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Subsequent Use of Electronic Surveillance Interceptions and the Plain View Doctrine: Fourth Amendment Limitations on the Omnibus Crime Control Act

Raymond R. Kepner
University of Michigan Law School

SUBSEQUENT USE OF ELECTRONIC SURVEILLANCE INTERCEPTIONS AND THE PLAIN VIEW DOCTRINE: FOURTH AMENDMENT LIMITATIONS ON THE OMNIBUS CRIME CONTROL ACT

In 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act in response to widespread public anxiety about crime and civil disorder.[1] Title III[2] of that complex and controversial Act provides guidelines for the conduct of electronic surveillance[3] by federal and state law enforcement agencies,[4] authorizing limited eavesdropping and wiretapping pursuant to judicial approval. Title III represents Congress' effort to implement the use of electronic surveillance as a police investigative tool in conformity with the fourth amendment standards which the Supreme Court delineated in *Berger v. New York*[5] and *Katz v. United States*.[6]

While prohibiting all wiretapping and eavesdropping by persons other than law enforcement officers, the Act permits court-ordered electronic surveillance subject to specified limitations.[7] A Title III surveillance order must be based upon a finding that there is probable cause to believe that communications concerning a particular crime will be obtained by the interception.[8] However, when lawfully executing such an order, law enforcement agents occasionally intercept conversations pertaining to criminal offenses other than those specified in the judicial authorization.[9]

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[1] *See generally* R. HARRIS, THE FEAR OF CRIME (1969); Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969).

[2] 18 U.S.C. §§ 2510-2520 (1970) [hereinafter referred to as Title III].

[3] As used in this article, the term "electronic surveillance" will encompass both wiretapping and electronic eavesdropping. Wiretapping is the interception of wire communications without the consent of the participants. Electronic eavesdropping, or "bugging," is the interception of communications transmitted orally, without the consent of the participants.

[4] 18 U.S.C. §§ 2516(1), (2) (1970). Title III is not self-executing as applied to the states. State and local law enforcement officers may conduct electronic surveillance only under the authority of a state act which satisfies the requirements of Title III. However, the federal act does not preempt individual states from enacting legislation which more narrowly circumscribes electronic surveillance. *See* Weinstein, *The Court Order System of Regulating Electronic Eavesdropping Under State Enabling Legislation*, 2 CONN. L. REV. 250 (1969).

[5] 388 U.S. 41 (1967). *See* notes 22-26 and accompanying text *infra*.

[6] 389 U.S. 347 (1967). *See* notes 31-40 and accompanying text *infra*.

[7] *See* notes 41-52 and accompanying text *infra*.

[8] *See* notes 41-47 and accompanying text *infra*.

[9] *See, e.g.*, United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); United States v. Denisio, 360 F. Supp. 715 (D. Md. 1973); United States v. Tortorello, 342 F. Supp. 1029 (S.D.N.Y. 1972), *aff'd*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971); United States v. Escandar, 319 F. Supp. 295 (S.D. Fla. 1970). *See also* notes 60-63 and accompanying text *infra*.

Section 2517(5)[10] of Title III permits retroactive judicial approval of the seizure of such communications. Pursuant to such subsequent ratification of a seizure, conversations relating to crimes not specified in the warrant become admissible as evidence in any judicial proceedings.[11] Proponents of Title III maintain that it effectively embodies the Supreme Court's framework of constitutional standards with respect to electronic surveillance,[12] thereby achieving the proper balance between fourth amendment rights and effective law enforcement.[13] This view has been endorsed by most

[10] 18 U.S.C. § 2517 (1970) provides in full:

> *Authorization for disclosure and use of intercepted wire or oral communications.*
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> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
>
> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of the communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.
>
> (4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.
>
> (5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

[11] 18 U.S.C. § 2517(5) (1970). *See* notes 49-59 and accompanying text *infra.*

[12] *See, e.g.,* Burpo, *Electronic Surveillance by Leave of the Magistrate: The Case for the Prosecution,* 38 TENN. L. REV. 14 (1970); Cranwell, *Judicial Fine-Tuning of Electronic Surveillance,* 6 SETON HALL L. REV. 225 (1975). *See* note 14 *infra* and cases listed therein.

[13] These commentators generally emphasize the value of electronic surveillance in combatting organized crime. *See* note 12 *supra. See also* note 90 *infra.* This was Congress' primary rationale in enacting Title III:

> Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent

of the lower federal courts which have considered the constitutionality of Title III.[14] By contrast, critics of the Act, while generally conceding that there exists a sphere within which electronic surveillance is constitutional, question whether Title III is consistent with the balance struck by the Court in *Berger* and *Katz*.[15]

Despite the critical examination to which many sections of Title III have been subjected, section 2517(5) has received little serious scrutiny from either the courts or the commentators. This note will analyze the constitutionality of the section in terms of the standards which the Supreme Court has articulated, both with respect to the law of search and seizure generally and with respect to electronic surveillance. This examination will reveal that section 2517(5) cannot be sustained under the existing contours of fourth amendment interpretation.

I. FOURTH AMENDMENT STANDARDS

A. Particularity

The fourth amendment requires that a search warrant particularly describe the place to be searched and the items which are to be seized.[16] The particularity requirement proscribes general warrants which do not specify the purpose of the search, the name of the person whose property is the object of the search, or the material which is to be seized.[17] A general warrant, in effect, gives the executing officer discretionary author-

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their commission is an indispensable aid to law enforcement and the administration of justice.

Pub. L. No. 90-351, Title III, § 801(c), June 19, 1968, 82 Stat. 212. *See also* S. REP. No. 1097, 90th Cong., 2d Sess. 70 (1968).

[14] *See, e.g.*, United States v. Sklaroff, 506 F.2d 837 (5th Cir. 1975); United States v. Ramsey, 503 F.2d 524 (7th Cir. 1974); United States v. James, 494 F.2d 1007 (D.C. Cir. 1974); United States v. Bobo, 477 F.2d 974 (4th Cir. 1973); United States v. Cafero, 473 F.2d 489 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); United States v. Tortorello, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974); United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972). *Contra*, United States v. Whitaker, 343 F. Supp. 358 (E.D. Pa. 1972), *rev'd*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973).

[15] *See, e.g.*, Schwartz, *supra* note 1; Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969); Note, *Federal Decisions on the Constitutionality of Electronic Surveillance Legislation*, 11 AM. CRIM. L. REV. 639 (1973); Note, *Federal Procedure for Court Ordered Electronic Surveillance: Does It Meet the Standards of Berger and Katz?*, 60 J. CRIM. L.C. & P.S. 203 (1969); Note, *Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968*, 23 RUTGERS L. REV. 319 (1969).

[16] The fourth amendment states:

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

U.S. CONST. amend. IV.

[17] Berger v. New York, 388 U.S. 41, 58 (1967).

ity to search wherever suspicion leads him and to seize whatever he finds.[18] In this manner, a general search undermines the central objective of the fourth amendment, which is the protection of an individual's reasonable expectation of privacy against arbitrary intrusion by government officials.[19]

In enunciating stringent constitutional standards with respect to electronic surveillance, the Court has recognized that electronic surveillance is an extraordinary form of search, since it involves an especially serious intrusion on privacy.[20] Accordingly, law enforcement officers using such investigative methods must strictly adhere to particular and specific limitations on the conversations to be searched for and seized.[21] Moreover, electronic surveillance poses a grave threat to the particularity requirement, because the use of electronic devices is likely to lead to searches of indiscriminate breadth. This was a key factor in *Berger v. New York,*[22] where the Court held that a New York electronic surveillance statute[23] was unconstitutional on its face. Berger had been convicted of conspiracy to commit bribery on the basis of evidence derived from court-ordered eavesdropping extending over a four-month period. The surveillance had been authorized and executed in accordance with the terms of the state statute, but the statute did not require the court order to describe with particularity the place to be searched. Nor did it demand identification of the specific crime which allegedly had been or was being committed, or of the conversations which were to be seized.[24] The statute also permitted the issuance of court orders authorizing surveillance for sixty days on the basis of a single showing of probable cause, and the statute's provision which allowed an unlimited number of sixty-day extensions without a further showing of probable cause compounded this flaw. Noting that particularity was especially important in the context of electronic sur-

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[18] The dangers inherent in a general search were discussed in the celebrated case of Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765), where Lord Camden asserted that such sweeping intrusions were "subversive of all the comforts of society." 19 How. St. Tr. at 1066. The antipathy of the framers to general warrants was the impetus behind the fourth amendment. In the eighteenth century, not only in England but also in the colonies, warrants were often issued authorizing a general search of a person's home or business for papers containing seditious statements. Moreover, sweeping writs of assistance were used by the Crown to enforce the customs laws. *See generally* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION 22-78 (1937).

