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EAVESDROPPING PROVISIONS OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968: HOW DO THEY STAND IN LIGHT OF RECENT SUPREME COURT DECISIONS?

INTRODUCTION

In the Fourth Amendment the founding fathers wrote that people had the right "to be secure in their persons, houses, papers and effects."[1] To protect this right, the Fourth Amendment provides that "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."[2] In deciding the first wiretap case in 1928, the Supreme Court held that the Amendment applied only to tangible matter —the place, person or things to be seized.[3] Under this interpretation, conversations were not constitutionally protected under the amendment. Since 1928, however, the Court has taken a more liberal position as to the protection afforded by the Fourth. In a series of cases, decided since 1966, the Court has formulated warrant requirements necessary for the protection of conversations.[4] These requirements equate the protection granted conversations to the protection given material things.

In its drive to curb crime, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968.[5] Portions of this Act provide that a court may authorize limited interception of electronic communications if certain procedural requirements are met.[6] For the most part these procedures conform to the requirements laid down by the Supreme Court. However, certain sections of the Act conflict with case law. It is the purpose of this note to review the warrant requirements provided by the Supreme Court and to evaluate the Crime Control Act with reference to them.

CASE REQUIREMENTS

In *Osborn v. United States*,[7] the Supreme Court upheld a conviction obtained with the aid of evidence secured by a tape recorder

1. U.S. CONST. amend. IV.
2. *Id.*
3. Olmstead v. United States, 277 U.S. 438 (1928).
4. Katz v. United States, 88 S. Ct. 507 (1968); Berger v. New York, 388 U.S. 41 (1967); Osborn v. United States, 385 U.S. 323 (1966).
5. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (June 19, 1968).
6. Pub. L. No. 90-351, § 2518, 82 Stat. 218 (June 19, 1968).
7. 385 U.S. 323 (1966).

concealed on a government informer. The defendant, an attorney, approached a member of the Nashville police force about the possibility of bribing a juror. The officer reported this to agents of the United States Department of Justice. The policeman then formalized his allegation in an affidavit. Two federal judges authorized the use of a recorder to ascertain the truthfulness of the affidavit by further conversations with the attorney. This recording was admitted in evidence at a subsequent trial.[8]

The Court held that, under these facts, the use of the recording device was permissible and the evidence was properly received. In so holding, the Court stressed that the use of the device was authorized by two federal judges in response to a detailed factual affidavit alleging the commission of a specific criminal offense.[9] Also pertinent was the fact that the recorder was used for the narrow and particularized purpose of obtaining evidence to ascertain the truth of the allegations contained in the affidavit.[10] In defending its reasoning, the Court tersely stated:

> [T]here could hardly be a clearer example of the "procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" as "a precondition of lawful electronic surveilance."[11]

In *Berger v. New York*,[12] a New York statute[13] authorized a court to issue an order permitting electronic eavesdropping by a police agency. The statute provided that upon the oath or affirmation of an appropriate official, a judge could issue an *ex parte* order permitting eavesdropping. The oath was required to state that evidence of a crime may be obtained, and it had to describe the person whose communications were to be intercepted. The order, once issued, could be valid for a period of up to four months since the original two month order could be renewed for an additional two months without a further showing of probable cause. Using the statute as authority, a judge issued an order permitting a "bugging" device to be installed in the office of a suspected conspirator. A conviction was secured by using this surreptitiously obtained evidence.

The United States Supreme Court held that the New York statute failed to provide the necessary constitutional safeguards and reversed the conviction.[14] The Court questioned, but did not dispute, whether the

8. *Id.* at 328, 329.
9. *Id.* at 330.
10. *Id.*
11. *Id.*
12. 388 U.S. 41 (1967).
13. N.Y. CODE CRIM. PROC. § 813-a (McKinney 1958) (repealed 1968).
14. 388 U.S. at 58.

