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The Authorization Procedure: Fact or Fiction.

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ons. Aside from seeking a pardon, the offender can only move to a more progressive state in order to regain the franchise.

The most obvious exception to the general rule excluding felons stems from society's own inadequate methods of crime control: those who are not caught and convicted for their crimes are, of course, never deprived of the right to vote. Following the reasoning of the "purity of the ballot" theory, one might ask whether states with a higher than average percentage of unsolved crimes have a less "pure" ballot.

The recent past has not been kind to Texas voting laws. One by one, the barriers to suffrage have been falling.[49] As yet, the United States Supreme Court has not dealt with the question of the disfranchisement of felons in a definitive manner. There is a discernible pattern of opinions suggesting, however, that laws like the one in Texas are eventually doomed as a result of judicial expansion of the equal protection clause.

This year, Texas has an opportunity to reconsider its statutory and constitutional voting exclusions. During this year's session, the legislature will consider a new state constitution. One may assume that the Constitutional Revision Commission intends to write a document that will reflect the realities of a society that is mature enough to live up to its promise of rehabilitation to the offender. By eliminating the provisions that disfranchise felons, Texas can show that it is a leader, not a follower, in the area of rehabilitation and treatment of felons. By choosing not to eliminate the provisions, it is evident that Texas would only be postponing an inevitable, progressive change. More important, the state would continue to sanction the special status of felons, that being something less than full citizenship.

William R. Schipul

TELECOMMUNICATIONS—OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968—THE AUTHORIZATION PROCEDURE: FACT OR FICTION? 18 U.S.C. §§ 2510-20 (1970).

In the wake of a rising crime rate and a growing fear of the awesome power and influence of organized crime,[1] the President appointed a Commission on Law Enforcement and the Administration of Justice.[2] The Commission reported:

49. *See* 50 NORTH CAROLINA L. REV. 903 (1972).

1. *See* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2116 (S. REP. No. 1097, 90th Cong., 2d Sess.).

2. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

> A majority of the members of the Commission believe that legislation should be enacted granting *carefully circumscribed authority* for electronic surveillance to law enforcement officers. . . .[3]

The Commission had discovered that organized crime utilizes wire and oral communications and concluded that interception was vital to law enforcement.[4] Nearly every law enforcement association in the nation recommended to the Congress that specific procedures to obtain judicial approval of interceptions be adopted.[5]

The Safe Streets Act of 1968,[6] the first comprehensive federal telecommunication legislation, superseded Section 695 of the Federal Commission Act of 1934[7] which prohibited interception and divulgence of wire communication.[8] Specifically designed to comply with constitutional standards set forth in the early Supreme Court cases[9] the new Act became the subject of

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3. *Id., quoted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2286 (S. REP. NO. 1097, 90th Cong., 2d Sess.) (emphasis added). All members of the Commission believe that if authority to employ these techniques is granted it must be granted only with stringent limitations . . . . *Id.* at 2286.

4. *See* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2284-86 (S. REP. NO. 1097, 90th Cong., 2d Sess.).

5. *Id.* at 2163:

(1) The President's Commission on Law Enforcement and Administration of Justice.
(2) The Judicial Conference of the United States.
(3) National Association of Attorneys General.
(4) National District Attorneys Association.
(5) Association of Federal Investigators.
(6) All living former U.S. attorneys for the southern district of New York.
(7) The National Council on Crime and Delinquency.

6. 18 U.S.C. §§ 2510-20 (1970) [hereinafter referred to as the Act or Safe Streets Act]. Signed into law on June 19, 1968. The Act, Pub. L. No. 90-351, 82 Stat. 197, is divided into five titles: Title 1, Law Enforcement Assistance; Title II, Admissibility of Confessions, Reviewability of Admission in Evidence of Confessions in State Cases, Admissibility in Evidence of Eyewitness Testimony and Procedures in Obtaining Writs of Habeas Corpus; Title III, Wiretapping and Electronic Surveillance; Title IV, State Firearms Control Assistance; Title V, General Provisions. Title III is a combination of the Federal Wire Interception Act introduced by Senator McClellan (Dem. Ark.) on Jan. 25, 1967 and the Electronic Surveillance Control Act of 1967 introduced by Senator Hruska (Rep. Neb.) on June 29, 1967. The Act prohibits surveillance except in cases where needed for the investigation of certain crimes and then only within prescribed limits.