[19] The Court has often emphasized that the thrust of the fourth amendment is to protect the security of individual privacy against arbitrary police intrusion. *See, e.g.,* Mapp v. Ohio, 367 U.S. 643, 655 (1961); Wolf v. Colorado, 338 U.S. 25, 27 (1949); Boyd v. United States, 116 U.S. 616, 630 (1886).

[20] *See* note 25 and accompanying text *infra.*

[21] *See, e.g.,* Dash, *Katz—Variations on a Theme by Berger,* 17 CATH. U.L. REV. 296 (1968); Schwartz, *Six Years of Tapping and Bugging,* 1 CIV. LIB. REV. 26 (Summer 1974). *See also* notes 22-26 and accompanying text *infra.*

[22] 388 U.S. 41 (1967).

[23] N.Y. CODE CRIM. PRO. § 813-a (McKinney 1958).

[24] The majority opinion, however, noted that the New York statute did conform to the fourth amendment requirement that electronic surveillance be conducted only pursuant to judicial authorization. *See* text accompanying notes 31-40 *infra.*

veillance,[25] the Court held that the New York statute prescribed inadequate standards to limit the scope of electronic searches by law enforcement officials. Rather than carefully circumscribing electronic surveillance so as to ensure the security and privacy of individuals against unreasonable intrusions, the statute permitted the issuance of orders which were tantamount to general warrants giving the executing officer discretion to seize any and all conversations.[26]

The Court contrasted the indiscriminate use of electronic surveillance under the New York statute with the precise surveillance procedures which had been sustained in *Osborn v. United States*[27] one year earlier. In *Osborn,* two federal judges jointly authorized a surveillance procedure employing a tape recorder concealed on an informant's person to secure evidence of an attorney's attempt to bribe a juror. The judicial authorization was based upon a detailed affidavit which alleged the commission of this specific criminal offense. Only the anticipated incriminating conversations between the informant and the suspect were intercepted in the conduct of the search. The *Osborn* Court upheld the admission into evidence of the recording, emphasizing that the surveillance was conducted by federal agents investigating a specific offense and that the scope of the search was restricted to the limited purpose outlined in the judicial order.[28] Moreover, the *Osborn* order particularly described the type of conversation sought, so that the investigating officer could not search unauthorized conversations or use the order as "a passkey to further search"[29] once the specified conversation was intercepted. Finally, *Osborn* involved one limited intrusion rather than a series of intrusions or a continuous surveillance. When the executing officer sought to resume the search, he was granted a new order only after a separate showing of probable cause.[30]

In *Katz v. United States,*[31] the Court reaffirmed the principle that particularity is an indispensable aspect of constitutionally permissible electronic surveillance. *Katz* involved surveillance limited not only in time and place, but also to a specific person and specific conversations. Federal agents had probable cause to believe that the petitioner was using a certain public telephone at the same time each day for the purpose of

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[25] The Court explained:

> The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope.

388 U.S. at 56. In a concurring opinion, Justice Stewart contended that the fourth amendment required an exceptionally rigorous standard of probable cause with respect to electronic surveillance. *Id.* at 69.

[26] *Id.* at 58-59.

[27] 385 U.S. 323 (1966). *See* Dash, *supra* note 21, at 311.

[28] 385 U.S. at 330.

[29] 388 U.S. at 57.

[30] 385 U.S. at 330.

[31] 389 U.S. 347 (1968). For a discussion of *Katz,* see Dash, *supra* note 21; SCHWARTZ, *Electronic Eavesdropping—What the Supreme Court Did Not Do,* 4 CRIM. L. BULL. 83 (1967).

transmitting gambling information. Without a court order, they attached a listening device to the outside of a telephone booth for the specific purpose of determining the content of the petitioner's telephone conversations. Surveillance was confined to those periods during which the suspect used the phone, and the agents intercepted only the conversations of the petitioner. Underscoring the principles enunciated in *Berger,* the Court concluded that the surveillance procedure in *Katz* was consistent with the particularity requirement of the fourth amendment.[32]

In summary, *Osborn, Berger,* and *Katz* clearly established the proposition that electronic surveillance is constitutionally permissible only if it is narrowly circumscribed. Otherwise, wiretapping and eavesdropping constitute general exploratory searches for incriminating evidence, thereby contravening the particularity requirement of the fourth amendment.

B. Judicial Control

The fourth amendment not only mandates particularity in the conduct of electronic surveillance, but also requires judicial control of wiretapping and eavesdropping by law enforcement agencies. Notwithstanding the extremely narrow scope of the search in *Katz,* the Supreme Court reversed the petitioner's conviction because the surveillance had not been conducted within a framework of judicial authorization and control.[33] Despite the restraint which the federal officers had exercised in circumscribing their surveillance, the Court held that the absence of prior judicial authorization rendered the search unreasonable within the meaning of the fourth amendment.[34] Actual compliance with the particularity standard

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[32] The Court observed:

> [T]his 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.

389 U.S. at 354.

[33] *Id.* at 356-59.

[34] A critical issue in *Katz* was whether fourth amendment protection extended to surveillance conducted by attaching an electronic device to the outside of a telephone booth, thus permitting interception of conversations without physical entry into the area in which the conversations were taking place. 389 U.S. at 349-53. In Olmstead v. United States, 277 U.S. 438 (1928), the first case in which the Supreme Court considered the legal status of wiretapping, the majority had ruled that the fourth amendment applied only to official intrusions involving a physical trespass. The *Olmstead* trespass doctrine was extended to electronic eavesdropping in Goldman v. United States, 316 U.S. 129 (1942), where the Court held that use of a detectaphone placed against the partition wall of the defendant's office for the purpose of eavesdropping did not constitute a trespass and was, accordingly, permissible under the fourth amendment. The *Olmstead-Goldman* rationale was both refined and undermined in Silverman v. United States, 365 U.S. 505 (1961), which held that the fourth amendment was violated where a "spike mike" was inserted into a party wall, thereby making contact with the petitioner's heating duct and converting the entire heating system into a sound conductor. Advancing a "constitutionally protected area" test, the Court stated that it was irrelevant

could not serve as a basis for retroactive ratification of electronic surveillance conducted without a court order.

Writing for the Court, Justice Stewart stated that the self-imposed restraint of the executing officers was not the constitutional equivalent of a determination of probable cause by a neutral judicial officer prior to the commencement of the search, followed by a specific court order setting forth the precise limits of the surveillance.[35] The fourth amendment requires the interposition of the judiciary between the police and the citizenry in determining the scope of a search. Otherwise, the right to be secure against unreasonable searches and seizures would depend entirely upon the discretion of the police.[36] Justice Stewart further noted that an after-the-fact determination of the reasonableness of a search is inherently less reliable than an impartial predetermination of probable cause.[37] A rigorous determination of probable cause is especially important in the context of electronic surveillance,[38] where the search is particularly intrusive and where the nature of the evidence seized may raise many questions concerning its reliability.[39] The fourth amendment requires that searches and seizures be preceded by a judicial determination of probable cause. While noting that there are a few specifically established and well-delineated exceptions to the general principle of prior judicial approval, the Court stated that these exceptions are not applicable in the context

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"whether or not there was a technical trespass under the local property law relating to party walls." *Id.* at 511. *See* Dash, *supra* note 21; Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891 (1960).

