire and oral communications." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 801, 82 Stat. 211 (codified as amended at 18 U.S.C. §§ 2510-2521)(1968)).

79. *The Right of Privacy Act of 1967: Hearings on S. 928 Before the Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1, 4 (1967) [hereinafter *1967 Right of Privacy Act Hearings*].

80. *United States v. Gris*, 247 F.2d 860, 864 (2d Cir. 1957). Indeed, *Gris* was cited with approval in the Final Senate Report. See SENATE REPORT, *supra* note 46, at 100.

81. Numerous hearings were conducted between 1965 and 1968 on legislative predecessors to Title III. See, e.g., *1967 Right of Privacy Act Hearings*, *supra* note 79; *Anti-Crime Hearings*, *supra* note 69; *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967); *Criminal Laws and Procedures: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966); *Invasions of Privacy: Hearings Before the Subcomm. on Admin. Prac-*

troduced into the record at one hearing an article written by Arthur Whiteman entitled "Is Big Brother Taping You?"⁸² In pertinent part, the article stated that "[i]ndividuals involved in civil suits bug each others' premises to gather useful information and evidence. The prime area for this is *divorce actions* So little is sacred in this line of endeavor that bugs routinely are discovered under the beds of *estranged husbands and wives*."⁸³

Further evidence that Congress was aware of the prevalence of electronic surveillance in domestic relations cases was provided by the testimony of Richard Gerstein, District Attorney for Dade County, Florida. Mr. Gerstein stated that "it is routine procedure in *marital disagreements* and other civil disputes for private detective agencies, generally with full knowledge of the lawyers, to tap telephones."⁸⁴ Two private detectives, Bernard Spindel and John Leon, corroborated Mr. Gerstein's testimony, stating that wiretapping was common in domestic relations investigations.⁸⁵ Following the presentation of all the evidence, Senator Long concluded that "[t]he three large areas of snooping in [the] field [of non-governmental electronic surveillance] are (1) industrial, (2) *divorce cases*, and (3) politics."⁸⁶

Following these hearings, a number of bills were introduced in the Senate which were intended to prohibit electronic surveillance by law enforcement officers and private individuals. In 1967, the Senate Committee on the Judiciary rejected these bills in favor of a bill entitled the "Right of Privacy Act of 1967."⁸⁷ This legislation was, with one significant difference, the same as the provision which Congress ultimately enacted into law as 18 U.S.C. § 2511.⁸⁸ Under the "Right of Privacy Act of 1967," electronic surveillance would have been prohibited only when it involved interstate commerce or occurred in a location where the United States exercised local law enforcement jurisdiction,⁸⁹ such as the District of Columbia and other federal en-

tice & Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., pts. 1-6 (1965-1966) [hereinafter *Invasions of Privacy Hearings*]; *Invasion of Privacy: Special Inquiry Before the Special Subcomm. on Invasion of Privacy of the House Gov't Operations Comm.*, 89th Cong., 1st Sess. (1965); see also *Wiretapping—the Attorney General's Program: Hearings Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962).

82. *Invasions of Privacy Hearings*, *supra* note 81, pt. 1, at 18.

83. *Id.* (emphasis added).

84. *Id.*, pt. 2, at 1009 (emphasis added) (statement of Richard E. Gerstein, District Attorney, Dade County, Fla.).

85. *Id.*, pt. 5 at 2409-11 (Statement of John W. Leon, a private investigator); *id.* at 2262 (Statement of Bernard B. Spindel, an electronic technician specializing in eavesdropping).

86. *Id.* at 2261 (emphasis added) (Statement of Sen. Long).

87. S. 928, 90th Cong., 1st Sess., 113 CONG. REC. 2887 (1967).

88. See *supra* note 53 and accompanying text.

89. See *Special Maritime and Territorial Jurisdiction of the United States Defined*, 18 U.S.C. § 7 (1988).

claves. Absent such a nexus, federal jurisdiction over the conduct would not have existed under the "Right of Privacy Act of 1967."

Robert Blakey, then a Professor of Law at Cornell University,⁹⁰ testified during the hearings which were held on the "Right of Privacy Act of 1967." Professor Blakey had served as a special consultant to the President's Commission on Law Enforcement and the Administration of Justice. In that capacity, he had prepared a draft statute which was designed to govern electronic surveillance.⁹¹ During his testimony, Professor Blakey explained that "private bugging in this country can be divided into two broad categories, commercial espionage and *marital litigation*."⁹² Professor Blakey then indicated, both in the course of his testimony and in his prepared statement, that he believed that the proposed statute was correct in attempting to prohibit electronic surveillance in these areas.⁹³ He described the private use of electronic surveillance techniques as "an abomination in a free society,"⁹⁴ and stated that "now is the time to take effective action to outlaw them."⁹⁵