7. 47 U.S.C. § 605 (1970) (originally enacted as Act of June 19, 1934, 48 Stat. 1103).

8. Prior to its amendment by title III, section 605 provided:

> [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same . . . for his own benefit or for the benefit of another not entitled thereto . . . .

Id. § 605.

9. *See* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2113 (S. REP. NO. 1097, 90th Cong., 2d Sess.). Congress considered the constitutional standards set out in Berger v. New York, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967); Katz v. United

controversy and judicial interpretation.[10] Critics especially feared that title III was an undesirable invasion of the right to privacy.[11]

An unlikely source of litigation, the authorization requirement has become a grave source of irritation to the Justice Department.[12] The appropriate section reads as follows:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications . . . .[13]

Seeking to prevent abuse, the Act minimizes discretion and creates responsibility in the authorizing officials by setting up a two step process:[14] First, the wiretap application must be authorized by the Attorney General or Assistant Attorney General specially granted authority to act by the Attorney General. Second, the identity of the person authorizing the application must be made known to the authorizing judge and through his order, to any party to a proceeding in which intercepted communications are offered in evidence.

Though other requirements are the essential safeguards of the Act,[15] the

States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). For a discussion of the requirements set forth in these cases see Note, *Eavesdropping Provisions of the Omnibus Crime Control and Safe Streets Act of 1968: How Do They Stand in Light of Recent Supreme Court Decisions?*, 3 VALPARAISO U.L. REV. 89 (1968).

10. *See* Schwartz, *The Legitimization of Electronic Eavesdropping: The Politics of "Law and Order"*, 67 MICH. L. REV. 455 (1969).

11. The constitutionality of title III has been affirmed by most courts but questioned in numerous law review articles. *E.g.*, United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972); United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971); United States v. King, 335 F. Supp. 523 (S.D. Cal. 1971); United States v. Lawson, 334 F. Supp. 612 (E.D. Pa. 1971); United States v. Becker, 334 F. Supp. 546 (S.D.N.Y. 1971); United States v. Perillo, 333 F. Supp. 914 (D. Del. 1971); United States v. Leta, 332 F. Supp. 1357 (M.D. Pa. 1971); United States v. Scott, 331 F. Supp. 233 (D.D.C. 1971); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971); United States v. Escander, 319 F. Supp. 295 (S.D. Fla. 1970), *rev'd on other grounds sub nom.*, United States v. Robinson, 468 F.2d 189 (5th Cir. 1972), *remanded*, No. 71-1058, 5th Cir., Jan. 16, 1973. Some law review articles have thought title III to be unconstitutional. *E.g.*, Fife, *Eavesdropping Under Court Order and the Constitution: Berger v. New York*, 1 LOYOLA U.L. REV. 143 (1968) (Los Angeles); Schwartz, *The Legitimization of Electronic Eavesdropping: The Politics of "Law and Order"*, 67 MICH. L. REV. 455 (1969); Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969).

12. At the time of United States v. Robinson, 468 F.2d 189 (5th Cir. 1972), *remanded*, No. 71-1058, 5th Cir., Jan. 16, 1973, the principal case in this area, the Justice Department informed that court that there were 13 unreported decisions of the United States District Courts pending appeal in six circuits. There were also 92 cases pending in 29 different United States District Courts.

13. 18 U.S.C. § 2516(1) (1970) (the authorization requirement).

14. *See* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2189 (S. REP. No. 1097, 90th Cong., 2d Sess.).

15. There are several independent procedural requirements in title III in addi-

authorization procedure clearly was meant to be more than a technical formality.[16] This is illustrated in *United States v. Robinson*,[17] the leading and most often cited case for the proposition that a strict compliance with the statute is necessary. The affidavits filed in the case clearly show that there was deviation from the statutory scheme set forth in 18 U.S.C. § 2516(1).[18] The Executive Assistant who was authorized to act in this situation by the Attorney General merely approved actions by designating Assistant Attorney General Will Wilson to authorize the judicial application. Then, Wilson's deputy approved the authorization as he did in all cases where Wilson was designated. Thus, neither the Attorney General nor the Assistant Attorney General acted personally in authorizing the application to the district judge.