In *Katz*, the Court expressly rejected the trespass doctrine. Although not involving actual physical penetration of a "constitutionally protected area," the surveillance was held to constitute a fourth amendment search because it violated the privacy upon which the petitioner had justifiably relied while using the telephone booth. In the Court's words:

> [T]his effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection .... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351-52 (footnotes omitted).

[35] 389 U.S. at 356-57.

[36] *Id.* at 358-59. Quoting Beck v. Ohio, 379 U.S. 89, 96 (1964), Justice Stewart stated that subsequent justification for the search was "too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

[37] 389 U.S. at 358-59.

[38] Justice Stewart contended in his concurring opinion in *Berger* that the standard of reasonableness embodied in the fourth amendment requires that "the showing of justification match the degree of intrusion." Accordingly, the "most precise and rigorous standard of probable cause" should be required in order to justify electronic surveillance. 388 U.S. at 69.

[39] In using evidence gathered through electronic surveillance, there may be difficulties in determining whether the recordings are authentic and whether changes, additions or deletions have been made. The identity of the speakers may be open to challenge, and the recordings may be inaudible or indistinct. E. LAPIDUS, EAVESDROPPING ON TRIAL 155 (1974). *See also* Schwartz, *supra* note 1, at 485 n.157.

of electronic surveillance.[40] The Court concluded that prior judicial authorization constitutes a second indispensable constitutional precondition of lawful electronic surveillance, even where the search satisfies the particularity standard of the fourth amendment.

II. THE CONGRESSIONAL RESPONSE TO THE *Berger-Katz* STANDARDS

A. The Basic Statutory Scheme

The *Berger* and *Katz* decisions provide the framework of constitutional standards which control the use of electronic surveillance by law enforcement agencies. In enacting Title III, Congress endeavored to establish a detailed statutory procedure for electronic surveillance consistent with the standards set forth in these decisions.[41] Under Title III a judge of competent jurisdiction may authorize wiretapping and eavesdropping in order to investigate a wide variety of offenses.[42] To obtain this court authorization the official[43] seeking a surveillance order must state the facts and circumstances upon which he bases his belief that the judge should issue the order.[44] This information is intended to facilitate the

[40] The Court stated:

> It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit." And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.

389 U.S. at 357-58 (footnotes omitted).

[41] S. REP. No. 1097, 90th Cong., 2d Sess. 97-108 (1968).

[42] 18 U.S.C. §§ 2516(1), (2) (1970). Among the federal offenses for which electronic surveillance may be authorized are murder, kidnapping, robbery, extortion, bribery, transmission of wagering information, obstruction of justice, various racketeering offenses, violations of narcotics laws and conspiracy to commit any of the enumerated offenses. 18 U.S.C. § 2516(1) (1970). In addition, state enabling laws may extend electronic surveillance to the investigation of any state crime "dangerous to life, limb or property, and punishable by imprisonment for more than one year . . . ." 18 U.S.C. § 2516(2) (1970).

[43] In the case of a federal surveillance, the application must be authorized by the Attorney General or an Assistant Attorney General. 18 U.S.C. § 2516(1) (1970). *See* United States v. Giordano, 416 U.S. 505 (1974). In the case of a state or local government, the application must be authorized by the principal prosecuting attorney of the state or political subdivision. 18 U.S.C. § 2516(2) (1970).

[44] The applicant must present evidence constituting probable cause to believe that an offense to which Title III is applicable "has been, is being, or is about to be committed." 18 U.S.C. § 2518(b) (1970). The applicant must also submit a detailed description of the particular offense under investigation, the nature and location of the facilities to be placed under surveillance, the type of communications sought, and the identity, if known, of the persons whose conversations are to be intercepted. *Id.* A law enforcement official applying for a surveillance order must also specify the period of time during which the interception is to be made. If the surveillance is

magistrate's determination whether or not to authorize the surveillance. If the judge concludes that the showing is sufficient,[45] he may grant an order in accordance with statutory limitations[46] which are intended to ensure that the order links up a specific person, a specific offense, and a specific place, thereby satisfying the constitutional requirement that electronic surveillance be used only under circumstances which fully comply with the requirement of particularity.[47] Title III further provides that no court may authorize the interception of communications for any period longer than is necessary to accomplish the objective of the authorization, nor in any event longer than thirty days. Extensions may be authorized upon a separate determination of probable cause.[48] Finally, every order and extension must provide that the interception be conducted in such a manner as to minimize the interception of communications not otherwise subject to interception.[49]

During the past eight years federal courts have, almost without exception, approved Congress' interpretation of the constitutional standards articulated in *Berger* and *Katz*. Relying on the presumption of the constitutionality of federal legislation, the courts have generally held that Title III adequately circumscribes the scope of electronic surveillance.[50] Some commentators, however, have contended that many of the safeguards of Title III are illusory.[51]

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not to terminate when the communications sought are first intercepted, the officer must set forth the particular facts establishing probable cause to believe that the same type of communications will occur subsequently. 18 U.S.C. § 2518(1)(d) (1970). The applicant must also show whether other investigative procedures have been tried, and why alternatives would be unlikely to succeed or would be too dangerous to employ. 18 U.S.C. § 2518(1)(c) (1970).

[45] 18 U.S.C. § 2518(3)(a) (1970) requires that the authorizing magistrate determine that probable cause exists with respect to a particular offense enumerated in 18 U.S.C. § 2516 (1970). *See* note 42 *supra*.

[46] 18 U.S.C. §§ 2518(4)(a)-(c) (1970).

[47] *See* S. REP. No. 1097, 90th Cong., 2d Sess. 102 (1968).

[48] 18 U.S.C. § 2518(5) (1970).

[49] *Id.* For a detailed discussion of this particular provision of Title III, see Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 STAN. L. REV. 1411 (1974). *See also* notes 60-62 and accompanying text *infra*.

[50] *See* note 14 and accompanying text *supra*.

[51] For critical discussions of the various provisions of Title III, see the articles in note 12 *supra*. Although Congress sought to implement the principles of particularity and judicial control, Title III permits departure from these safeguards in several situations. For example, 18 U.S.C. § 2518(7) (1970) allows a law enforcement official "specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof" to initiate electronic surveillance without prior judicial authorization when confronted by an "emergency situation," involving conspiratorial activities which threaten national security or which are characteristic of organized crime. This provision is complemented by 18 U.S.C. § 2511(3) (1970) which attempts to preserve "the constitutional power of the President" to authorize wiretapping and bugging without judicial supervision in cases which involve either foreign or domestic threats to national security. Although a discussion of these provisions is beyond the scope of this article, it is clear that they raise serious constitutional questions in light of the *Berger* and *Katz* standards.

B. Subsequent Use of Interceptions

Section 2517(5) of Title III,[52] which permits the use and disclosure of conversations concerning crimes not specified in the court order by law enforcement officials other than those obtaining the order, does not comport with the controlling constitutional criteria. The disclosure and use of intercepted communications is an aspect of electronic surveillance which the Supreme Court has never squarely considered. Section 2517(1) provides that a law enforcement officer who has obtained knowledge of the contents of any electronic surveillance, or evidence derived therefrom, may disclose that information to other investigative or law enforcement officers.[53] In addition, section 2517(2) authorizes the use of the contents of any intercepted communications by any officer who has obtained knowledge of such information,[54] in order to establish probable cause for arrest, to establish probable cause for engaging in further search and seizure, or to develop witnesses for trial.[55] Congress intended that the sharing and use of this information between law enforcement agencies would be circumscribed by safeguards for privacy,[56] but the only safeguard set forth in sections 2517(1) and 2517(2) is that any disclosure and use must be appropriate to the proper performance of the official duties of the officers.[57] Finally, under section 2517(3), any person who has any information concerning an intercepted communication, or evidence derived therefrom, may disclose the contents of the interception in testimony before any state or federal court or grand jury.[58]

These provisions do not raise serious constitutional questions until they are viewed in conjunction with section 2517(5), which permits information relating to offenses other than those specified in the judicial order authorizing the surveillance to be used or disclosed in any manner set forth in the first three provisions of section 2517, provided that a judge of competent jurisdiction finds on subsequent application that the contents were intercepted in accordance with the provisions of Title III.[59] Because electronic surveillance is an inherently uncontrollable investigative tool, section 2517(5) raises serious constitutional questions. A tap on a telephone, for example, intercepts the conversations of everyone who uses the phone to make a call, and those of everyone who calls to or is called from the tapped phone, regardless of how unrelated the intercepted com-

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[52] 18 U.S.C. § 2517(5) (1970). *See* note 10 *supra.*

[53] 18 U.S.C. § 2517(1) (1970). *See* note 10 *supra.*

[54] 18 U.S.C. § 2517(2) (1970). *See* note 10 *supra.*

[55] *See* S. REP. No. 1097, 90th Cong., 2d Sess. 99 (1968).