Although Professor Blakey praised the proposed bill and concluded that it would prohibit commercial espionage eavesdropping,⁹⁶ the majority of which occurs between businesses involved in interstate commerce, he believed that a fatal weakness existed in the bill. In Professor Blakey's opinion, this deficiency was linked to the bill's dependence on the interstate commerce clause for its jurisdictional nexus. Although commercial espionage typically occurs in the context of interstate commerce, Professor Blakey noted that this relationship was *not* typical in domestic relations situations.⁹⁷ Professor Blakey stated that:

this [interstate character of commercial espionage] is not true in the *domestic relations investigation*, which involves, moreover, a far *more objectionable* invasion of privacy [than commercial espionage]. It is, of course, one thing to overhear a business secret; it is a wholly different matter, however, to place under surveillance the *marital relationship*. Electronic surveillance by a private individual in another's bedroom cuts most sharply against the grain.

90. See *1967 Right of Privacy Act Hearings*, *supra* note 79, pt. 2, at 413 (testimony of G. Robert Blakey); *id.* at 441 (prepared statement of G. Robert Blakey). Professor Blakey is currently the Robert J. and Dorothy O'Neill Professor of Law at the Notre Dame Law School.

91. See G. Robert Blakey & James A. Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME L. REV. 657 (1968). Professor Blakey has been publicly credited as the "author" of Title III. See *infra* note 113.

92. *1967 Right of Privacy Act Hearings*, *supra* note 79, pt. 2, at 413 (emphasis added); see also *id.* at 441-43.

93. *Id.* at 441.

94. *Id.* at 443.

95. *Id.* at 443.

96. *Id.*

97. *Id.* at 442.

But few, if any, of these investigations ever touch interstate commerce.⁹⁸

To remedy this flaw, Professor Blakey suggested that Congress declare that "all electronic surveillance aimed at [obtaining evidence for use in] *marital litigation* was criminal."⁹⁹ Professor Blakey testified that because most marital litigation results in a court order, Congress could declare that any order that is based "directly or indirectly" on electronic surveillance violated the due process clause of the Fourteenth Amendment.¹⁰⁰ He also stated that under the Necessary and Proper Clause,¹⁰¹ Congress could outlaw all domestic relations surveillance since no one could distinguish at the inception between surveillance that would result in a court order and surveillance that would not.¹⁰² Accordingly, Professor Blakey recommended that Congress reject the "Right of Privacy Act of 1967" and, instead, enact his own draft bill.¹⁰³ According to Professor Blakey, his draft statute corrected the weaknesses in the "Right of Privacy Act of 1967" by providing a complete ban on all electronic surveillance, including electronic surveillance in domestic relations cases.¹⁰⁴

Approximately one year later, President Johnson signed Title III into law. Title III was an amalgam of the House and Senate versions of the bill that had been pending in Congress. The House version of Title III, House Bill 13,275,¹⁰⁵ was introduced on October 3, 1967.¹⁰⁶ The Senate version of Title III, Senate Bill 917, was a "combination"¹⁰⁷ of Senate Bill 675,¹⁰⁸ the Federal Wire Interception Act, introduced by Senator McClellan for himself

98. *Id.* (emphasis added); *see also id.* at 413 (stating that "the statute, as it is *presently drafted*, will *not reach* . . . an attempt to use electronic equipment in the invasion of privacy of the home and, particularly, the marital relationship") (emphasis added).

99. *Id.* at 413 (emphasis added); *see id.* at 442-43.

100. U.S. CONST. amend. XIV, § 1 (providing in pertinent part that no "state [shall] deprive any person of life, liberty, or property without due process of law").

101. U.S. CONST. art. I, § 8, cl. 18 ("Congress shall have Power To . . . make all laws which shall be necessary and proper for carrying into Execution [its enumerated powers].").

102. *1967 Right of Privacy Act Hearings, supra* note 79, pt. 2, at 413 (testimony of Professor Blakey) (commenting that "since [Congress] could not distinguish between the 'good' electronic surveillance and the 'bad' electronic surveillance, [Congress] might be able to outlaw it all").

103. *Id.* at 445, 452; *see Blakey & Hancock, supra* note 91.

104. *1967 Right of Privacy Act Hearings, supra* note 79, pt. 2, at 413 (testimony of Professor Blakey) (commenting that "[The Right of Privacy Act of 1967] will not reach . . . an attempt to use electronic equipment in the invasion of the home and, particularly, the marital relationship").

105. 113 CONG. REC. 27,718 (1967).

106. H.R. 13,275, 90th Cong., 1st Sess., 113 CONG. REC. 27,718 (1967).

107. *See SENATE REPORT, supra* note 46, at 66, *reprinted in* 1968 U.S.C.C.A.N. at 2153.