The government argued that the power of the Attorney General to authorize a wiretap application is in fact delegable under another statutory provision, 28 U.S.C. § 510.[19] However, the Court of Appeals for the Fifth Circuit summarily rejected this contention.[20]

> Since § 510 already existed when § 2516(1) was enacted, the inclusion in the latter statute of language specifying who the Attorney General

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tion to the authorization requirement; *i.e.*, the wiretapping may not be authorized for an unduly long period of time, probable cause must be shown, all other avenues of gaining the evidence must be exhausted, the identity of the individual observed and the purpose must be disclosed. *See* 18 U.S.C. § 2518(4) (1970).

16. This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices will develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way toward guaranteeing that no abuses will happen.

1968 U.S. CODE CONG. & AD. NEWS 2112, 2185 (S. REP. No. 1097, 90th Cong., 2d Sess.).

17. 468 F.2d 189 (5th Cir. 1972), *remanded*, No. 71-1058, 5th Cir., Jan. 16, 1973. Remand was made for an evidentiary hearing to determine if the wiretap applications were properly authorized under 18 U.S.C. § 2516(1) (1970). The Court of Appeals for the Fifth Circuit disfavored resolving the authorization issue simply on the basis of two affidavits.

18. Sol Lindenbaum duly sworn said:

> . . . I reviewed the submitted material, concluded that the request satisfied the requirements of the statute, and also concluded, from my knowledge of the Attorney General's actions on previous cases, that he would approve the requests if submitted to him. Because the Attorney General was unavailable on any of the three occasions, I approved each of the requests pursuant to the authorization which he had given to me to act in the circumstances and caused his initials to be placed on memoranda to Will Wilson. The memoranda approved requests that authorization be given to Robert W. Rust to make the applications for interception orders.

No. 71-1058, at 14-15 (5th Cir. Jan. 16, 1973) (Appendix).

19. 28 U.S.C. § 510 (1970) states: "The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."

20. *Accord*, United States v. Narducci, 341 F. Supp. 1107, 1114 (E.D. Pa. 1972); United States v. Aquino, 338 F. Supp. 1080, 1083 (E.D. Mich. 1972).

> could specially designate to perform the instigating function would have been surplusage if Congress meant that the Attorney General could authorize the performance of this duty by any officer, employee or agency of his department. We therefore conclude that § 2516(1) was intended to operate as a limit upon § 510, rather than that § 510 broadened the circumscribed authority set out in § 2516(1).[21]

The numerous cases decided around the time of *Robinson* indicate that the procedure followed therein was by no means unusual.[22] On the contrary, it appears to have been the standard operating procedure. In *United States v. Focarile*,[23] there was a request for approval of a wiretap when the Attorney General was away from Washington, D.C. Mr. Lindenbaum, the Executive Assistant to the Attorney General, reviewed the application and supporting documents. From his alleged knowledge of previous actions by the Attorney General on similar cases, Mr. Lindenbaum approved the request in the belief that the Attorney General *would have* approved it.[24] The court reached the conclusion that neither the Assistant Attorney General nor the Attorney General authorized the application and accordingly suppressed the wiretap evidence.

Having failed in the argument that 28 U.S.C. § 510 provides the Attorney General with general delegation authority, the government resurrected the so-called "alter ego" theory. This theory claims that given the nature of the office and the practical necessity of having a personal aide with fiduciary responsibility, the aide and the officer should be treated as one.

Applying the theory to the authorization requirement, the government contention has been that when the Attorney General is unavailable, the Executive Assistant is the Attorney General's "alter ego."[25] Delegation to

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21. United States v. Robinson, 468 F.2d 189, 191 (5th Cir. 1972), *remanded*, No. 71-1058, 5th Cir., Jan. 16, 1973.

22. *E.g.*, United States v. Giordano, 469 F.2d 522 (4th Cir. 1972); United States v. Fox, 349 F. Supp. 1258 (S.D. Ill. 1972); United States v. Vasquez, 348 F. Supp. 532 (C.D. Cal. 1972); United States v. Boone, 348 F. Supp. 168 (E.D. Va. 1972); United States v. Narducci, 341 F. Supp. 1107 (E.D. Pa. 1972); United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972); United States v. Aquino, 338 F. Supp. 1080 (E.D. Mich. 1972); United States v. Baldassari, 338 F. Supp. 904 (M.D. Pa. 1972); United States v. Chial, 336 F. Supp. 261 (W.D. Pa. 1972), *appeal docketed*, No. 72-1201, 3d Cir., April 13, 1972.

