THE SUPPRESSION SANCTION IN THE FEDERAL ELECTRONIC SURVEILLANCE STATUTE

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III)[1] regulates official use of electronic surveillance for investigative purposes.[2] Title III requires law enforcement officials to satisfy a series of procedural requirements when applying for[3] and executing[4] a surveillance warrant.[5] The statute also specifies that a judge must make certain findings before issuing[6] a warrant and delineates the judge's post-interception duties.[7]

Title III contains a suppression sanction for violations of its provisions.[8] The Supreme Court has held that not every violation of Title III

1. Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1982)).

2. One of the most significant restrictions on the use of electronic surveillance as an investigative tool is the requirement that law enforcement officials state in their application for a warrant why normal investigative procedures have been or would be unsuccessful. 18 U.S.C. § 2518(1)(c) (1982); *see infra* notes 117-19 and accompanying text. *See generally* Note, *Electronic Surveillance, Title III, and the Requirement of Necessity,* 2 HASTINGS CONST. L.Q. 571 (1975).

3. *See* 18 U.S.C. § 2516 (1982) (detailing mandatory procedures for seeking authorization of electronic surveillance); *id.* § 2518(1)(a)-(f) (specifying the required contents of the applications).

4. *See id.* § 2518(5) (requiring government agents to minimize the interception of nonpertinent calls); *id.* § 2518(6) (requiring agents to submit progress reports at the judge's discretion); *id.* § 2518(8)(a)-(b) (requiring sealing of the recordings, applications, and orders of surveillance); *id.* § 2518(8)(d) (requiring notice to intercepted persons).

5. Law enforcement officials must obtain a warrant before intercepting communications unless a party to a communication has consented to the interception. *See id.* § 2518(1) (outlining the procedures for applying for a warrant); *id.* § 2518(3)-(6) (outlining the procedures for obtaining judicial approval of a warrant); *id.* § 2511(2)(c) (providing that a "person acting under color of law" may lawfully intercept a conversation where one of the parties to the communication has consented to the interception); The Supreme Court has held constitutional the consent exception to the Title III warrant requirement. United States v. White, 401 U.S. 745, 754 (1971); *see also* 18 U.S.C. § 2511(e) (1982) (permitting warrantless electronic surveillance by designated United States officials in accordance with the provisions of the Foreign Intelligence Surveillance Act of 1978 Pub. L. No. 95-511 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801-1811 (1982)).

This Note will not address these exceptions. For a discussion of the various exceptions to the Title III warrant requirement, see generally J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE 63-148 (1977).

6. *See* 18 U.S.C. § 2518(3) (1982) (specifying the findings a judge must make before issuing a surveillance warrant); *id.* § 2518(4) (specifying the content of a surveillance order).

7. *See id.* § 2518(6) (allowing the issuing judge to order progress reports); *id.* § 2518(8)(a)-(b) (requiring the judge to direct the manner of sealing the recordings, applications, and orders); *id.* § 2518(8)(d) (requiring the judge to determine who should receive notice of the interceptions).

8. *See id.* § 2515 (prohibiting the use of wiretap evidence if disclosure of the evidence would violate the statute); *id.* § 2518(10)(a) (describing who may challenge the use of electronic surveillance evidence and delineating the grounds for suppression); *infra* note 54 and accompanying text.

requires suppression of the conversations intercepted.[9] Lower federal courts have employed several approaches and have reached differing results in determining whether a specific Title III violation mandates suppression of evidence obtained in contravention of Title III procedural safeguards.

After examining the background, statutory framework, and procedural requirements of Title III, this Note examines judicial use of suppression to sanction various violations of the statute.[10] This Note concludes that in deciding whether to suppress intercepted conversations, courts should adopt the flexible test enunciated in *United States v. Chun*[11] rather than a test focusing on a "but for" relationship between the violation of the statute and the interception.[12]

I. ELECTRONIC SURVEILLANCE PRIOR TO TITLE III

In a series of cases beginning in 1942,[13] the Supreme Court upheld the investigative use of eavesdropping devices in certain circumstances as permissible under the fourth amendment.[14] In *Berger v. New York*[15] and

This Note only addresses application of the suppression sanction at criminal trials. *Cf.* United States v. Gelbard, 408 U.S. 41 (1972) (discussing the applicability of § 2515 to grand jury proceedings); Boudin, *The Federal Grand Jury,* 61 GEO. L.J. 1, 9-12 (1972) (same).