[56] *Id.*

[57] 18 U.S.C. §§ 2517(1),(2) (1970). Intercepted conversations may have political significance or commercial value. They may be of interest to the press or be used for blackmail. Clearly these provisions proscribe such uses of interceptions. However, Title III offers no standard for determining which uses of such evidence are appropriate to the proper performance of the official duties of police officers. For a discussion of the difficulty of policing the police, see Spritzer, *supra* note 15, at 189-91.

[58] 18 U.S.C. § 2517(3) (1970).

[59] 18 U.S.C. § 2517(5) (1970).

munications are to the authorized purpose of the tap.[60] Electronic eavesdropping is potentialy even broader than wiretapping in establishing a dragnet for the seizure of conversations, since a bugging device can intercept every utterance of each individual in the area under surveillance.[61] Although probable cause may exist with respect to one party to an intercepted conversation, it does not necessarily exist with respect to other persons overheard. Title III, however, permits the monitoring and interception of a third party's conversations, thereby permitting the seizure of one person's statements merely upon the showing of probable cause as to someone else.[62] Section 2517(5) then sanctions the evidentiary use of such conversations involving crimes which are not the subject of the original court authorization, including the communications of persons as to whom there has been no showing of probable cause prior to the infringement on their reasonable expectation of privacy.[63]

III. THE PLAIN VIEW DOCTRINE

A. Searches Under a Warrant

Section 2517(5) is based upon the extension of the plain view doctrine to the context of electronic surveillance. The plain view concept constitutes an exception to the basic fourth amendment rule that searches and seizures conducted without prior approval by a judge or magistrate are *per se* unreasonable.[64] The crux of the plain view exception is that the seizure of incriminating evidence which falls within plain view is permissible, if a police officer has prior justification for an intrusion in the course of which he inadvertently discovers such evidence.[65] Although

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[60] *See Hearings on S. 675 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 1180 (1967) (testimony of Speiser).

[61] *See, e.g.*, Silverman v. United States, 365 U.S. 505 (1961), where conversations throughout the entire house were overheard. *See also* Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 MINN. L. REV. 835 (1960).

[62] As the court noted in United States v. Whitaker, 343 F. Supp. 358, 367 (E.D. Pa. 1972), *rev'd*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973):

> In both Osborn and Katz, only one end of a conversation was listened to involving a nonconsenting party for whom probable cause to intercept had been established. Under this statute [Title III] not only are both ends of the conversation being monitored without any consent, but often the very purpose of listening will be to obtain evidence against many individuals.

[63] For a discussion of the reasonable expectation of privacy test, see note 34 *supra*.

[64] For an analysis of the development of the warrant requirement as "the central tenet of fourth amendment jurisprudence," see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 409-14 (1974). *See also* Katz v. United States, 389 U.S. 347, 356-59 (1967).

[65] In Harris v. United States, 390 U.S. 234 (1968), the Court formulated the rule as follows:

> [O]bjects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.

this exception to the warrant requirement developed with respect to searches and seizures of tangible objects, Congress and several lower federal courts have uncritically extended the doctrine to cases involving electronic surveillance,[66] characterizing section 2517(5) as merely a restatement of existing decisional law adapted to fit the electronic surveillance context.[67]

The proposition that section 2517(5) restates existing law is open to challenge since, even in the physical search context, the scope of the plain view exception is not clearly defined. The exception initially developed in cases involving warrantless searches incident to an arrest. It is a well-recognized exception to the warrant requirement that police officers effecting an arrest may search the person of the suspect and the place where the arrest is made.[68] Under the plain view doctrine, the officers may seize incriminating evidence which comes into plain view in the course of an appropriately limited search incident to an arrest.[69] In recent years the Court has extended the plain view exception beyond the confines of the arrest context, holding that police may seize incriminating evidence which they inadvertently discover while in "hot pursuit" of a fleeing suspect.[70] In one case the Court even relied upon the exception to sustain the seizure of incriminating evidence by an officer who was not engaged in an investigative search.[71] However, electronic surveillance under the court order procedure established by Title III is an instance of a search pursuant to a warrant. Accordingly, if section 2517(5) is to be justified as a mere restatement of existing law, the relevant inquiry is to whether the plain view concept is a recognized exception insofar as searches under a warrant are concerned.

Nearly fifty years ago, the Supreme Court addressed this question in *Marron v. United States*.[72] Although subsequent decisions cast doubt

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Id. at 236. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465-72 (1971). *See also* notes 78-85 and accompanying text *infra*. *See generally* LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 ILL. L. FORUM 255, 333-43; *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 237-50 (1971); Note, *"Plain View"—Anything but Plain: Coolidge Divides the Lower Courts*, 7 LOYOLA L. REV. 489 (1974).

[66] S. REP. No. 1097, 90th Cong., 2d Sess. 100 (1968); United States v. Tortorello, 342 F. Supp. 1029 (S.D.N.Y. 1972), *aff'd*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971); United States v. Escandar, 319 F. Supp. 295 (S.D. Fla. 1970); *cf.* United States v. Denisio, 360 F. Supp. 715 (D. Md. 1973).

[67] United States v. Sklaroff, 323 F. Supp. 296, 307 (S.D. Fla. 1971).

[68] *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969), where the Court discussed the rationale and limitations of the exception for searches incident to arrest.

[69] *Id.;* Harris v. United States, 390 U.S. 234 (1968); Ker v. California, 374 U.S. 23 (1963); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

[70] Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967).

[71] Harris v. United States, 390 U.S. 234 (1968). The Court upheld the seizure of an incriminating notecard which came within the plain view of an officer who was routinely searching and securing an automobile which had been impounded as evidence.

[72] 275 U.S. 192 (1927). *But see* notes 78-85 and accompanying text *infra*.

on the validity of *Marron,* the Court indicated that law enforcement officers engaged in lawfully executing a search warrant may not seize items not described therein. Federal agents had obtained a warrant for the seizure of intoxicating liquors and articles for their manufacture. While searching the designated premises for these objects, the officers found certain ledgers and bills connected with the illegal enterprise, which they seized along with those objects named in the warrant. The Court held that a lawful search under a warrant could not justify the seizure of inadvertently discovered evidence which had not been described in the warrant. The seizure of items not specified in the warrant was deemed to be inconsistent with the particularity requirement of the fourth amendment.[73]

Some commentators have maintained that the *Marron* principle is an indispensable element of the fourth amendment proscription of general searches.[74] By confining the permissible seizure to the described object, the rule reduces the incentive for officers to engage in a sweeping foray beyond the scope of the judicial order.[75] Moreover, the *Marron* principle, which requires officers to obtain a separate warrant in order to seize unanticipated incriminating evidence, strips the executing officer of discretion in determining the scope of the warrant, thereby ensuring judicial control over the procedure. Indeed, a few courts have construed *Marron* as so narrowly circumscribing police discretion that even contraband not described in the warrant may not be seized if found in the course of a search under a warrant.[76]

In essence, *Marron* limits the plain view exception to warrantless searches. This implies that the plain view doctrine cannot adequately sustain the constitutionality of section 2517(5), unless the requirements of particularity and judicial control are less strictly applied in the electronic surveillance context than in the setting of the conventional search.

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[73] The Court stated that:

> The requirement that warrants shall particularly describe the thing to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

275 U.S. at 196. However, since the agents lawfully arrested the person in charge of the premises, the incriminating evidence which fell within their plain view was held to be seizable as incident to an arrest. *See* notes 68-69 and accompanying text *supra.*

[74] *See, e.g.,* Schwartz, *supra* note 1, at 465-66; Spritzer, *supra* note 15, at 188.