108. S. 675, 90th Cong., 1st Sess., 113 CONG. REC. 1491 (1967).

and Senator Hruska on January 25, 1967,¹⁰⁹ and Senate Bill 2050,¹¹⁰ the Electronic Surveillance Control Act of 1967, which was introduced by Senator Hruska for himself and Senator McClellan on June 29, 1967.¹¹¹ Indeed, House Bill 13,275 was the same draft statute that Professor Blakey had recommended as a substitution for the "Right of Privacy Act of 1967."¹¹² The Senate bill was also based on Professor Blakey's work because it incorporated the recommendations of the President's Commission on Law Enforcement and the Administration of Justice, to which Professor Blakey was a special consultant. As a result, the Senate bill's prohibitions against private electronic surveillance were essentially the same as the House bill, which was the Blakey bill.¹¹³

Thus, the only fundamental difference between the predecessor bill and the version of Title III that President Johnson signed into law was the latter's broad prohibition on wiretapping, which was specifically designed to close the gap caused by the former's failure to prohibit electronic surveillance in domestic relations situations. Professor Blakey's testimony, coupled with the Senate Judiciary Committee's decision to choose the language of the Blakey bill when faced with a choice between the two proposals,¹¹⁴ persuasively demonstrates the Committee's desire to apply the law in domestic relations situations.

An examination of the statements made by the bill's sponsors and other senators provides additional evidence of Congress' intent. The legislators made it clear that wiretapping and eavesdropping in marital disputes was pervasive and would now be prohibited under the new Title III legislation. For example, Senator Thurmond noted that his views on the bill were contained in a joint statement with Senators Hruska, Dirksen, and Scott, which indicated that Title III would apply to domestic relations cases.¹¹⁵ Senator Hruska, one of the bill's two co-sponsors, stated that the legislation imposes "[a] broad prohibition . . . on private use of electronic surveillance, particu-

109. *Id.*

110. S. 2050, 90th Cong., 1st Sess., 113 CONG. REC. 18,007 (1967).

111. *Id.*

112. *See supra* notes 90-103.

113. Both the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit have described Professor Blakey as the "author" of Title III. *See United States v. Giordano*, 416 U.S. 505, 517 n.7 (1974); *United States v. Hall*, 488 F.2d 193, 197 n.7 (9th Cir. 1973).

114. Professor Blakey was present in the Senate and conferred with Senator McClellan, a co-sponsor of Title III, during the Senate floor debate. 114 CONG. REC. 14,473 (1968) ("Professor Blakey is in the Chamber and is conferring with the Senator from Arkansas.").

115. 114 CONG. REC. 11,611 (1968); *id.* at 11,613. This joint statement was included in the final Senate Report. *See SENATE REPORT, supra* note 46, at 224, *reprinted in* 1968 U.S.C.C.A.N. at 2273.

larly in *domestic relations* and industrial espionage situations.”¹¹⁶ Senator Scott also stated that the legislation prohibits surveillance by “*all private persons* and by public officials unless they demonstrate a compelling *law-enforcement* need.”¹¹⁷ Senator Mundt stated that:

[e]veryone agrees that private wiretapping or eavesdropping should be prohibited. It is repugnant to our way of life. And yet it has grown substantially in the last few years. . . . *Domestic relations*, industrial espionage, and counterespionage, information obtained for civil litigation are all fertile fields for those who traffic in other people’s privacy. Title III takes care of this by making it a crime to intercept communications without the consent of one of the participants.¹¹⁸

Senator Tydings stated that: “as the law stands today, . . . [a]ll of our private eyes, our economic detectives, our snoopers, can tap with impunity anybody’s wire, on any action from a *domestic relations* case to a real estate operator or a major manufacturing concern Title III corrects this situation.”¹¹⁹ Senator McClellan, the other co-sponsor of Title III, stated that “[t]o assure the privacy of oral and wire communications, title III prohibits *all* wiretapping and electronic surveillance by persons *other than* duly authorized law enforcement officers.”¹²⁰

These statements and the statements of other members of Congress show that a unified Congress¹²¹ intentionally chose the language of the Blakey bill

116. SENATE REPORT, *supra* note 46, at 225, *reprinted in* 1968 U.S.C.C.A.N. at 2274 (emphasis added).

117. 114 CONG. REC. 13,200 (1968) (emphasis added). Senator Hruska also introduced an article into the Congressional Record by Senator Scott which stated, in pertinent part, that under the proposed legislation, the “[p]rivate utilization of wiretapping and bugging would be flatly prohibited.” 114 CONG. REC. 2950 (1968). Notably, the United States Supreme Court has also chosen this language to describe the scope of Title III. *Gelbard v. United States*, 408 U.S. 41, 46 (1972) (explaining that all oral and wire interceptions are “flatly prohibited”); *see also* *United States v. Giordano*, 416 U.S. 505, 514 (1974) (stating that Title III was passed to “effectively . . . prohibit . . . all interceptions of oral and wire communications, except those specifically provided for in the Act”).