9. *See* United States v. Chavez, 416 U.S. 562 (1974); United States v. Giordano, 416 U.S. 505 (1974); *infra* notes 56-70 and accompanying text.

10. *See infra* notes 86-99 and accompanying text (identification requirement); *infra* notes 100-16 and accompanying text (notice requirement); *infra* notes 117-30 and accompanying text (necessity requirement); *infra* notes 131-49 and accompanying text (previous applications requirement); *infra* notes 150-86 and accompanying text (minimization requirement); *infra* notes 187-212 and accompanying text (sealing requirement).

11. 503 F.2d 533 (9th Cir. 1974); *see infra* notes 71-76 and accompanying text.

12. *See infra* notes 231-32 and accompanying text; *see also* notes 79-81 and accompanying text (discussing "but for" test).

13. *See* Osborn v. United States, 385 U.S. 323 (1966) (judicial authorization of taping of a conversation when it was known that an attorney was attempting to induce a government agent to bribe jurors); Lopez v. United States, 373 U.S. 427 (1963) (holding admissible recording of conversations because an agent could testify to their content); On Lee v. United States, 343 U.S. 747 (1952) (radio transmitter on police agent did not violate the fourth amendment); Goldman v. United States, 316 U.S. 129 (1942) (use of a detectaphone applied to a wall permissible).

14. The fourth amendment provides as follows:

> 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.

15. 388 U.S. 41 (1967).

Katz v. United States,[16] however, the Court placed general limits on the use of electronic surveillance by requiring that law enforcement agencies adhere to minimum procedural requirements.[17]

In *Berger*,[18] the Court held unconstitutional under the fourth amendment[19] a New York eavesdropping statute that permitted general searches.[20] The Court compared the New York procedures for obtaining an eavesdropping warrant with those held constitutional in *Osborn v. United States*.[21] The court observed that the judicial order in *Osborn* limited the use of electronic surveillance[22] and specified the duties of the executing officers.[23] The *Berger* Court determined that the New York eavesdropping statute[24] lacked these constitutionally permissible "precise

16. 389 U.S. 347 (1967).

17. 388 U.S. at 63-64.

18. A justice of the New York Supreme Court, acting pursuant to the New York eavesdropping statute, *see infra* note 20, issued an order to install a recording device in an office. The information gained from the surveillance led to a second eavesdrop order. The second order uncovered a conspiracy and implicated the defendant as an intermediary between the principal conspirators. The district attorney played portions of these recordings at trial, and the jury convicted the defendant of conspiracy to bribe. All parties stipulated that without the recordings the district attorney did not have enough information to present a case to the grand jury or to make a successful prosecution. 388 U.S at 54.

19. 388 U.S. at 55-60. The Court held that the New York statute violated the particularity requirement of the fourth amendment because the statute did not require that a surveillance warrant specify the site of the surveillance, the conversations to be seized, or the crime under investigation. *Id.* at 58. A surveillance warrant under the New York statute did not have to contain a termination date for the surveillance. *Id.* at 59-60. In addition, the statute did not include procedures for notice to affected parties or require return of the warrant to the issuing magistrate. *Id. See* N.Y. CODE CRIM. PROC. § 813a (McKinney 1958).

20. N.Y. CODE CRIM. PROC. § 813a (McKinney 1958). The New York statute did not require that probable cause support issuance of a surveillance warrant. 388 U.S. at 58. Justice Clark, writing for the Court, contended that the Court did not need to address whether the statute's "reasonable ground" standard satisfied the fourth amendment's probable cause requirement, as the statute was "deficient on its face in other respects." *Id.* at 55. Justices Harlan and White, in separate dissenting opinions, objected to the Court's willingness to permit a facial attack on the statute. *Id.* at 90 (Harlan, J., dissenting); *id.* at 108-09 (White, J., dissenting). Both dissenting Justices feared that the Court's holding would significantly restrict future use of electronic surveillance in government investigations. *Id.* at 89-90 (Harlan, J., dissenting); *id.* at 113 (White, J., dissenting); *cf.* Note, *Eavesdropping Under Court Order and the Constitution:* Berger v. New York, 1 LOY. L.A.L. REV. 143, 154 (1968) (maintaining that law enforcement officials may still use electronic surveillance under the stringent *Berger* requirements if they first develop a "substantial, independent case").