23. 340 F. Supp. 1033 (D. Md. 1972).

24. *Id.* at 1051. Mr. Lindenbaum claimed a general authorization was given to him by the then Attorney General Mitchell to act in such a situation. After Mr. Lindenbaum placed the Attorney General's initials on the memorandum to Will Wilson, the Assistant Attorney General's staff reviewed, and an assistant to Mr. Wilson signed his signature authorizing a United States Attorney to make the application to the court. The court reached the conclusion that Will Wilson failed to authorize the application and therefore suppressed the wiretap evidence.

25. *E.g.*, United States v. Giordano, 469 F.2d 522, 528 (4th Cir. 1972); United States v. Narducci, 341 F. Supp. 1107, 1114 (E.D. Pa. 1972); United States v. Focarile, 340 F. Supp. 1033, 1058 (D. Md. 1972); United States v. Aquino, 338 F. Supp. 1080, 1083 (E.D. Mich. 1972); United States v. Chial, 336 F. Supp. 261, 267 (W.D. Pa. 1972), *appeal docketed*, No. 72-1201, 3d Cir., April 13, 1972.

him is deemed to satisfy the statute. However, the "alter ego" theory was rejected by those courts dealing with the issue.[26]

In *United States v. Giordano*,[27] the government argued that there was a good faith effort to comply with the statute, that the authorizing official was eventually identified and that delegation is dictated by necessity.[28] However, the court rejected these arguments for two reasons: Such delegation violates the intent of Congress to rest responsibility with a public official subject to the political process; acknowledgement of responsibility for the authorization is not an adequate substitute for prior personal approval. In short, the government argues the *spirit* not the letter of the law is important. In conrast, the courts have held the letter of the law to be important.

> . . . Congress has made form as important as substance; Congress was concerned not just with the integrity of the internal Justice Department review of agency wiretap requests, but also with the identity and status of the person initiating the authorization . . . .[29]

In the typical situation, responsibility may still be traced. But the government's reasoning has the inherent danger of qualifying anyone within or without the Department of Justice as an "alter ago." Some future Attorney General could, after the fact, repudiate any connection with a politically embarrassing wiretap authorization.[30] That eventually justifies strict adherence to the language of the statute.

The government advances an argument first raised in *United States v. Narducci*[31] that if Congress had desired the authority in question to be nondelegable, it would have expressly stated so.[32] This argument is not persuasive since 18 U.S.C. § 2518 does provide for suppression.[33] Perhaps as a

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26. *E.g.*, United States v. Giordano, 469 F.2d 522, 528 (4th Cir. 1972); United States v. Narducci, 341 F. Supp. 1107, 1114 (E.D. Pa. 1972); United States v. Focarile, 340 F. Supp. 1033, 1058 (D. Md. 1972); United States v. Aquino, 338 F. Supp. 1080, 1083 (E.D. Mich. 1972); United States v. Chial, 336 F. Supp. 261, 267 (W.D. Pa. 1972), *appeal docketed*, No. 72-1201, 3d Cir., April 13, 1972.

27. 469 F.2d 522 (4th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3513 (U.S. Mar. 27, 1973) (No. 72-1057).

28. *Id.* at 527-31.

29. United States v. Narducci, 341 F. Supp. 1107, 1114 (E.D. Pa. 1972).

30. *Id.* at 1114. "[T]he Government, by determining who qualified as the Attorney General's 'alter ego', could, in effect, dilute the standard which Congress tried to create."

31. 341 F. Supp. 1107 (E.D. Pa. 1972).

32. *Id.* at 1115. Congress during the same session in which 18 U.S.C. § 2516 was enacted amended § 245(a)(1) and provided that certification of criminal prosecution of civil rights violators may not be delegated.