[75] Professor Schwartz contended prior to the decision in *Coolidge:*

> Were the *Marron* limitation abolished, all searches and seizures would verge on the general, so long as the initial entry was legitimate; there would be no reason to stop the search, even after the described item was seized, since everything else that was found could be used in a subsequent prosecution.

Schwartz, *supra* note 1, at 466.

[76] *See, e.g.,* United States v. Harrison, 319 F. Supp. 888 (D.N.J. 1970); United States v. Coots, 196 F. Supp. 775 (E.D. Tenn. 1961). Relying on *Marron v. United States,* these courts held that officers violated the fourth amendment when they seized illegal weapons in the course of a search under a warrant. *See also* Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), which explicitly rejected any distinction between "mere evidence" and contraband, stolen goods or other instrumentalities of crime.

Such an approach would be incompatible with the *Berger* and *Katz* decisions.[77]

The Court's decision in *Coolidge v. New Hampshire*,[78] however, casts doubt upon the continuing validity of *Marron*. Language in the plurality opinion indicates a willingness to expand the plain view exception to searches pursuant to a warrant. Writing for four members of the Court,[79] Justice Stewart prefaced an extensive discussion of the plain view exception by asserting that one example of the exception is the situation in which the police have a warrant to search a place for specified objects and in the course of the search come across an incriminating article not designated in the warrant.[80] Justice Stewart presented no direct authority supportive of his statement concerning the scope of the plain view exception,[81] and he did not advance a specific justification for extending the plain view exception beyond the context of warrantless searches. Nevertheless, Justice Stewart's reasons for applying the exception in the warrant context are implicit in his view that, if officers conducting a lawful search inadvertently discover evidence in plain view, it is a needless inconvenience to require them to obtain a separate warrant.[82]

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[77] *See* part I *supra*.

[78] 403 U.S. 443 (1971). In *Coolidge*, the petitioner became the suspect in a murder because of his unexplained absence from his home on the night of the crime and his ownership of an automobile which matched the description of one seen at the approximate time and place of the murder. When further investigation, including ballistics tests, produced additional evidence incriminating Coolidge, police obtained warrants for his arrest and for the search of his house and car. Coolidge was arrested at his home and taken into custody. The incriminating automobile, found parked in Coolidge's driveway, was towed to the police station and impounded. Vacuum sweepings of the car linked the suspect to the murder victim. The Court held that the warrants, which had been signed by the State Attorney General, who had conducted the investigation, were defective because they had not been issued by a "neutral and detached magistrate." *Id.* at 449. The Court, proceeding to treat the search and seizure as a warrantless one, considered and rejected the state's efforts to justify the search and seizure of the car under three recognized exceptions to the warrant requirement, one of which was the plain view exception. *Id.* at 465-73.

[79] Justice Stewart was joined by Justices Douglas, Brennan, and Marshall, while Justices White and Black wrote long opinions, concurring in part and dissenting in part. Justice Blackmun joined Justice Black's opinion. Chief Justice Burger joined Justice White's and most of Justice Black's opinion, and also filed his own brief opinion. Justice Harlan's concurrence in the judgment did not encompass the section of the plurality opinion in which Justice Stewart delineated his understanding of the plain view exception. However, Justice Harlan did not expressly disavow that part of the opinion, and he did concur with another section incorporating Justice Stewart's explication of the exception.

[80] 403 U.S. at 465.

[81] Justice Stewart cited several cases which concerned the plain view exception in searches incident to arrest. *Id.* The most direct support for Justice Stewart's dicta was his own concurring opinion in Stanley v. Georgia, 394 U.S. 557, 569 (1969), which the majority had decided on first amendment grounds.

[82] 403 U.S. at 467-68. Justice Stewart's view is consistent with the approach of the many lower courts which have disregarded *Marron* and applied the plain view exception to searches under a warrant. Even before *Coolidge*, rather than requiring officers to obtain a new and separate warrant in order to seize unanticipated items, lower courts often held that, if a search pursuant to a warrant is limited to the place specified in the warrant and to areas within the place where the specified arti-

The plurality opinion did not specifically refer to *Marron,* even though the extension of the plain view exception to searches under a warrant amounted to an abandonment of the approach enunciated in that case. However, in a dissenting opinion, Justice White, joined by Chief Justice Burger, indicated that the demise of the *Marron* principle was drawing near. The dissenters contended that it was anomalous to permit plain view seizures in connection with warrantless searches, while forbidding the warrantless seizure of evidence in plain view by officers executing a search warrant.[83] Accordingly, Justices White and Burger expressed approval of the plurality's cursory statement that the plain view exception applied to searches under a warrant.[84]

The question whether *Marron* imposes limitations on the scope of the plain view exception remains to be resolved by the Court. In *Coolidge,* a majority of the Court indicated a willingness to abandon *Marron,* at least where the seized evidence was in plain view.[85] Nevertheless, the plurality statement on this point was only dictum which did not even make specific reference to the *Marron* case.

If the plain view exception is not yet established with respect to searches under a warrant, then section 2517(5) is not sustainable on the ground that it simply restates the existing law of search and seizure and adapts it to cases involving electronic surveillance. However, even if the *Marron* principle is no longer valid, and if the plain view concept does extend to searches under a warrant, the constitutionality of section 2517(5) is not established. Since electronic surveillance differs from conventional searches and seizures in many respects, it must be determinined whether

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cles might be concealed, it is lawful to seize other objects falling within plain view. *See, e.g.,* Johnson v. United States, 293 F.2d 539 (D.C. Cir. 1961); Bryant v. United States, 252 F.2d 746 (5th Cir. 1958); Sanders v. United States, 238 F.2d 145 (10th Cir. 1956). *Contra,* United States v. Harrison, 319 F. Supp. 888 (D.N.J. 1970); United States v. Coots, 196 F. Supp. 775 (E.D. Tenn. 1961).

Initially, such warrantless seizures were limited to contraband and instrumentalities of crime. After the Supreme Court struck down the "mere evidence" rule in Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), this became an untenable limitation. *Hayden* has often been construed as having made any plain view evidence seizable incident to a warrant so long as the seized items relate to the criminal behavior in question, even though they are neither contraband nor instrumentalities of crime. *See, e.g.,* United States v. Teller, 412 F.2d 374 (7th Cir. 1969); United States v. Singleton, 361 F. Supp. 346 (E.D. Pa. 1973); Taylor v. Minnesota, 342 F. Supp. 911 (D. Minn.), *aff'd,* 466 F.2d 1119 (8th Cir. 1972), *cert. denied,* 410 U.S. 956 (1973). The Second Circuit, recognizing *Hayden's* potential for diluting the particularity requirement of the fourth amendment, has sought to limit *Hayden* to searches incident to an arrest, holding that *Marron* is controlling where officers executing a warrant seize "mere evidence" not described in the warrant. United States v. Dzialak, 441 F.2d 212 (2d Cir.), *cert. denied,* 404 U.S. 883 (1971); United States v. LaVallee, 391 F.2d 123 (2d Cir. 1968). This is ultimately an unpersuasive analysis, however, since *Hayden's* rationale for rejecting the "mere evidence" rule left that rule without viability even in the search warrant context.

[83] 403 U.S. at 514-15. *See* LaFave, *supra* note 65, at 276. *But cf.* Schwartz, *supra* note 1, at 465-66.

[84] 403 U.S. at 515.

[85] *See* note 79 *supra.*

the controlling fourth amendment principles permit the extension of the plain view doctrine to searches conducted by electronic surveillance.

B. Plain View and Electronic Surveillance

1. Judicial Control—In articulating the rationale of the plain view exception, the plurality in *Coolidge* recognized that the use of the term "plain view" as a legal concept must be distinguished from its use as a term of description.[86] Evidence seized by police officers will almost always be in plain view at the moment of seizure, even where the search is illegal. However, the plain view exception may be invoked only to justify the warrantless seizure of evidence where the officer has prior authorization for the intrusion which leads to his plain view discovery.[87] Since a lawful prior intrusion is a condition precedent to a valid plain view seizure, the Court in *Coolidge* found the plain view exception to be consistent with the warrant requirement's objective of eliminating any search or seizure not justified by a careful prior determination of necessity.[88] In the Court's view, plain view alone is never a sufficient justification for the seizure of evidence.[89] Because of this limitation, the Court found the exception to be compatible with the fourth amendment principle of judicial control over searches by law enforcement officers.