118. 114 CONG. REC. 14,747 (emphasis added).

119. 114 CONG. REC. 14,480 (emphasis added); *see also* 114 CONG. REC. 14,695; 114 CONG. REC. 14,732.

120. 114 CONG. REC. 14,469 (emphasis added).

121. Senator Percy summarized the views of his colleagues when he stated: “Mr. President, the provisions of the bill banning private surveillance enjoy widespread if not complete support of this body.” 114 CONG. REC. 14,762; *see also* 114 CONG. REC. 14,724 (statement of Sen. Cooper) (Title III provides “strict penalties against persons who do not follow the designated procedure to secure a proper order for the authority to intercept a communication by wire or radio, or an oral communication”); 114 CONG. REC. 16,286 (statement of Rep. Machen) (Title III “makes unauthorized wiretapping or bugging a Federal crime”); 114 CONG. REC. 14,471 (statement of Sen. Long) (“the pending bill would prohibit all private third party wiretapping”); 114 CONG. REC. 14,701 (statement of Sen. Long) (Title III would prohibit electronic surveillance from all “private persons”). Senator Long also read a report

over that of the "Right of Privacy Act of 1967," and that it did so to ensure inclusion of domestic relations cases within the scope of prohibited conduct governed by Title III. Additionally, the final Senate Report accompanying Title III contains numerous statements¹²² that Title III was intended to impose a complete ban on the interception of wire and oral communications,¹²³ except as specifically provided.

After the enactment of Title III, Congress established the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance. The Commission's function was to study and review the effectiveness of Title III during the six-year period following its enactment.¹²⁴ Professor Blakey was appointed to serve on the Commission.¹²⁵ The appointment provided the rare opportunity to learn the thoughts of the statute's author¹²⁶ years after its enactment. Professor Blakey characterized domestic relations interceptions as "one of the most vicious invasions of privacy, not business secrets but literally the intimacies of personal relations,"¹²⁷ and he believed that such interceptions were in direct contravention of Title III. Accordingly, Professor Blakey severely

into the record by the New York Bar Association which compared the "Blakey bill," which "imposes a blanket ban on all wiretapping and eavesdropping by private parties," with other pending legislation. See 114 CONG. REC. 14,476.

122. SENATE REPORT, *supra* note 46, at 27, reprinted in 1968 U.S.C.C.A.N. at 2113 ("Title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order . . ."); *id.* at 66, reprinted in 1968 U.S.C.C.A.N. at 2153 ("To assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance [except as authorized]. . ."); *id.* at 89, reprinted in 1968 U.S.C.C.A.N. at 2177 ("[A]ll unauthorized interceptions of [wire and oral] communications should be prohibited . . ."); *id.* at 91, reprinted in 1968 U.S.C.C.A.N. at 2180 ("Section 2511 of the new chapter prohibits, except as otherwise specifically provided in the chapter itself, the interception and disclosure of all wire or oral communications."); *id.* at 91, reprinted in 1968 U.S.C.C.A.N. at 2179 ("[T]he definition [of a person] is intended to be comprehensive."); *id.* at 91, reprinted in 1968 U.S.C.C.A.N. at 2180 (Section 2511 "establishes a blanket prohibition against the interception of any wire communication"); *id.* at 225, reprinted in 1968 U.S.C.C.A.N. at 2274 ("A broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations.")

123. President Johnson, upon signing the law, issued a statement in which he said that he had urged Congress to "outlaw all wiretapping and electronic eavesdropping, public and private, wherever and whenever it occurs." N.Y. TIMES, June 20, 1968, at 23.

124. *Commission Hearings, National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance*, 2 (1976) [hereinafter *NWC Comm'n Hearings*] ("It . . . is now the active mandate of this Commission to review and evaluate the effectiveness of th[e] [Omnibus Crime Control Act, Title III] legislation.")

125. *Id.* at iii.