33. 18 U.S.C. § 2518(10)(a) (1970);

> Any aggrieved person . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval . . . is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

last resort, it is argued that there is no reason to apply the drastic remedy of suppression to correct a "mere technical defect in procedure."[34] However, this "mere technical defect in procedure," (failing to identify the person authorizing the application) is one-half of the two prong statutory mandate.[35] This is not a mere technicality, but non-compliance with the basic requirements of the statute. This is expressly made grounds for suppression in the statute and acknowledged as such by the courts.[36]

Given a similar fact situation as found in *Robinson*, only one district court has reached a contrary result. In *United States v. Pisacano*,[37] it was held that "[p]rocedures used clearly conformed with the letter of § 2516(1), particularly when this is read in light of the evidence, furnished by § 101(a) of the Civil Rights Act of 1968, 18 U.S.C. § 245(a)(1), that when Congress wished to prohibit delegation of any sort, it knew how to do it . . . ."[38] In *Pisacano*, there is a willingness to accept less than strict compliance with the letter of the statute because the responsible official was eventually identified.[39] The courts have unanimously adopted the reasoning in *Robinson* and rejected that of *Pisacano*.[40]

In a dramatic turn-about, the literal interpretation of the statute repre-

34. *E.g.*, United States v. Giordano, 469 F.2d 522, 531 (4th Cir. 1972); United States v. Narducci, 341 F. Supp. 1107, 1115 (E.D. Pa. 1972).

35. 18 U.S.C. § 2518(4) (1970): "Each order authorizing or approving the interception of any wire or oral communication shall specify—

. . . .

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application . . . ."

36. *See, e.g.*, United States v. Giordano, 469 F.2d 522 (4th Cir. 1972); United States v. Narducci, 341 F. Supp. 1107 (E.D. Pa. 1972).

37. 459 F.2d 259 (2d Cir. 1972), *petition for cert. filed*, 40 U.S.L.W. 3528 (U.S. April 8, 1972) (No. 71-1410).

38. *Id.* at 263. Three recommended authorizations were at issue here. The latter two were allegedly approved by the Attorney General himself; in the first case by his initialed memorandum and in the second by specific telephone authorization to Mr. Lindenbaum. *Contra*, United States v. Vasquez, 348 F. Supp. 532 (C.D. Cal. 1972). The court suppressed evidence based on a telephone authorization. Thus it is difficult to estimate if *that* deviation from the authorization procedure will be sanctioned.

39. "[A]s is evident from this case, that procedure does nonetheless ensure that the responsible official be reasonably identifiable." United States v. Pisacano, 459 F.2d 259, 264 & n.5 (2d Cir. 1972). The Court of Appeals for the Second Circuit reasoned that discrepancy on the face of the application to the judge did not violate 18 U.S.C. § 2518(1)(a), (4)(d), because the intent of Congress was to ensure that responsibility be fixed and it was in the instant case.

40. *E.g.*, United States v. Giordano, 469 F.2d 522 (4th Cir. 1972); United States v. Fox, 349 F. Supp. 1258 (S.D. Ill. 1972); United States v. Vasquez, 348 F. Supp. 532 (C.D. Cal. 1972); United States v. Boone, 348 F. Supp. 168 (E.D. Va. 1972); United States v. Narducci, 341 F. Supp. 1107 (E.D. Pa. 1972); United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972); United States v. Aquino, 338 F. Supp. 1080 (E.D. Mich. 1972); United States v. Baldassari, 338 F. Supp. 904 (M.D. Pa. 1972); United States v. Chial, 336 F. Supp. 261 (W.D. Pa. 1972), *appeal docketed*, No. 72-1201, 3d Cir., April 13, 1972.

sented by *Robinson* has been circumvented by a factual distinction. The Attorney General claims that he *personally authorized* all wiretap applications after November 20, 1971.[41]

Representative of this class of cases is *United States v. Cox.*[42] Allegedly, Attorney General Mitchell personally reviewed this application as evidenced by his initialed memorandum to Mr. Wilson reciting: "Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to authorize Calvin K. Hamilton to make the above-described application."[43]

So unlike *Robinson* where the authorization was approved by officials not authorized by the Act,[44] in *Cox* the authorization allegedly was personally approved by Attorney General Mitchell. This renders immaterial the failure of the Assistant Attorney General to personally review, since here the memorandum supplies the needed authorization. The memorandum, however, fails to fulfill all the requirements of the Act. Section 2518(1)(a) and (4)(d) specify that each application include the identity of the officer authorizing the application.[45]

In contrast to *Robinson*, most courts in the *Cox* class of cases have overlooked deviation from the statute or interpreted the Attorney General's memorandum as an authorization.[46]

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41. Proclaimed by sworn affidavit in United States v. Narducci, 341 F. Supp. 1107, 1112 (E.D. Pa. 1972).