It is doubtful whether section 2517(5) can be constitutionally sustained in terms of the plain view exception as it was enunciated in *Coolidge*. By allowing the disclosure and use of communications concerning crimes not specified in a Title III surveillance order, the section extends the plain view concept to the electronic surveillance context without also carrying over an indispensable limitation on the exception. Section 2517(5), in effect, applies the plain view exception in circumstances where the intercepting officer often will have no prior justification for the intrusion. This becomes evident when it is noted that Title III permits, and even anticipates, the seizure of conversations of persons not specified in the court order.[90] There is no specific judicial authorization with respect to

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[86] 403 U.S. at 465.

[87] *Id.* at 466.

[88] *Id.* at 467.

[89] *Id.* at 468.

[90] A principal justification advanced by advocates of electronic surveillance is that it provides law enforcement agencies with a uniquely valuable method for obtaining "strategic intelligence" about the activities of organized crime. In the words of the leading draftsman of Title III:

> It is necessary to subject the known criminals to surveillance, that is, to monitor their activities. It is necessary to identify their criminal and noncriminal associates; it is necessary to identify their areas of operation, both legal and illegal. Strategic intelligence attempts to paint this broad overall picture of the criminal's activities in order that an investigator can ultimately move in with a specific criminal investigation and prosecution.

Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 957-58 (1967) (testimony of Prof. G. Robert Blakey). It has often been argued that such strategic surveillance is incompatible with the

the surveillance of unspecified persons, although the seizure of their conversations is subject to fourth amendment standards, including the principle of judicial control which *Katz* articulated. However, unspecified parties do not receive the protection of a prior judicial authorization, as their conversations are seized in the absence of a prior justification for the official intrusion upon their reasonable expectation of privacy.[91] Accordingly, even if it is conceded that the plain view seizure of a designated person's conversation concerning other crimes is consistent with the limitations set forth in *Coolidge,* such an argument cannot justify the plain view seizure of incriminating conversations of persons who are not named in the court order.

The difficulty with applying the plain view doctrine to electronic searches goes beyond the fact that Title III does not incorporate a crucial aspect of the *Coolidge* rationale. There are important differences between electronic surveillance and conventional searches which suggest that different limitations are required if electronic surveillance is to comport with the principle of judicial control of law enforcement searches. Because it is inherently uncontrollable, electronic surveillance is more likely than a conventional search to lead to seizures from parties not specified in the court authorization.[92] This danger is exacerbated by the fact that often the very purpose of the monitoring is to gather evidence against many individuals, including undesignated parties.[93] Electronic surveillance is further distinguishable from a conventional search in terms of its temporal duration. A conventional search under a warrant is a single intrusion, narrowly limited in time, thereby minimizing the danger of discovering evidence which the warrant does not specify. However, an electronic surveillance order under Title III permits a continuous series of intrusions over a period of weeks, or even months, pursuant to a single showing of probable cause.[94] In such circumstances, incriminating conversations which

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restrictions imposed by *Berger* and *Katz. See, e.g.,* Schwartz, *supra* note 1, at 468-72. *See also* text accompanying notes 60-63 *supra.*

[91] The facts of Cox v. United States, 449 F.2d 679 (10th Cir. 1971), illustrate this point. In that case there was prior judicial authorization with respect to the interception of Richardson's conversations concerning violations of narcotics laws. However, in the course of the surveillance, the police intercepted conversations between Richardson and Cox which implicated the former in a bank robbery. The surveillance of Cox involved an intrusion upon his reasonable expectation of privacy without a prior judicial determination of probable cause and in the absence of an exception to the warrant requirement. Consequently, the plain view concept could not justify the seizure of Cox's conversations without disregarding a key limiting requirement set forth in *Coolidge v. New Hampshire. See* notes 108-21 and accompanying text *infra.*

[92] *See* notes 60-61 and accompanying text *supra.*

[93] *See* note 90 and accompanying text *supra. See also* note 62 *supra.*

[94] In the words of one commentator:

> [The effectiveness of electronic surveillance] normally depends upon a protracted period of lying-in-wait. For however long that may be, the lives and thoughts of many people—not merely the immediate target but all who chance to wander into the web—are exposed to an unknown and undiscriminating intruder.

Spritzer, *supra* note 15, at 189.

the officers are not specifically authorized to seize are almost certain to fall within plain view. When the monitoring officers overhear conversations relating to an offense outside the scope of the judicial order, the seizure of the conversation may be made solely on the basis of their discretionary determination that it is incriminating. Since they search for an extended period of time, the plain view concept enhances the latitude of the police in determining which conversations are subject to seizure.[95] Although the dissemination of this information among law enforcement agencies is not subject to judicial scrutiny, section 2517(5) provides that subsequent judicial authorization or approval is required in order for conversations about other crimes to be admitted into testimony in a criminal proceeding.[96] The statute also states that upon subsequent application the judge must find that the contents were intercepted in accordance with all other provisions of the act.[97] Congress intended that subsequent judicial authorization would rest upon a showing that the original surveillance order was lawfully obtained and that it was sought in good faith and not as a subterfuge for an illegal search.[98] Moreover, Congress envisioned that in most cases the evidence of other crimes would be intercepted incidentally in the course of a lawfully executed order.[99]

Despite the provision of such subsequent judicial oversight, it is questionable whether section 2517(5) satisfies the principle of judicial control articulated in *Katz*.[100] This section permits the use of incriminating evidence, notwithstanding the absence of a prior judicial determination that it should be seized, whereas *Katz* held that there must be a judicial predetermination of the scope of the search, and that law enforcement officers conducting electronic surveillance must observe precise limits established in advance by a specific court order.[101] Moreover, the *Katz* Court explicitly rejected the claim that subsequent judicial approval of an interception is a safeguard equivalent to a procedure of antecedent justification, since after the seizure there is great pressure on the magistrate to ratify a successful surveillance in order to permit the use of the evidence.[102]

Subsequent judicial inquiry probably cannot effectively determine whether an interception is the product of a subterfuge surveillance. Even proponents of the plain view exception concede that electronic surveillance involves a serious danger that police will engage in fishing expeditions for unknown criminal activity while ostensibly searching for the conversa-

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[95] 18 U.S.C. § 2518(5) (1970) only requires that officers "minimize the interception of communications not otherwise subject to interception" and thus is not a limitation on the discretion of officers in intercepting evidence of other crimes.

[96] 18 U.S.C. §§ 2517(1)-(3) (1970). *See* note 10 *supra*.

[97] 18 U.S.C. §§ 2517(1)-(3) (1970).

[98] S. REP. No. 1097, 90th Cong., 2d Sess. 100 (1968).

[99] *Id.*

[100] *See* part I *supra*.

[101] 389 U.S. at 356-59. *See* notes 31-40 and accompanying text *supra*.

[102] 389 U.S. at 358. *See* note 36 *supra*. *See also* Schwartz, *supra* note 1, at 487.

tions which are specified in the court order.[103] An obvious answer to this concern is that there is a parallel risk that conventional search warrants will be misused. However, this argument overlooks the fact that electronic surveillance is necessarily a secret search, whereas a physical search usually provides notice in itself to the subject of the search.[104] Accordingly, subterfuge in the electronic search context is more likely to escape detection.[105]

Those who contend that the plain view doctrine justifies the use of incriminating conversations which are not designated in the order have frequently claimed that the privacy of the individual has already been invaded by the original search during the course of an investigation for a designated offense.[106] Proponents of this point of view argue that, since the intrusion has already occurred, no items seized should be excluded. The exclusion of such evidence would simply transform the right to privacy into the right not to be convicted of a crime. This rationale for sustaining the plain view doctrine in the electronic surveillance context rests on the questionable assumption that the dissemination and use of intercepted communications does not involve a continuing intrusion against the defendant's interest in privacy. Furthermore, this line of analysis suggests that even though law enforcement officers have violated the defendant's fourth amendment right to be secure from an unreasonable search, as defined by *Katz*,[107] the defendant is not protected from prosecution on the basis of the unlawfully obtained evidence. To justify the use of the evidence by arguing that the defendant's privacy has already been violated is to beg the question whether the defendant has been subjected to an unreasonable search.