126. See *supra* note 113.

127. 2 *NWC Comm'n Hearings*, *supra* note 124, at 1112; see also William J. Holt, Comment, *Interspousal Electronic Surveillance Immunity*, 7 U. TOL. L. REV. 185, 204 n.85 (1975).

criticized the Fifth Circuit's decision in *Simpson v. Simpson*,¹²⁸ stating that he could not understand how the court "could have read . . . [interspousal immunity] into the statute."¹²⁹

Based upon a review of the entire legislative history of Title III, including Professor Blakey's oral and written testimony, there is no question that the Fifth Circuit wrongly decided the *Simpson* case. The Fifth Circuit's failure in *Simpson* to discover key passages in the relevant legislative history caused this error. This is evidenced by the court's statement that while there were "occasional references to the fact that the bill would prohibit private use of electronic surveillance techniques, there are no substantive discussions of the probable or desired reach of the prohibitions."¹³⁰ If the Fifth Circuit had discovered all of the statements in the final Senate Report and the other portions of the legislative history referenced above, which clearly demonstrate that Congress intended Title III to apply in domestic relations situa-

128. 2 *NWC Comm'n Hearings*, *supra* note 124, at 1111; *see supra* notes 56-63 and accompanying text.

129. 2 *NWC Comm'n Hearings*, *supra* note 124, at 1111. Testimony before the Wiretap Commission also underscored the impact of the *Simpson* decision upon the ability of the Justice Department to prosecute Title III violations since the statute required the government to prove a "willful" interception. *NWC REPORT*, *supra* note 6, at 166-71. Unfortunately, the term "willful" was construed and misconstrued by the courts due to the reference to *United States v. Murdock*, 290 U.S. 389 (1933), in the final Senate Report. *See SENATE REPORT*, *supra* note 46, at 93, *reprinted in* 1968 U.S.C.C.A.N. at 2181 ("A violation of each must be willful to be criminal (*United States v. Murdock*, . . . 290 U.S. 389 (1933))."). The House of Representatives acknowledged this judicial inconsistency when it sought to amend Title III in 1986. *See H.R. REP. NO. 647*, 99th Cong., 2d Sess., pt. 1, at 48 (1986). The House Report indicates that "the Committee intends that the term [willful] have the same meaning as the term intentional." *Id.* When the Senate considered the bill, the legislators specifically changed the mens rea requirement from "willful" to "intentional." 132 *CONG. REC.* 27,633 (1986) (statement of Sen. Leahy). As a result of the passage of The Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(f), 100 Stat. 1853, the government is required to prove only that the defendant's act was "intentional." *See S. REP. NO. 541*, 99th Cong., 2d Sess., pt. 1, at 23, *reprinted in* 1986 U.S. C.C.A.N. at 3555, 3577. Thus, while persons charged with violating Title III may still assert a defense based upon an "accidental" interception or a mistake of fact, *see id.* at 25, reliance upon *Simpson* to provide a mistake of law defense is no longer available. *See Fultz v. Gilliam*, 942 F.2d 396, 404 (6th Cir. 1991) (rejecting defendant's ignorance of the law defense); *accord Heggy v. Heggy*, 944 F.2d 1537, 1542 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1514 (1992).

130. *Simpson v. Simpson*, 490 F.2d 803, 807 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974) (footnote omitted). The legislative history discovered by the *Simpson* court was set forth in a footnote of the court's opinion. *Id.* at 808 n.14. The court stated: "[o]ur independent search of legislative materials has been long, exhaustive, and inconclusive [W]e have found no direct indications that Congress intended [that Title III apply to the marital home]." *Id.* at 806.

tions, it is certain that the court, which had "doubts"¹³¹ about its decision, would have reached a different conclusion.¹³²

III. POLICY CONSIDERATIONS

A. *The Interspousal Immunity Doctrine: Anachronistic and Misapplied*

The common law doctrine of interspousal immunity originated in the early 1800s, when marriage had different social and religious implications than it does today. A husband and wife were perceived as one—the man.¹³³ During this period, a married woman had no independent right to sue and could not be sued, as such legal rights were reserved for the man.¹³⁴ Marriage was considered a lifetime proposition, and a husband was legally responsible for his wife's misbehavior in a court of law.¹³⁵ Consequently, since a marriage had a singular, as opposed to a dual identity, it was impossible for spouses to sue each other since the husband obviously could not sue himself.¹³⁶

As women became emancipated over the years, the roles and societal perception of women and of marriage changed. In addition, pursuant to the passage of the Married Women's Property Act in every state and the District of Columbia, married women were given the right to sue and be sued in their

131. *Id.* at 810.

132. Leading commentators on the law of electronic surveillance have also concluded that the *Simpson* decision "misreads the legislative history and purpose of Title III." JAMES G. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE*, § 8.05(2)(c), at 499 (1977); see JAMES G. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE*, § 3.6, at 3-109 (2d ed. 1992) [hereinafter CARR (2d ed.)] ("Courts [like the *Simpson* court] which allow one spouse to eavesdrop electronically on the other . . . misread the legislative history of Title III."); CLIFFORD S. FISHMAN, *WIRETAPPING AND EAVESDROPPING* § 8, at 119 (Supp. 1991) (commenting that the "prevailing, and correct view, is that it is unlawful for one spouse to tap the marital phone to acquire evidence against the other spouse"); *id.* § 25.1, at 203 ("[I]t is clear from the language and history of Title III that Congress intended no such [interspousal immunity] exception."). Even Professor Herman Schwartz, of the State University of New York at Buffalo School of Law, whose comments about the telephone extension exception were misconstrued by the Fifth Circuit in *Simpson*, see 490 F.2d at 809 n.17; *supra* note 69, has stated that the *Simpson* decision was "not consistent" with the intent of the law. 2 *NWC Comm'n Hearings*, *supra* note 124, at 1111 (commenting that the *Simpson* decision is "just not consistent with the statute").

133. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *442 ("In marriage, husband and wife are one person in law."); see WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 122, at 859 (4th ed. 1971).

134. See, e.g., McCurdy, *supra* note 7.

135. See 2 FOWLER V. HARPER, ET AL., *THE LAW OF TORTS*, § 8.10 (2d ed. 1986); McCurdy, *supra* note 7.

136. See Val Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956).

own capacity, without joinder of their husbands.¹³⁷ Thereafter, litigation arose concerning whether interspousal lawsuits could be maintained.

Most courts upheld the interspousal immunity doctrine, concluding that interspousal lawsuits could not be maintained.¹³⁸ These courts justified their recognition of the interspousal immunity doctrine by rationalizing that the doctrine maintained domestic tranquility and avoided the potential for collusion between spouses.¹³⁹ These courts also concluded that interspousal lawsuits should not be maintained because of the availability of other remedies, and articulated their concern that judicial intervention would threaten the fabric of the marriage.¹⁴⁰

Today, however, the strength of the interspousal immunity doctrine has weakened.¹⁴¹ Courts more readily discard the notion that the institution of marriage is a "sacred cow."¹⁴² If one spouse is secretly intercepting and recording the private telephone conversations of the other spouse as a reaction to the latter's perceived misdeeds, it is the spouses' conduct, not the judiciary, which is threatening the fabric of the marriage.¹⁴³

A second and perhaps more important reason for not recognizing the interspousal immunity doctrine in the context of Title III is that the doctrine is not, and never has been, a doctrine which applied in criminal cases.¹⁴⁴ In

137. See PROSSER, *supra* note 133, § 122 at 861; CHESTER G. VERNIER, 3 AMERICAN FAMILY LAWS §§ 167, 179-80 (1935 & Supp. 1938).

138. See, e.g., Adams v. Grogg, 116 S.E.2d 755 (W. Va. 1969); Rubalcava v. Gisseman, 384 P.2d 389 (Utah 1963); Campbell v. Campbell, 114 S.E.2d 406 (W. Va. 1960). See generally Adler, *supra* note 7 (providing a detailed history of interspousal immunity developments in the states).

139. See *infra* note 140.

140. See, e.g., Thompson v. Thompson, 218 U.S. 611, 619 (1910) (suggesting that a wife resort to bringing a criminal action, seeking a divorce or a separation or reporting to the Chancery Court to recover damages for assault and battery by her husband); Mims v. Mims, 305 So. 2d 787, 789 (Fla. Dist. Ct. App. 1974) (citing divorce proceedings as the proper forum for the resolution of a claim of fraud for love and affection); Ensminger v. Ensminger, 77 So. 2d 308, 310 (Miss. 1955) (citing alternative forums of divorce and criminal courts but acknowledging that neither is applicable in this case); see Dorian L. Rowe, Comment, *Wiretapping and the Modern Marriage: Does Title III Provide a Federal Remedy for Victims of Interspousal Electronic Surveillance?*, 91 DICK. L. REV. 855, 864-66 (1987) (identifying the arguments for and against the interspousal immunity doctrine); Holt, *supra* note 127, at 191-97 (discussing the arguments used to preserve the interspousal immunity doctrine in a jurisdiction where a Married Woman Act had been enacted).

141. United States v. Jones, 542 F.2d 661, 672 n.21 (6th Cir. 1976) ("The trend appears to be toward abrogation of the doctrine."); see PROSSER, *supra* note 133, § 122 at 863-64; HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 10.1 at 372-73 (2d ed. 1988).

142. Kratz v. Kratz, 477 F. Supp. 463, 476 (E.D. Pa. 1979); Holt, *supra* note 127, at 196.

143. See CARR (2d ed.), *supra* note 132, § 3.6 at 3-108; see also Heggy v. Heggy, 944 F.2d 1537, 1541 n.8 (10th Cir. 1991), cert. denied 112 S. Ct. 1514 (1992).