"reasonable ground" requirement of the statute was equivalent to the "probable cause" required by the Fourth Amendment.[15] Rather, the Court held that the limits of allowable interception were so vague that the statute permitted a general search.[16] There was no requirement that the order describe the suspect, the offense or the communication to be seized. The interception could continue up to four months without any requirement that the search stop when the desired communication was seized. Furthermore, there was no requirement that a return be made showing how the order was executed or what was seized. The Court then went on to indicate that there must be a showing of exigent circumstances to overcome the defect of lack of notice inherent in an eavesdrop order.

In *Osborn*, the Court had found that a court order authorizing eavesdropping was not inconsistent with the commands of the Fourth Amendment when based on a particularized affidavit alleging a specific offense.[17] Building upon the foundation laid in *Osborn,* the Court in *Berger* then amplified the requirements necessary to validate a court order authorizing eavesdropping. The order must name the person whose communication is to be seized, state the specific offense committed, particularly describe the communication to be seized and provide that the search end when the desired communication is seized.[18] The order must also be executed with dispatch and require a return showing how it was executed and what was seized. Only by meeting these requirements could the order overcome the taint of "general search," and the information seized be admissible as evidence.

Justice Clark, in the Court's majority opinion, indicated the reasons for the imposition of these warrant requirements when he stated:

> 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. As was said in *Osborn v. United States*, the "indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments," and imposes " a heavier responsibility on this Court in its supervision of the fairness of procedures. . . ."[19]

In *Katz v. United States*[20] the Supreme Court overturned a con-

15. *Id.* at 55.
16. *Id.* at 58, 59.
17. 385 U.S. at 329.
18. 388 U.S. at 59, 60.
19. *Id.* at 56.
20. 88 S. Ct. 507 (1968).

viction obtained with the aid of evidence secured by an eavesdropping device fastened to the top of a telephone booth. No warrant had been issued for the search. The government contended its search complied with constitutional safeguards because there was adequate probable cause. The interception did not begin until the petitioner's activities established a strong probability that the telephone was being used to transmit gambling information. The search was properly limited in both scope and duration and the interception was limited to brief periods when the petitioner used the phone. Also, communications of other parties were not intercepted.

The Court held the search narrow enough so that a court, upon a showing of probable cause, could have constitutionally authorized it.[21] The fatal defect, however, was that the search was not authorized by a judge.[22] The Court stated that no matter how carefully the police restrain themselves, the judiciary must interpose between the police and the public before a valid interception can take place.[23]

The Court in *Katz* affirmed the *Osborn* holding that a judicial order may authorize eavesdropping to accomodate legitimate law enforcement needs. *Katz* held, however, that the search must be limited both as to the conversations sought to be monitored and the period during which such monitoring takes place.[24] Through these protections, the Court continued, no greater intrusion than is necessary pierces the privacy of an individual.

THE CRIME CONTROL ACT

A Presidential Commission found that organized criminals make extensive use of wire and oral communications and indicated that interception of these communications was vital to law enforcement.[25] Accordingly, when Congress passed the Omnibus Crime Control and Safe Streets Act of 1968[26] (Crime Control Act), Title III included provisions for specific procedures enabling law enforcement officials to obtain judicial authorization for such interceptions.

Section 2516

Under this section of the Crime Control Act, the United States Attorney General, or a specially designated assistant, may approve an

21. *Id.* at 513.
22. *Id.* at 514.
23. *Id.*
24. *Id.* at 513.
25. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967).
26. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (June 19, 1968).

application to a federal judge for an order authorizing electronic interception.[27] The order may be executed by the Federal Bureau of Investigation or other federal investigating agency.[28] Only when certain offenses are alleged in the application may the order be issued to provide interception. Among these offenses are violations of the Atomic Energy Act, espionage, sabotage, treason, and activities of organized crime.[29] Similarly, a state Attorney General or principal prosecuting officer of a state political subdivision, if authorized by state statute, may make an application to a state judge for an intercept order.[30] A state order may be authorized when the commission of a felony is alleged.[31]

Section 2517

Communications intercepted under a valid order may be disclosed to other investigative officers to the extent necessary for the proper performance of either the disclosing or receiving officer's duties.[32]

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27. Pub. L. No. 90-351, § 2516(1), 82 Stat. 216 (June 19, 1968), *amending* 18 U.S.C. 802 (1948).

