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LEGISLATIVE REFORM

WIRETAPPING AND THE CONFINES OF THE MARITAL HOME: *What Part of "Any" Don't You Understand?*

I. INTRODUCTION

Family values and marital relationships have been the topic of sociological, political, and legal debate in recent years. At the center of that debate is electronic surveillance which has become a method of modern warfare in the marital home as ammunition for both divorce cases and custody battles. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 U.S.C. §§ 2510-2520¹ regulates electronic surveillance and has been a subject of great disagreement among the Federal Courts of Appeals.²

The split in the circuits is centered upon whether the interception of telephone conversations of one spouse by the other without the knowledge or consent of the spouse being wiretapped is included within the statutory prescription of the Omnibus Crime Control and Safe Streets Act. The Fifth Circuit, in *Simpson v. Simpson*³ held that Title III did not reach the tapping by one spouse of the other spouse's phone conversation. Thus, interspousal immunity to the civil cause of action created by § 2520⁴ was recognized by the Fifth Circuit.⁵ Although this holding has been followed by the Second Circuit,⁶ it has been expressly rejected by the Fourth,⁷ Sixth,⁸ Eighth,⁹ and Tenth Circuits.¹⁰

The effect of the split concerning the interspousal immunity exception creates confusion as to the intent and meaning of the statute. This confusion results in the obvious problem of spousal wiretapping being legal and unpunishable in one state while in other jurisdictions it results in both civil liability and criminal punishment.

1. 18 U.S.C. §§ 2510-2520 (1988) [hereinafter cited as Title III or by section].

2. *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974).

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

4. 18 U.S.C. § 2520 provides:

(a) In general.—Except as provided in § 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

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

6. *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977).

7. *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984).

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

9. *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989).

10. *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991).

II. INTERSPOUSAL WIRETAPPING

A. Interspousal Immunity Exception: *Simpson v. Simpson*

In *Simpson v. Simpson* the Fifth Circuit Court of Appeals was the first federal court to apply the wire interception provisions of Title III to interspousal wiretapping.¹¹ Mr. Simpson placed a tapping device on the phone within his marital residence to confirm his suspicions that his wife was unfaithful to him.¹² Mr. Simpson taped conversations between his wife and another man.¹³ He further proceeded to play the tapes to various individuals including a lawyer.¹⁴ The tapes resulted in an uncontested divorce from his wife.¹⁵ Mrs. Simpson brought a civil suit against her husband to recover damages pursuant to Title III.¹⁶

The language which allows civil suits, and upon which Mrs. Simpson relied, reads:

any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation.¹⁷

The Fifth Circuit Court of Appeals held that the wire interception provisions of Omnibus Crime Control and Safe Streets Act of 1968 did not apply to the interception by a spouse of a partner's conversations in "the marital home."¹⁸ The Fifth Circuit based its argument on several contentions. Although the court conceded that the plain language of the Act included interspousal wiretapping, it argued that the Congress did not intend for the act to have such far-reaching results.¹⁹ The court continued by asserting that domestic conflicts within the home are usually handled by states, and that Congress did not intend to encroach upon the territory of traditional state matters.²⁰

The Fifth Circuit continued by conducting an "exhaustive" search to determine the legislative intent behind Title III.²¹ The court decided that Congress did not intend to regulate interspousal wiretapping through Title III.²² The court found that the major purpose of Title III is to combat organized crime.²³ The court determined that although Congress alluded to the dilemma of interspousal wiretapping its inclusion in the statute was somewhat incidental.²⁴ The court lent support to this contention by exposing the lack of testimony devoted to interspousal wiretapping in comparison to the testimony offered on crime control.²⁵ In addition, the court explained that the majority of testimony on interspousal wiretapping dealt with an intrusion into the marital home

11. 490 F.2d 803 (5th Cir. 1974), *cert denied*, 419 U.S. 897 (1974).

12. *Id.* at 804.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. 18 U.S.C. § 2520(a) (1988) (emphasis added).

18. *Id.* at 805.

19. *Id.* at 805.

20. *Id.*

21. *Id.* at 806.

22. *Id.* at 805.

23. *Id.* at 807.

24. *Id.* at 807.

25. *Id.*

by a third party such as a private investigator.²⁶ The court distinguished wiretapping by an "outside third party" with the consent of one spouse from the facts in *Simpson*.²⁷ The court surmised that this type of third party intrusion is included within the language and intent of the statute:

[T]o our minds, a third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse's privacy of a much greater magnitude than is personal surveillance by the other spouse. The latter, it seems to us, is consistent with whatever expectations of privacy spouses might have vis-a-vis each other within the marital home.²⁸

The court conceded, however, that the legislative history of Congress suggested a general awareness of the problem of interspousal wiretapping within the home.²⁹ However, the court pointed out that Title III contains an exception which does not prohibit a person from intercepting a family member's telephone conversation by using an extension.³⁰ The court elected to analogize *Simpson* with this exception and thereby concluded that Congress did not intend to intrude upon the confines of the marital home.³¹