42. 462 F.2d 1293 (8th Cir. 1972). The affidavits in this case demonstrate that the application for a wiretap was first considered by an attorney in the Organized Crime and Racketeering Section of the Criminal Division of the Justice Department, then forwarded to the Deputy Assistant to the Attorney General who forwarded to the office of the Attorney General with a detailed recommendation that the authorization be granted. The Assistant Attorney General failed to personally authorize the application.

43. United States v. Cox, 462 F.2d 1293, 1299 & n.7 (8th Cir. 1972).

44. *I.e.*, the Attorney General's personal assistant and his Deputy Assistant. The Act authorizes only those officials subject to the political process (appointed by the President and confirmed by the Senate). In addition to the Attorney General this includes *nine* Assistant Attorneys General. 28 U.S.C. § 506 (1970).

45. 18 U.S.C. § 2518(1)(a), (4)(d) (1970). In both *Robinson* and *Cox* there is deviation from the requirements of the Act. But Attorney General Mitchell's memorandum claiming he personally authorized the wiretap application in *Cox* significantly shifts the controversy. In the *Cox* situation the only obstacle to admitting the wiretap evidence is the failure of the application submitted to the judge to correctly *identify* the authorizing official (it names the Assistant Attorney General not the Attorney General). In *Robinson* the *identified* official was not authorized. The former is a violation of section 2518(1)(a), (4)(d); the latter a violation of section 2516(1). In the *Cox* situation the factual question is: *Who* really made the authorization? In *Robinson* the question is: *How* was the authorization made?

46. *E.g.*, United States v. Fiorella, 468 F.2d 688 (2d Cir. 1972); United States v. Ceraso, 467 F.2d 647 (3d Cir. 1972); United States v. Becker, 461 F.2d 230 (2d Cir. 1972); United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); United States v. DeCesaro, 349 F. Supp. 546 (E.D. Wis. 1972);

> That requirement (that wiretap authorization not reach into lower echelons) should not be construed so inflexibly as to invalidate a wiretap application personally authorized by the Attorney General of the United States simply because the request recites the Assistant Attorney General as the applying officer.[47]

The fact that the application and order recites Mr. Wilson rather than Mr. Mitchell authorized the application is deemed "irrelevant" in *Cox*,[48] and in *United States v. Whitaker*,[49] a federal district court reasoned there is no prejudice involved in the discrepancy.[50] Likewise, there is no requirement that the government establish the *extent* of consideration given by the authorizing officials.[51]

In contrast to *Cox*, two district courts[52] have disallowed the personally initialed Mitchell memoranda. In *United States v. Casale*[53] the court held: "The plain meaning of the words of the memo is that Will Wilson was specially designated in this case to exercise the power and discretion conferred by the statute . . . to authorize the application for an order of court. The memo . . . is not an authorization to anyone to apply to this Court for an order."[54]

United States v. Kohne, 347 F. Supp. 1178 (W.D. Pa. 1972); United States v. Cantor, 345 F. Supp. 1352 (E.D. Pa. 1972); United States v. Mainello, 345 F. Supp. 863 (E.D.N.Y. 1972); United States v. Whitaker, 343 F. Supp. 358 (E.D. Pa. 1972); United States v. Consiglio, 342 F. Supp. 556 (D. Conn. 1972); United States v. Doolittle, 341 F. Supp. 163 (M.D. Ga. 1972); United States v. D'Amato, 340 F. Supp. 1020 (E.D. Pa. 1972); United States v. Iannelli, 339 F. Supp. 171 (W.D. Pa. 1972); United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971).

47. United States v. Cox, 462 F.2d 1293, 1300 (8th Cir. 1972).

48. *Id.* at 1300.

49. 343 F. Supp. 358 (E.D. Pa. 1972). However, in Cafero v. United States, 12 CRIM. L. REP. 2453 (3d Cir. January 30, 1973), the Court of Appeals for the Third Circuit expressly disavowed the holding in *Whitaker* that title III of the Act was unconstitutional.