21. 388 U.S. at 58 (citing Osborn v. United States, 385 U.S. 323 (1966)).

22. 388 U.S. at 57. The judicial order in *Osborn* authorized only a recording of a specific type of conversation by one of the parties to the conversation. *Id.*

23. *Id.* The issuing judge ordered the executing officers to execute the surveillance warrant promptly and to make a return of the warrant to the judge. *Id.*

24. 388 U.S. at 58. The Court characterized the New York statute as a "blanket grant of

and discriminate requirements."[25]

Six months after *Berger*, in *Katz v. United States*,[26] the Court implicitly reaffirmed its holding in *Berger*[27] and imposed additional procedural requirements.[28] In *Katz*, law enforcement officials failed to obtain a warrant authorizing interception of the defendant's conversations.[29] The Court found the lack of prior judicial authorization enough to invalidate the surveillance despite the otherwise careful procedures employed to limit the intrusiveness of the surveillance.[30]

Congress recognized that the limitations imposed by the Court on the use of electronic surveillance restricted the investigative efforts of law enforcement officials in controlling organized crime activities.[31] Title III

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permission" to eavesdrop, lacking both adequate judicial supervision or protective procedures. *Id.* at 60. *See* Note, *supra* note 20 (detailed discussion of *Berger*).

One commentator suggests that the *Berger* Court's reference to Osborn creates confusion because there was no need for judicial authorization in *Osborn*. Dash, Katz—*Variations on a Theme by* Berger, 17 CATH. U.L. REV. 296, 312-13 (1968). Professor Dash believes that the Berger Court used *Osborn* in its analysis because the latter case presented the unique situation in which law enforcement officials know in advance the type of conversation they wanted to seize and therefore could describe it with the requisite specificity. *Id.* at 312-13.

25. 388 U.S. at 58 (quoting Osborn v. United States, 385 U.S. 323, 329 (1966)).

26. 389 U.S. 347 (1967).

27. 389 U.S. 347, 354-55 (1967). The *Katz* Court quoted the *Berger* Court's discussion of the procedures used in *Osborn*, which "permitted no greater invasion of privacy than was necessary under the circumstances." *Id.* (quoting Berger v. New York, 388 U.S. 41, 57 (1967)); *see* Note, *Wiretapping and Electronic Surveillance, Title III of the Crime Control Act of 1968*, 23 RUTGERS L. REV. 319, 331 (1969); *see also* Dash, *supra* note 24, at 312 (asserting that the *Katz* Court did not abandon the *Berger* requirements).

28. Law enforcement agents in *Katz* did not commence electronic surveillance until they had established a strong probability that the defendants were using a public telephone to transmit gambling information. 389 U.S. at 354. The Court approved this procedure, noting that the surveillance was limited both in scope and duration. *Id.* The *Katz* Court ultimately held that an issuing judge may authorize a surveillance warrant, with appropriate safeguards, if law enforcement officials adequately inform the judge of the need for the investigation and the precise nature of the intrusion. *Id.* *See infra* note 30.

By permitting postsearch notice, the *Katz* Court also relaxed the *Berger* requirement of presearch notice or a statement of exigent circumstances. The Court reasoned that officers need not announce their search if doing so would cause the destruction of evidence. 389 U.S. at 355 n.16.

29. *Id.* at 354-56.

30. *Id.* at 359. The Court asserted that the fourth amendment requires that government agents act pursuant to judicially imposed restraints. *Id.* at 356-57. The Court contended that the judicial authorization prerequisite ensures neutral judicial review of agents' finding of probable cause. *Id.* at 356-57.