(1) 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 by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of. . . .

28. *Id.*

29. *Id.* at § 2516(1)(a)-(1)(g).

30. Pub. L. No. 90-351, § 2516(2), 82 Stat. 217 (June 19, 1968), *amending* 18 U.S.C. 802 (1948).

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

31. *Id.*

32. *Id.* at § 2517(1), (2).

(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.

Information intercepted may also be disclosed to either a state or federal criminal proceeding or grand jury.[33] However, a privileged communication intercepted under a valid order does not loose its privileged character.[34]

If information relating to an offense not specified in the intercept order is obtained, it may be disclosed to other officers and may be used as evidence upon judicial determination that the interception was otherwise made in accordance with the order.[35] This provision seems to extend the scope of the interception beyond the limits set out by the Supreme Court in case law. The Court in *Katz, Berger* and *Osborn* stressed the need for specifying the offense for which the order is sought. The Crime Control Act permits the executing officer, rather than the court, to determine what will be seized. While a judge must determine that the information was intercepted in accordance with the provisions of the Act, it may be questioned whether the Supreme Court would find subsequent judicial approval equivalent to the procedure of antecedent justification necessary under the Fourth Amendment.[36]

Section 2518

This section provides that an application for an order authorizing or approving interception of oral or wire communications may be made

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(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.

33. *Id.* at § 2517(3).

(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 that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

34. Pub. L. No. 90-351, § 2517(4), 82 Stat. 218 (June 19, 1968), *amending* 18 U.S.C. 802 (1948).

(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.

35. *Id.* at § 2517(5).

(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.

36. *See* note 11 *infra.*

in writing to a judge of competent jurisdiction.[37] The application must identify the officer making and approving the application.[38] The application must also state details of the offense that has been or is about to be committed; a description of the facilities from which the interception is to take place; description of the type of commuincation to be intercepted; and the identity of the person, if known, whose communications are to be intercepted.[39] The length of time the interception will continue must be specified.[40] There must be a showing that other investigative procedures have been tried and failed, or would probably fail or be too dangerous.[41] The court must be informed if other interceptions involving the same individuals or facilities have taken place.[42] The issuing judge may require the applicant to furnish additional evidence in support of the application.[43]

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37. Pub. L. No. 90-351, § 2518(1), 82 Stat. 218 (June 19, 1968), *amending* 18 U.S.C. 802 (1948).

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information. . . .

38. *Id.* at § 2518(1)(a).

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application. . . .

39. *Id.* at § 2518(1)(b).

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted. . . .

40. *Id.* at § 2518(1)(d).

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter. . . .

41. *Id.* at § 2518(1)(c).

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .

42. *Id.* at § 2518(1)(e).

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each application. . . .

43. Pub. L. No. 90-351, § 2518(2), 82 Stat. 219 (June 19, 1968), *amending* 18 U.S.C. 802 (1948).

(2) The judge may require the applicant to furnish additional testimony

The judge may issue an *ex parte* order authorizing or approving interception of oral or wire communications if he finds sufficient probable cause.[44] Under the Act, probable cause includes finding that the enumerated offense has been committed;[45] that communications relating to the offense will be obtained through the interception;[46] and that the communications will be intercepted from facilities specified in the application.[47] The judge must also determine that other investigative measures have been tried and failed, would fail or would be too dangerous.[48] The order authorizing or approving interception must specify the identity of the person whose communication is to be intercepted;[49] the facilities from which the interception is to take place;[50] a particular description of the type of communication to be intercepted and the particular offense to which it relates;[51] the identity of the agency authorized to make the interception;[52] and the length of time for which the interception is authorized.[53]

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or documentary evidence in support of the application.

44. *Id.* at § 2518(3).

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that. . . .