144. Jones, 542 F.2d at 672.

Simpson v. Simpson,¹⁴⁵ the Fifth Circuit relied on a section of Professor Prosser's text on torts.¹⁴⁶ Within the section cited by the *Simpson* court is a statement that indicates that the courts that have upheld the interspousal immunity doctrine have relied, in part, on the availability of alternative remedies each spouse may have in criminal and divorce laws.¹⁴⁷ Thus, the interspousal immunity doctrine should not bar a criminal prosecution, because it owes its existence, in part, to the availability of criminal sanctions.¹⁴⁸ Indeed, as the Sixth Circuit recognized in *United States v. Jones*,¹⁴⁹ "[e]ven in states which recognize interspousal immunity, that immunity does not apply to criminal prosecutions."¹⁵⁰ Since Title III is a criminal statute,¹⁵¹ the interspousal immunity doctrine should not have been held applicable to Title III. Moreover, as the Sixth Circuit has noted, "husbands and wives were always regarded as separate individuals in criminal law,"¹⁵² which differs radically from the earlier fused identity of husband and wife in contract and tort actions, which gave rise to the interspousal immunity doctrine.¹⁵³

A third reason for denying application of the interspousal immunity doctrine to Title III is that a state's law cannot supplant a cause of action created by federal law.¹⁵⁴ Interspousal immunity is a creation of state law.¹⁵⁵ Congress intended Title III to govern electronic surveillance, but never intended the statute to regulate marital relations or concern itself with issues relating to support or custody, all of which are issues governed by state

145. 490 F.2d 803 (5th Cir.) *cert. denied*, 419 U.S. 897 (1974); *see supra* notes 56-63 and accompanying text.

146. *Simpson*, 490 F.2d at 806 n.7 (citing PROSSER, *supra* note 133, § 122 at 861-64).

147. PROSSER, *supra* note 133, § 122 at 862.

148. *Jones*, 542 F.2d at 672.

149. 542 F.2d 661 (6th Cir. 1976).

150. *Id.* at 672.

151. Even the *Simpson* court recognized this proposition. *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.); *cert. denied*, 419 U.S. 897 (1974).

152. *Jones*, 542 F.2d at 672 n.22.

153. *Id.* Although the Supreme Court has not addressed this issue in the context of interspousal electronic surveillance, the Supreme Court has continued to articulate its view that a husband and wife have separate legal identities with respect to their individual privacy rights in the marital relationship. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976) ("When the wife and the husband disagree on this decision [to terminate a pregnancy], the view of only one of the two marriage partners can prevail."); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."). *See Rowe*, *supra* note 140, at 881 ("Each spouse continues to possess an individual privacy interest after marriage which should remain free from all wrongful intrusions. The personal right of privacy in one's bodily integrity differs only in degree from the personal right of privacy in one's thoughts and conversations.").

154. *See Heggy v. Heggy*, 944 F.2d 1537, 1541 n.8 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1514 (1992); *see Jones*, 541 F.2d at 672.

155. *See, e.g., Bonkowsky v. Bonkowsky*, 431 N.E.2d 998 (Ohio 1982).

law.¹⁵⁶ To permit the invocation of a state-created doctrine to usurp the overriding purpose of a federal statute would controvert the constitutional principle that federal laws are supreme to those of the states.¹⁵⁷

B. Personal Privacy Considerations

From a personal privacy perspective, electronic surveillance clearly invades a protected federal constitutional right.¹⁵⁸ The original hearings before Congress¹⁵⁹ and the subsequent analysis completed by the Wiretap Commission¹⁶⁰ showed that the preservation of privacy is of national concern to the American public. Indeed, as one study revealed, three out of four Americans equate the preservation of privacy with the inalienable right to life, liberty and the pursuit of happiness.¹⁶¹ The presence of a wiretapping device which can automatically, and with a "minimum of human supervision"¹⁶² record all incoming and outgoing telephone calls, invades more than the privacy of the spouse who is the victim of the electronic surveillance: it invades the privacy of all persons who talk on that telephone.¹⁶³ The "evil" of wiretapping, as Justice Brandeis described in his dissenting opinion in *Olmstead v. United States*,¹⁶⁴ is the invasion of the constitutional right of privacy, which is exacerbated by the installation of even an unsophisticated eavesdropping device purchased at a local electronics store.

The legislative solution to the evil of wiretapping is embodied in Title III. Congress articulated its objectives regarding Title III in the final Senate Report when it stated that:

156. See *Kratz v. Kratz*, 477 F. Supp. 463, 476 (E.D. Pa. 1979).

157. Article VI of the United States Constitution provides, in pertinent part, that "the Laws of the United States . . . shall be the supreme Law of the Land; . . . [the] Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl.2.

158. *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). See generally RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1977) (stating that the right of privacy is an individual's "right to be left alone.")