31. *See* Berger v. New York, 388 U.S. 41, 119-29 (1967) (White, J., dissenting) (excerpting a report by the President's Commission on Law Enforcement and Administration of Justice that discusses some of the problems facing law enforcement in dealing with organized crime); S. REP. NO. 1097, 90th Cong., 2d Sess. 66, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2153 [herein-

of the Omnibus Crime Control and Safe Streets Act of 1968,[32] enacted one year after the *Katz* decision, reflected congressional recognition of law enforcement's need for effective measures against organized crime, individual rights to privacy,[33] and the procedural standards enunciated in *Berger* and *Katz*.[34]

II. Overview of Title III

A. Statutory Framework

Title III requires law enforcement officials and the courts to follow certain enumerated procedures in securing and issuing a warrant for electronic surveillance.[35] The Attorney General or a specially designated Assistant Attorney General must authorize an application for a warrant.[36] The application must carefully describe the crime thought to be in progress,[37] the place where the interception will occur,[38] and the nature of the conversations to be seized.[39] In addition, the application must name the investigative officer making the request,[40] the authorizing officer,[41] and all persons suspected of committing the crime under investigation who will be the subjects of intercepted communications.[42] The applicant must also disclose all previous applications for electronic sur-

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after cited as LEGIS. HIST.]. The Senate Report discusses at length the problem of organized crime, *id.* at 2154, 2157-63, and states that the major purpose of Title III is "to combat organized crime." *Id.* at 2157.

32 Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1982)).

33 LEGIS. HIST., *supra* note 31, at 2154, 2157-63.

34. *Id.* at 2161-63. "Working from the hypothesis that any wiretapping and electronic surveillance legislation should include the above constitutional standards, the subcommittee has used the *Berger* and *Katz* decisions as a guide in drafting Title III." *Id.* at 2163.

The Senate Report states that the dual purposes of Title III are "1) to protect the privacy of wire and oral communications and 2) to delineate on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *Id.* at 2153.

35 *See* 18 U.S.C. § 2516 (1982) (delineating the procedures for judicial approval of applications for electronic surveillance); *id.* § 2518(1)-(3) (establishing the procedures for applying for and issuing a surveillance order).

36. *Id.* § 2516(1).

37 *Id.* § 2518(1)(b)(i).

38. *Id.* § 2518(1)(b)(ii).

39. *Id.* § 2518(1)(b)(iii).

40 *Id.* § 2518(1)(a).

41. *Id.*

42 *Id.* § 2518(1)(b)(iv). For a description of the identification requirement, see *infra* note 86 and accompanying text.

veillance[43] and explain why other investigative techniques have been or would be unsuccessful.[44]

The judge initially must determine that probable cause supports issuance of a warrant.[45] After finding probable cause, the judge must then

43. 18 U.S.C. § 2518(1)(e) (1982). For a description of the previous applications requirement, see *infra* notes 131-33 and accompanying text.

44. 18 U.S.C. § 2518(1)(c) (1982). For a description of the necessity requirement, see *infra* notes 117-19 and accompanying text.

45. 18 U.S.C. § 2518(3) (1982) (providing that a judge must find that "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").

The probable cause standard applicable to electronic surveillance cases is apparently identical to that applied in other search warrant cases. *See, e.g.*, United States v. Clements, 588 F.2d 1030, 1034 (5th Cir.), *cert. denied*, 440 U.S. 982 (1979); United States v. Rotchford, 575 F.2d 166, 173 (8th Cir. 1978); United States v. Hyde, 574 F.2d 856, 862 (5th Cir. 1978); United States v. Shakur, 560 F. Supp. 318, 327 (S.D.N.Y. 1983); United States v. Napolitano, 552 F. Supp. 465, 476 (S.D.N.Y. 1982); United States v. Dorfman, 542 F. Supp. 345, 360 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (1982); United States v. Lyons, 507 F. Supp. 551, 554 (D.C. Md. 1981), *aff'd per curiam*, 695 F.2d 802 (4th Cir. 1982); United States v. Leta, 332 F. Supp. 1357, 1359 (M.D. Pa. 1971). These cases all applied the two-prong test of probable cause that the Court established in Aguillar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). In *United States v. Clements*, for example, the Fifth Circuit enunciated the probable cause standard in electronic surveillance case as follows:

> When the facts that show probable cause are provided by informants, the affidavit must pass a two-pronged test: first, the judge must be informed of some of the circumstances relied upon by the informant, and second, facts must be shown from which the affiant concluded that the informant was reliable so the judge can make an independent determination of probable cause.