45. *Id.* at § 2518(3)(a).

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter. . . .

46. *Id.* at § 2518(3)(b).

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception. . . .

47. *Id.* at § 2518(3)(d).

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

48. *Id.* at § 2518(3)(c).

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. . . .

49. *Id.* at § 2518(4)(a).

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted. . . .

50. *Id.* at § 2518(4)(b).

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted. . . .

51. *Id.* at § 2518(4)(c).

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates. . . .

52. *Id.* at § 2518(4)(d).

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

53. *Id.* at § 2518(4)(e).

The Act appears to meet the particularized requirements of a valid interception of communications based on probable cause as laid down by the Supreme Court, with one exception. The Act provides that the order must particularly describe the "type of communication"[54] to be seized. In *Berger,* the Court stated that the order must "particularly describ[e] the communication, conversation or discussions to be seized."[55] It may be questioned whether the Court will find that describing the "type" of communication is equivalent to a requirement that the order "particularly describ[e]" the communication. However, the Court's requirement in *Berger* may ask too much. Concerning *Berger,* Justice Black in his dissent to *Katz* said:

> Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one "describe" a future conversation, and if not, how can a magistrate issue a warrant to eavesdrop one in the future?[56]

The Court in *Katz* did not mention this requirement, and in failing to do so may have relaxed its position on this point. If so, the Crime Control Act's entire particularization requirement should meet the Court's approval.

The Court in *Katz* did not mention this requirement and in failing to do because it failed to require a showing of exigent circumstances to overcome the lack of notice inherent in an eavesdrop order.[57] In neither *Katz* nor *Osborne* did the Court require a special showing to overcome this defect. The Court in *Katz* cited *Ker v. California*[58] to support the proposition that the notice requirement of a warrant may be omitted if it would enable a suspect to escape or evidence to be destroyed.[59] The Crime Control Act, however, requires a showing that other investigative means have been tried and failed, or would fail or be too dangerous.[60] In the light of *Katz* and *Ker,* this showing is probably sufficient to overcome the defect of lack of notice.

No order may be authorized for any period longer than that

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

54. *Id.* at § 2518(4)(c).
55. 388 U.S. at 59.
56. 88 S. Ct. at 519.
57. 388 U.S. at 60.
58. Ker v. California, 374 U.S. 23 (1962).
59. 88 S. Ct. at 513 n.16.
60. Pub. L. No. 90-351, § 2518(1)(c), 82 Stat. 218; § 2518(3)(c), 82 Stat. 219 (June 19, 1968), *amending* 18 U.S.C. 802 (1968).

necessary to intercept the described conversation with the maximum period being thirty days.[61] If the intercept is not to end when the desired communication is seized, probable cause must be shown that communications of the same type will subsequently occur.[62] If the communication is not obtained within the original period, an extension may be requested, supported by a showing of probable cause and a reasonable explanation for the failure to achieve results.[63] In addition, the issuing judge may require periodic reports of the progress made toward achieving the authorized objective.[64] In *Berger,* the Court held that the New York statute permitted general searches and was therefore unconstitutional, one of the controlling reasons being that searches could be continued for periods of up to 120 days.[65] Since the Crime Control Act does not permit a search to continue for a longer period than can be supported by probable cause and it permits the issuing court to supervise the search in progress, it is submitted that the searches permitted by the Act cannot be termed "general," and are therefore constitutional.

The Court in *Katz, Berger* and *Osborn* stated that an eavesdrop order must provide for a return showing what was seized.[66] If a return were not required, the executing officer would have full discretion as to the disposition of seized conversations of both suspected and innocent

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61. Pub. L. No. 90-351, § 2518(5), 82 Stat. 219.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

62. *Id.* at § 2518(1)(d). For text see note 40 *supra.*

63. Pub. L. No. 90-351, § 2518(1)(f), 82 Stat. 218 (June 19, 1968), *amending* 18 U.S.C. 802 (1948).

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

64. Pub. L. No. 90-351, § 2518(6), 82 Stat. 220 (June 19, 1968), *amending* 18 U.S.C. 802 (1968).

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

65. 388 U.S. at 59.