The constitutional implications of the tension between the plain view exception and judicial control of electronic surveillance became evident in *Cox v. United States*.[108] *Cox* stemmed from a federal court order

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[103] *See, e.g.*, Biddle, *Court-Supervised Electronic Searches: A Proposed Statute for California*, 1 PACIFIC L.J. 97 (1970).

[104] Katz v. United States, 389 U.S. 347, 355 n.16 (1970).

[105] Under Title III the subject of an electronic surveillance order has an absolute right to postsearch notice. 18 U.S.C. § 2518(8)(d) (1970). However, persons not named in the order, even though they may be the actual subjects of subterfuge surveillance have no right to be notified of the interception of their conversations unless the contents are to be disclosed at a judicial proceeding. 18 U.S.C. § 2518(9) (1970). Even if communications are disseminated among law enforcement agencies, no notice is required, unless the communications are introduced at a judicial proceeding. *Id.*

[106] The commentary to the ABA Standards asserts:

> [T]he privacy of the individual has already been invaded lawfully by the original search during the course of an investigation for a designated offense. Formulating a rule which would prevent the use of such evidence would not change police conduct in the future or protect as such citizen privacy.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO ELECTRONIC SURVEILLANCE 145 (1968). *See also* Biddle, *supra* note 103, at 116.

[107] *See* note 34 *supra*.

[108] 449 F.2d 679 (10th Cir. 1971).

authorizing agents of the Bureau of Narcotics and Dangerous Drugs to intercept wire communications to and from the telephone of Richardson. The authorization had been granted on the basis of an affidavit establishing probable cause with respect to the violation of federal narcotics laws. However, while monitoring conversations over the tapped phone, the federal agents overheard and recorded conversations relating to a bank robbery. Among the parties to the incriminating conversations were several persons not specified in the wiretap order, including the petitioner Cox. Pursuant to section 2517(5), a federal district court authorized the use and disclosure of these conversations at Cox's trial for bank robbery.[109]

In appealing his conviction, Cox contended that section 2517(5) is unconstitutional on its face in that it contravenes the fourth amendment.[110] Cox's objection was that section 2517(5) allows the use of intercepted telephone communications where the particular interception has not been previously authorized by a judge. He further maintained that the subsequent authorization procedure required under section 2517(5) did not satisfy the fourth amendment requirement of judicial control by means of specific prior authorization. Although the Tenth Circuit conceded that specific prior authorization is prescribed by *Berger, Katz,* and *Osborn,* it noted that the Supreme Court had not directly passed on the question of subsequent judicial approval of unanticipated incriminating material obtained incident to a warrant describing other subject matter.[111] The court was not persuaded by Cox's challenge to section 2517(5), although it did not base its decision on the plain view doctrine, which the government had advanced in support of the provision's constitutionality.[112] Contending that the general principles controlling electronic surveillance orders were similar to those governing search warrants for the seizure of tangible evidence, the government analogized the seizure of unanticipated conversations to the seizure of unanticipated physical evidence. The court did not find the comparison persuasive, concluding that the quest for private communications is a different and more traumatic intrusion than is the search for physical objects.[113] While the court did not elaborate this point, it was simply restating a basic premise of the *Berger* and *Katz* decisions.[114]

Underlying the Supreme Court's view of fourth amendment standards is the belief that electronic surveillance is inherently unmanageable.[115] Viewing electronic searches as involving a grave threat to individual security from unreasonable searches and seizures, the Court has emphasized that a specific prior authorization is an indispensable precondition of law-

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109 *Id.* at 679-82.

110 *Id.* at 682.

111 *Id.* at 685.

112 *Id.* at 686.

113 *Id. See* notes 60-63 and accompanying text *supra. See also* notes 92-95 and accompanying text *supra.*

114 *See* part I *A supra.*

115 *See* notes 61-62 *supra.*

ful surveillance.[116] The *Cox* court shared this awareness of the unmanageability of electronic surveillance, noting that once the listening commences it becomes infeasible to turn it off when an unauthorized conversation is overheard.[117] However, the court concluded that it would be unreasonable to draw distinctions between that information which is specifically authorized and that which is unanticipated and which is seized in the course of an authorized search,[118] rather than finding that this unmanageability led to violations of Cox's fourth amendment right to be free from an unauthorized search and seizure.[119]

The *Cox* court upheld the use of the intercepted statements on the ground that the search was reasonable, thus departing from the mode of fourth amendment analysis which the Supreme Court relied upon in *Katz*. *Katz* emphasized that a seizure could not be deemed reasonable merely because the officers had engaged in a restrained and limited surveillance.[120] Prior judicial authorization was held to be a *sine qua non* of a reasonable search and seizure, unless an exception to the warrant requirement was applicable. Any other search is *per se* unreasonable and in violation of the fourth amendment.[121] While the *Cox* court conceded that the search had not received prior judicial authorization, the court, in sustaining a conviction based on the seizure of Cox's words, was reluctant to base its decision on any exception to the warrant requirement. However, in rejecting the *Katz* approach, the Tenth Circuit advanced no alternative framework for principled analysis of the fourth amendment. Concluding that the intrusion was reasonable and that section 2517(5) is constitutional, the court, in effect, nullified the warrant requirement of the fourth amendment as applied to the defendant Cox.

2. Particularity—In articulating the circumstances under which the plain view exception will permit departure from the warrant requirement, the Supreme Court in *Coolidge v. New Hampshire*[122] held that a lawful plain view seizure requires that the evidence be inadvertently discovered, and that its incriminating character be immediately apparent to the officers who make the seizure. This restriction renders the exception consistent with the particularity requirement of the fourth amendment by preventing the police from transforming an initially limited search into a general exploratory search.[123]

This limitation on the plain view exception cannot be meaningfully in-

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[116] *See* part I *B supra.*

[117] 449 F.2d at 686-87.

[118] *Id.*

[119] This was the conclusion which Justice Douglas drew from the Tenth Circuit's discussion in *Cox*. Cox v. United States, 406 U.S. 934 (1972), *denying cert. to* 449 F.2d 679 (10th Cir. 1971) (Douglas, J., dissenting).

[120] *See* notes 35-36 and accompanying text *supra.*

[121] *See* notes 33-35 and accompanying text *supra.*

[122] 403 U.S. 443 (1971).

[123] 403 U.S. at 469-70. For an extensive discussion concerning the approach of lower courts to this limitation, see Note, *supra* note 65. *See also* notes 73-87 and accompanying text *supra.*

corporated into the electronic search context. The key factor which distinguishes electronic surveillance from conventional searches is the unmanageability of the former.[124] Because of this difference the extension of the plain view exception to the electronic search context raises serious questions with respect to the particularity requirement of the fourth amendment. Whereas a conventional search warrant can designate unique objects to be found in the place which is to be searched, the specification of the item to be seized is unusually speculative and imprecise when the object is a future conversation.[125] Accordingly, officers conducting electronic surveillance are likely to have a less clear idea of the object of their search than officers executing a conventional warrant. They may also have greater difficulty in determining whether they have realized the object of the search.[126] Since the effective implementation of the particularity standard requires that the executing officers know what they are looking for and when they should search no further, electronic surveillance involves an especially serious danger that even officers with lawful intentions will exceed the scope of the court order.[127]

Particularity is especially difficult to achieve in the conduct of electronic surveillance for another reason. In a conventional search, the officer must engage in some overt act in order to seize an object. He must determine whether the object to be seized is specified in the warrant or whether it is seizable under the plain view exception because of its immediately apparent incriminating character. However, in the conduct of electronic surveillance, not only is it inevitable that there are many seizures which are unrelated to the offense for which the order is issued, but the seizure of a conversation often occurs before its character has been determined

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[124] *See* notes 60-61 and accompanying text *supra*.