50. *Id.* at 361; *accord*, United States v. Pisacano, 459 F.2d 259, 263 (2d Cir. 1972), *petition for cert. filed*, 40 U.S.L.W. 3528 (U.S. April 8, 1972) (No. 71-1410). United States v. Consiglio, 342 F. Supp. 556, 560 (D. Conn. 1972). In *Consiglio*, the defendants asserted the doctrine of estoppel contending that the former "misrepresentation" should preclude the present claim that Attorney General Mitchell authorized the application. The court rejected the argument because no prejudice to the defendants could be shown to stem from reliance on the government's initial claim.

51. United States v. Consiglio, 342 F. Supp. 556, 560 (D. Conn. 1972); United States v. Doolittle, 341 F. Supp. 163, 169 (M.D. Ga. 1972). "The requirement of § 2516(1) is simply that the Attorney General 'authorize an application.' The method and manner of his authorizing is not prescribed." *Id.* at 169.

52. United States v. Casale, 341 F. Supp. 374 (M.D. Pa. 1972); United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972).

53. 341 F. Supp. 374 (M.D. Pa. 1972).

54. *Id.* at 375; *cf.* United States v. Whitaker, 343 F. Supp. 358, 360 (E.D. Pa. 1972). The court reasoned that a literal reading *could* find the Attorney General only *delegated* authority but the court concluded this would "elevate semantics above reality."

Often the only available evidence, these memoranda are self-serving documents authenticated only by the government's sworn affidavits. Grounds for questioning their acceptance is found in *United States v. Kohne*,[55] where the defense attorney produced a memorandum purportedly initialed by Mitchell and a memorandum from another case, *United States v. LaGorga*.[56] Both documents were alleged to be signed by Mitchell but had different handwriting. Faced with the discrepancy the government conceded some of the memoranda from *LaGorga* were not signed by Mitchell as alleged. As a result of this admission certain wiretap evidence was ordered suppressed.[57]

Clearly the Department of Justice will continue to side-step the enumerated procedure if they are successful in admitting the wiretap evidence. This is because of the practical impossibility of personally reviewing all the applications, and the fact bureaucracy naturally functions by delegation. Two classes of cases have developed and the results have been remarkably divergent. Having discovered that one approach leads to certain success and the other to equally certain failure, conceivably the latter will be avoided. Nothing prevents the government from claiming in *every* case that there was personal authorization by the Attorney General. The few safeguards the Act had, have been abrogated by the memorandum cases. At present section 2516(1) is merely a costly waste of judicial labor.

In contravention of legislative intent and prevailing judicial construction, the new proposed Federal Code of Criminal Procedure[58] would decentralize, diversify, and depersonalize the authorization procedure. It retains the existing structure but allows, in addition to the Attorney General and his specially designated Assistant Attorney General, the Deputy Assistant Attorney General and all United States Attorneys to authorize applications. It fails to change the game rules; it just increases the players. Under the proposed code there would no doubt be less litigation but greater divergence from the intended purposes of the statute.

It is apparent that as a result of the memorandum cases section 2516(1) has become a nullity because it remains possible to circumvent the requirements of the statute by admitting self-serving memoranda verified only by affidavit. The actual facts being almost impossible to discover, the most

55. 347 F. Supp. 1178, 1181 (W.D. Pa. 1972).

56. 340 F. Supp. 1397 (W.D. Pa. 1972).

57. *Id.* The United States Attorney on March 31, 1972 filed an affidavit advising the court he had become aware that the memorandum relied on had not been initialed by the Attorney General as purported.

58. § 3-10C2 provides in part:

(a) Federal.—The Attorney General, the Deputy Attorney General, any Assistant Attorney General or any United States attorney specially designated by the Attorney General may authorize an application to a court of competent jurisdiction for an order authorizing or approving the interception of a private communication.

questionable affidavit becomes virtually unchallengeable. The important consideration is not whether abuse has occurred, but the likelihood that it could. Important constitutional rights should be better protected.

At present the authorization requirement is unenforceable, but the courts cannot ignore the clear language of the statute to make it enforceable. If the fear that engendered passage of section 2516(1) was unfounded, a stringent procedure is not justified. If justified it is best to rely on more than the good faith of the restrained. Fault rests with the legislature which has the power, but not the inclination, to make the authorization procedure enforceable.

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