The Second Circuit in *Anonymous v. Anonymous*³² took the same view the Fifth Circuit laid out in *Simpson v. Simpson*.³³

B. Interspousal Wiretapping: Included within Title III

In *United States of America v. Jones*, the Sixth Circuit clearly attacked the rationale of *Simpson*.³⁴ In *Jones*, Mr. Jones, who was separated from his wife, intercepted his wife's telephone calls after he suspected that she was involved in extramarital affairs.³⁵ Mr. Jones utilized the taped telephone conversations in obtaining the divorce.³⁶ Criminal charges were then filed against Mr. Jones pursuant to Title III.³⁷

The Sixth Circuit Court of Appeals found the language of Title III to be straightforward and comprehensive.³⁸ The court's own review of Title III's legislative history led them to the conclusion that Title III "establishes a broad prohibition on all private electronic surveillance and that a principal area of congressional concern was electronic surveillance for the purposes of marital litigation."³⁹ The court continued by explaining that any exceptions to Title III, including an interspousal immunity, would have been included in the statute. The court cited statements made by Senator Long, the Chairman of the subcommittee, who identified three major areas where private electronic surveillance was widespread: "The three large areas of snooping in this (non-governmental) field are (1) industrial, (2) divorce cases, and (3) politics. So far,

26. *Id.* at 808.

27. *Id.* at 809.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. 558 F.2d 677 (2d Cir. 1977).

33. 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974).

34. 542 F.2d 661 (6th Cir. 1976).

35. *Id.* at 663.

36. *Id.*

37. *Id.*

38. *Id.* at 668.

39. *Id.* at 669.

we have heard no real justification for continuance of snooping in these three areas."⁴⁰

The court also opined on the distinction drawn in *Simpson*⁴¹ between third-party interceptions and spousal interceptions. The court determined that no such distinction exists:

In our view, it is a classic 'distinction without a difference.' For purposes of federal wiretap law, it makes no difference whether a wiretap is placed on a telephone by a spouse or by a private detective in the spouse's employ. The end result is the same, the privacy of the unconsenting parties to the intercepted conversation has been invaded.⁴²

Therefore, the court determined that the harm suffered by both intrusions were equivalent and no distinction can be made in regards to the end result - a gross invasion of privacy.

The court rejected the notion that the doctrine of interspousal immunity prevented the application of Title III to cases involving interspousal wiretapping.⁴³ First, the court demonstrated that the doctrine of interspousal immunity is a state law that is not entirely uniform.⁴⁴ The current trend is that the doctrine is outdated and many states have abrogated it.⁴⁵ Second, because Title III is a federal law it is a serious question as to whether a doctrine of state tort law should even influence a federal statute.⁴⁶ Third, the doctrine of interspousal immunity does not apply to criminal prosecutions.⁴⁷

The Fourth, Eighth, and Tenth Circuits have held that interspousal wiretapping is actionable under Title III.⁴⁸

III. TITLE III REVISIONS

Marital dissolution has become an unfortunate trend in our society in recent years. As a result, electronic surveillance has frequently been employed to aid in divorce and custody cases.

Title III was clearly meant to include interspousal wiretapping. The provisions are unambiguous and comprehensive. Professor G. Robert Blakey of the Notre Dame Law School, one of the drafters of Title III, asserts that Title III was intended to include interspousal wiretapping.⁴⁹ When asked to comment on the current circuit split, Professor Blakey remarked, "It is hard for me to understand how judges fail to see that 'any person' means 'any person.'"⁵⁰ Although a reading of the statute inclines one to agree with the view espoused by Professor Blakey, an unfortunate split remains in the circuits as to whether interspousal immunity applies to Title III. Therefore, in the con-

40. *Id.*

41. 490 F.2d 803 (5th Cir. 1974), *cert denied*, 419 U.S. 897 (1974).

42. 542 F.2d 661, 670 (6th Cir. 1976).

43. *Id.* at 671.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. 944 F.2d 1537, 1540 (10th Cir. 1991); 868 F.2d 970, 973 (8th Cir. 1989); 732 F.2d 372, 374 (4th Cir. 1984).

49. Interview with G. Robert Blakey, Professor of Law, University of Notre Dame Law School, Notre Dame, Indiana (March 1, 1994).

50. *Id.*

text of facilitating application of the statute consistent with legislative intent, Congress should amend the definition of "person" and "aggrieved person" in § 2510 of Title III. The definitions of "person" and "aggrieved person" should be amended as follows:

(6) "person" means any employee, or agent of the United States or any State or subdivision thereof, and any individual *not limited by relationship of marriage*, partnership, association, joint stock company, trust, or corporation.⁵¹

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication *not limited by relationship of marriage*, or a person *not limited by relationship of marriage* against whom the interception was directed.⁵²

The redraft would clarify the split because courts would not be inclined to employ the flawed interpretation of Title III used in *Simpson*. Courts would interpret cases involving interspousal wiretapping in a manner which is consistent with the plain meaning of the statute, the legislative intent of Congress, and decisions such as *Jones*.

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51. § 2510(6) currently reads:

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation.

52. § 2510(11) currently reads:

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

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