[125] In the words of one court:

> [I]t is much easier to describe with particularity in a warrant the nature and contents of a physical object than a conversation which has not yet been heard.

United States v. Focarile, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd,* 416 U.S. 505 (1974). *See also* Spritzer, *supra* note 15, at 189.

[126] *See* note 128 *infra*.

[127] In comparing electronic surveillance and conventional searches, Professor Spritzer noted:

> [T]here are limitations in the nature and practice of the conventional search that cannot be incorporated in the electronic search. It is undoubtedly true that if the police are engaged in a visual search for a designated object, they are very likely to see numerous other tangible items in their quest for the specified one. However, it is by no means inevitable that they will see or examine every possession of the resident. The officer engaged in the traditional search announces his identity and provides notice of the extent of his authority. The homeowner or office tenant may be able to satisfy the warrant by voluntarily producing or promptly revealing the item in question. In other situations, the character of the described item will itself impose limitations.
>
> [Electronic surveillance] has no channel and is certain to be far more pervasive and intrusive than a properly conducted search for a specific, tangible object at a defined location.

Spritzer, *supra* note 15, at 188-89.

to be incriminating.[128] Whereas the particularity requirement in the setting of a conventional search is likely to limit the seizure to items specified in the warrant, electronic surveillance involves the seizure of many items prior to a determination of whether they are within the scope of either the warrant or an exception to the warrant requirement. Therefore, since even the most carefully conducted electronic search resembles a dragnet procedure which is likely to produce a vast evidentiary windfall, the plain view doctrine constitutes a much broader exception with respect to electronic searches than with respect to conventional searches.

It may be argued that since the seizure of many conversations not specified in the court order is inevitable, this factor actually cuts in favor of section 2517(5)'s extension of the plain view exception. This argument rests on the tacit assumption that the extension of the plain view concept to electronic surveillance does not affect the officers' conduct in executing a surveillance order.[129] However, some commentators have noted that section 2517(5) provides a disincentive for officers to limit the scope of their search, thus undermining the particularity requirement.[130] The exclusion of evidence obtained from conversations outside the scope of the court order, it is argued, would provide some limitations on the scope of surveillance by reducing the incentive of officers to exceed the scope of the surveillance order.[131]

The particularity standard underlying section 2517(5) does not fully comport with the strict standard mandated by *Berger v. New York*,[132] where the Court's premise was that the need for particularity is especially great in searches conducted by electronic surveillance. *Berger* struck down a procedure which gave the executing officer a "roving commission" to seize any conversations, regardless of their nexus with the purpose of the search.[133] By permitting executing officers to seize any incriminating conversations outside the scope of the initial authorization, the plain view

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[128] In the words of one court:

> [In a conventional search] the law enforcement officer can by sight and touch generally determine before he takes the item into his custody whether it is something which he is authorized to seize by the warrant while in the [case of electronic surveillance] he can generally determine with exactness whether the conversation is authorized to be seized by the warrant only when he has already taken it into his custody by having heard it in its entirety.

United States v. Focarile, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

[129] *See* note 106 *supra.*

[130] *See, e.g.*, Schwartz, *supra* note 1, at 465-66. Since section 2517 permits the use of unspecified conversations seized in the course of electronic surveillance, it is arguable that investigating officers are encouraged to engage in a general, exploratory surveillance on the basis of the initial court authorization. This argument is especially persuasive when one recalls that electronic surveillance is most valuable for gathering strategic intelligence about criminal activities. *See* note 90 and accompanying text *supra.*

[131] Schwartz, *supra* note 1, at 463-64.

[132] 388 U.S. 41 (1967).

[133] *Id.* at 59.

exception effectively converts every court order for surveillance into a "roving commission," similar to those which *Berger* prohibited.[134]

Despite the disparity between *Berger* and Title III, the courts which have considered the question have upheld section 2517(5), rejecting constitutional challenges directed at its compliance with the particularity requirement of the fourth amendment.[135] For example, in *United States v. Escandar,*[136] where the defendants unsuccessfully claimed that section 2517(5) was unconstitutional on its face as allowing an indiscriminate and overbroad search, the court observed that the section permits the seizure and use of conversations concerning other crimes only on the condition that the original warrant was valid and that efforts had been made to minimize interceptions of innocent conversations. The controlling principle, in the court's view, was that if the original court order is valid and its execution has been lawfully conducted, seizure of unrelated incriminating evidence is permissible.[137] The *Escandar* decision uncritically extends the plain view exception from the conventional search context to cases involving electronic surveillance. The logic underlying this extension is straightforward. Since electronic surveillance is within the scope of the fourth amendment, it is controlled by the recognized exceptions to the warrant requirement.[138] This approach, however, does not rest upon any perceptible analytical justification for the analogy drawn between physical and electronic searches insofar as the plain view doctrine is concerned, and it conflicts with the recognition in *Berger* that the unusually intrusive nature of electronic surveillance requires an especially strict application of the particularity standard in order to prevent the executing officer from engaging in a general exploratory search.[139] The plain view doctrine may satisfy constitutional standards for physical searches pursuant to a warrant, since such searches are inherently limited in scope by the nature of the object being sought. However, in the less manageable context of the electronic search, the plain view exception involves a greater risk to the particularity requirement, which the courts upholding section 2517(5) have failed to consider carefully.

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[134] *Id.* at 57.

[135] *See, e.g.,* United States v. Tortorello, 342 F. Supp. 1029 (S.D.N.Y. 1972), *aff'd,* 480 F.2d 764 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971); United States v. Escandar, 319 F. Supp. 295 (S.D. Fla. 1970); *cf.* United States v. Denisio, 360 F. Supp. 715 (D. Md. 1973).

[136] 319 F. Supp. 295 (S.D. Fla. 1971).

[137] *Id.* at 301.

[138] In United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971), the same court again considered whether section 2517(5) measures up to the particularity standard of the fourth amendment. Again the court saw no merit in the petitioners' contention that in not excluding intercepted conversations about a crime not specified in the order, the provision lacked particularity. Since it was "settled law" that unspecified items might be seized if discovered in the course of a lawful search under a warrant, "[b]y analogy, the same rule should apply to conversations, which are seizures under the *Katz* case." *Id.* at 307.

[139] *See* part I *supra.*

IV. CONCLUSION

The seizure and use of conversations concerning crimes which are not designated in a Title III court order cannot be constitutionally justified as simply the extension of a clearly delineated exception to the warrant requirement of the fourth amendment. First, it remains to be resolved whether the plain view concept applies to searches under a warrant. The subsequent use provision of Title III is in direct conflict with *Marron,* and if the Supreme Court upholds the principle that an officer executing a warrant may not seize items not designated therein, then section 2517(5) is clearly unconstitutional. However, even if the plain view doctrine is eventually sustained with respect to searches pursuant to a warrant, the limitations on the doctrine do not permit its extension to cases involving electronic surveillance. Because of important differences between conventional searches and electronic surveillance, such as the inherent unmangeability and intrusiveness of the latter, the extension of the plain view exception to electronic surveillance would undermine the constitutional requirements of judicial control and particularity.

Section 2517(5) can be justified in terms of the plain view exception only if a prior justification for the intrusion is not deemed an essential precondition, and only if the exception is held to apply even where the incriminating character of the item seized is not readily apparent. The existing parameters of the plain view exception, as articulated in *Coolidge v. New Hampshire,* do not give the exception such a broad scope.

If the plain view exception does not sustain section 2517(5), then that provision can only be upheld through an approach similar to that adopted by the court in *Cox v. United States.* Rejecting the plain view analogy, the *Cox* court arrived at a determination of the reasonableness of a search without reference to the warrant requirement or any specifically established exception. To resolve the constitutionality of section 2517(5) in this manner requires a dramatic and unwarranted departure from the existing framework of fourth amendment doctrine. Therefore, principled analysis should lead courts to conclude that section 2517(5) is unconstitutional.

—Raymond R. Kepner