159. See *supra* note 81.

160. See *supra* note 124.

161. ALAN F. WESTIN, THE DIMENSIONS OF PRIVACY: A NATIONAL OPINION RESEARCH SURVEY OF ATTITUDES TOWARD PRIVACY 5 (1979).

162. *Kratz v. Kratz*, 477 F. Supp. 463, 474 (E.D. Pa. 1979) (quoting Holt, *supra* note 127, at 205-06; *People v. Otto*, 831 P.2d 1178, 1190 (Cal. 1992) (commenting that a wiretap device "is of potentially unlimited duration, and is wholly indiscriminate").

163. An "aggrieved person" means any "person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11) (1968); cf. *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977) (holding that the interception of all incoming and outgoing telephone calls "invaded the privacy of innumerable persons, known and unknown").

164. 277 U.S. 438, 475-76 (1928) (Brandeis, J., dissenting). The reasoning has now been accepted by a majority of the Supreme Court. See *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. New York*, 389 U.S. 347 (1967).

[a]ll too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation.¹⁶⁵

Indeed, Congress was extremely concerned with the invasion of privacy and sought to provide both criminal and civil penalties for illegal electronic surveillance.¹⁶⁶ In addition, Congress sought to ensure that the initial invasion of privacy would not be compounded by the subsequent disclosure and use of the illegally intercepted communications.¹⁶⁷ As part of the broad array of protections against the invasion of privacy, Congress enacted a statutory exclusionary rule¹⁶⁸ to enforce the limitations imposed by Title III upon wiretapping and electronic surveillance,¹⁶⁹ as well as separate disclosure¹⁷⁰ and use¹⁷¹ provisions.

165. SENATE REPORT, *supra* note 46, at 69, reprinted in 1968 U.S.C.C.A.N. at 2156.

166. *Id.*

167. *Id.*; see *Fultz v. Gilliam*, 942 F.2d 396, 401 (6th Cir. 1991) (The separate use and disclosure provisions "insure protection for the wiretap victim from third parties, unrelated to the wrongdoer, who, having access to the material and a reasonable basis to know its source, might desire to disclose the information for their own purposes.").

168. 18 U.S.C. § 2515 (1968). Section 2515 provides that:

[w]hensoever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if disclosure of that information would be in violation of this chapter.

Id.; see SENATE REPORT, *supra* note 46, at 96, reprinted in 1968 U.S.C.C.A.N. at 2185. ("[Section 2515] forms an integral part of the system of limitations and is designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications.").

169. *Gelbard v. United States*, 408 U.S. 41, 47-49 (1972).

170. 18 U.S.C. § 2511(1)(c). Section 2511(1)(c) provides criminal and civil penalties for any person who "intentionally discloses, endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." *Id.*; see, e.g., *Providence Journal Co. v. FBI*, 602 F.2d 1010, 1013 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

171. 18 U.S.C. § 2511(1)(d). Section 2511(1)(d) provides criminal and civil penalties for any person who "intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." *Id.*; see, e.g., *Bess v. Bess*, 929 F.2d 1332, 1334 (8th Cir. 1991).

IV. CONCLUSION

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is "straightforward and comprehensive."¹⁷² It provides criminal and civil penalties when there is an intentional interception of a telephone conversation without the consent of one of the parties to the conversation. Even without examining the legislative history of Title III, it is clear from the plain meaning of the text of the statute that Title III does not provide a specific exception that would permit one spouse to intentionally intercept and record the private telephone conversations of the other spouse.

There can be no doubt that Congress was aware of the degree to which wiretapping occurred in domestic relations situations and specifically rejected a predecessor bill to Title III because it failed to prohibit electronic surveillance in such cases. Congress intended Title III to be a "blanket prohibition"¹⁷³ against all electronic surveillance unless a "specific" statutory exception applied. Whatever remaining validity the interspousal immunity doctrine may have in other contexts, it is not applicable to Title III.

Carving out an interspousal immunity exception in Title III is simply extralegal policy-making by the judiciary—indeed, bad policy—that has neither been approved by Congress nor presented to the President for his signature.¹⁷⁴ When one spouse talks on the telephone, the other spouse has no legal right to secretly intercept and record those private telephone conversations, even if he or she is paying the telephone bill.

172. *United States v. Jones*, 542 F.2d 661, 666 (6th Cir. 1976).

173. SENATE REPORT, *supra* note 46, at 91-92, reprinted in 1968 U.S.C.C.A.N. at 2181; see *United States v. Giordano*, 416 U.S. 505, 514 (1974); *Gelbard v. United States*, 408 U.S. 41, 46 (1972).

174. Article I of the Constitution provides that legislation is not valid unless it has been passed by both the House and the Senate and presented to the President, usually for his signature. U.S. CONST. art. I, § 7 cl. 2; see *INS v. Chadha*, 462 U.S. 919, 950-51 (1983).