66. Katz v. United States, 88 S. Ct. 507, 514 (1968).

parties. The Act, however, does not provide for a return showing how the order was executed as the Court has required. While this defect may be cured by adhering to the procedures of rule 41(d) of the Federal Rules of Criminal Procedure,[67] the Act itself does not so direct. Whether this would be sufficient is for the Supreme Court to ultimately decide.

Also, the Crime Control Act directs that the order shall be executed "as soon as practicable" and in such a manner as to minimize the interception of communication of innocent parties.[68] Communications intercepted shall, if possible, be recorded and custody of the recordings shall be the responsibility of the issuing judge.[69] Thus, while the Crime Control Act provides for the disposition of recorded interceptions, it is silent as to the procedures to be followed by the executing offficer when no recordings are made.

The Act provides that in emergency situations, involving national security or organized crime, interceptions of oral or wire communications may be made without judicial authorization.[70] These interceptions may

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67. FED. RULES CRIM. PROC. 41(d), 18 U.S.C. (1940).

68. *See* note 64 *infra.*

69. Pub. L. No. 90-351, § 2518(8), 82 Stat. 220 (June 19, 1968), *amending* 18 U.S.C. 802 (1968). This section, in part, states:

> (8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. . . .

70. *Id.* at § 2518(7)(a). Section (7) provides:

> (7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—
>
> (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize such interception,
>
> may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

be carried out by any officer specially designated by the United States Attorney General or the principal prosecuting officer of the state or political subdivision.[71] An application for an order approving the interception must be made to a judge of competent jurisdiction within forty-eight hours after the interception has begun.[72]

It is submitted that this provision is unconstitutional. Allowing any search to proceed without judicial authorization, even for forty-eight hours, seems to expressly violate the Fourth Amendment.

> "Over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial process" and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment, subject to a few specifically established and well-delineated exceptions.[73]

In his concurring opinion to *Katz*, Justice White proposed that the warrant procedures of the Fourth should be relaxed if the President or Attorney General authorized electronic interception in cases involving the national security interest.[74] Justice Douglas replied to Justice White by stating:

> Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.[75]

In light of these statements, it is submitted that the Court would not allow "any investigative or law enforcement officer" to act as neutral judge, even for forty-eight hours and under the most pressing circumstances, and the Court may well declare this provision unconstitutional.

Conclusion

Both Congress and the United States Supreme Court have recognized that modern electronic eavesdropping techniques may threaten the privacy of every citizen. By interpreting the Fourth Amendment to include conversations, Congress and the Supreme Court have provided

71. *Id.* at § 2518(7).
72. *Id.*
73. Katz v. United States, 88 S. Ct. 507, 514 (1968).
74. *Id.* at 518.
75. *Id.* at 516.

our citizens with protection against this threat. At the same time, by laying down the requirements for a valid warrant, they have provided law enforcement officials with necessary and powerful means by which to obtain evidence for cirminal prosecution. However, in its willingness to give law enforcement as much assistance as possible, Congress, in some provisions of the Crime Control Act, seems to have infringed upon the protection afforded citizens by the Fourth Amendment. As a result, it is submitted, these infringements may be unconstitutional, and if the Supreme Court deems these infringements not severable, the entire act may fail.[76]

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76. Although the Act contains a separability clause (Title XI), presumption of separability may be overcome if it is felt the legislative intent would not be fulfilled by the deletion. Williams v. Standard Oil Company, 278 U.S. 235 (1928).

Speaking of the Omnibus Crime Control and Safe Streets Act of 1968, former Justice Arthur J. Goldberg said: "This law, along with much needed measures to strengthen law enforcement, contains in Titles II and III provisions which are . . . of dubious constitutionality." A. Goldberg, *Criminal Justice in Times of Stress,* 52 J. AM. JUD. SOC'Y 54 (1968).