588 F.2d at 1034 (citing Spinelli v. United States, 393 U.S. 410 (1969); Aguillar v. Texas, 378 U.S. 108 (1964)).

The Supreme Court recently altered the probable cause standard in Illinois v. Gates, 103 S. Ct. 2317 (1983), rejecting the "two-pronged" *Aguillar/Spinelli* test in favor of a flexible "totality of the circumstances" approach. *Id.* at 2328-32. For a post-*Gates* determination of probable cause in an electronic surveillance case, see United States v. Tehfe, 722 F.2d 1114, 1118 (3d Cir. 1983) ("fourth amendment principles are the same in an authorization for a wire tap as in a property search"), *cert. denied*, 104 S. Ct. 1679 (1984).

When considering attacks on the truthfulness of affidavits, courts generally apply the standard established in Franks v. Delaware, 438 U.S. 154, 171-72 (1978) (providing that only deliberate lies or a reckless disregard for the truth by the affiant are possible sources for attack).

Franks further provided that a warrant will not be held invalid when alleged false statements do not detract from the probable cause determination. *Id.* For cases applying the *Franks* test to electronic surveillance warrants, see United States v. Licavoli, 604 F.2d 613, 621 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); United States v. Shakur, 560 F. Supp. 318, 328 (S.D.N.Y. 1983); United States v. Balistrieri, 551 F. Supp. 275 (E.D. Wis. 1982); United States v. Dorfman, 542 F. Supp. 345, 365-69 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (1982). The Fifth Circuit, in contrast, has held surveillance warrants invalid upon a finding of either intentional or reckless misrepresentation, regardless of the materiality of the misrepresentation or the innocence of a misstatement of a material fact. *See* United States v. Hyde, 574 F.2d 856, 865 (5th Cir. 1978); United States v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973); *see also* United States v. Vento, 533 F.2d 838, 856-69 (3d Cir. 1976) (discussing the difference between the *Franks* test and the Fifth Circuit test).

issue an order stating the facts that justify the interception,[46] a statement of when the interception should cease,[47] and an instruction that execution of the surveillance warrant must minimize the interception of conversations not included in the order.[48] Title III also articulates procedures for providing notice to affected parties[49] and for sealing the tapes after interception.[50]

The Supreme Court has never addressed the constitutionality of Title III.[51] The Court has, however, interpreted various subsections of the statute.[52] Lower federal courts that have addressed the constitutionality of Title III have uniformly sustained its validity.[53]

B. The Suppression Sanction

In the event that law enforcement officials or the issuing judge violates the requirements of Title III in the course of intercepting a conversation, the statute imposes the strict sanction of suppression.[54] Supreme Court interpretations of the suppression remedies of Title III, however, indicate that not all violations of the statute will result in suppression.[55]

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46 *See supra* notes 35-44 and accompanying text.

47. 18 U.S.C. § 2518(4)(e) (1982).

48 *Id.* § 2518(5). For a description of the minimization requirement, see *infra* notes 150-59 and accompanying text.

49. 18 U.S.C. § 2518(8)(d) (1982) (providing for mandatory notice to persons named in the surveillance order and notice to other persons at the discretion of the issuing judge). For a description of the notice requirement, see *infra* notes 100-01 and accompanying text.

50. 18 U.S.C. § 2518(8)(a) (1982) (requiring sealing of recordings immediately after execution of the order at the direction of the issuing judge). For a discussion of the sealing requirement, see *infra* notes 187-88 and accompanying text.

51. *See* J. CARR, *supra* note 5, at 33.

52. *See, e.g.*, United States v. Donovan, 429 U.S. 413 (1977) (interpreting the identification and notice requirements); United States v. Chavez, 416 U.S. 562 (1974) (interpreting the authorization requirements of § 2516(1)); United States v. Giordano, 416 U.S. 505 (1974) (same). For a discussion of these cases, see *infra* notes 56-70 & 87-116 and accompanying text.

53. *See* United States v. Smith, 712 F.2d 702, 707 n.2 (1st Cir. 1983) (collecting cases).

54. 18 U.S.C. §§ 2515, 2518(10)(a)(i)-(iii) (1982). Section 2515 provides that evidence from electronic surveillance may not be used at trial in violation of Title III. Section 2518(10)(a)(i)-(iii) states that any "aggrieved person" may move to suppress evidence of electronic surveillance if "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." *Id.* § 2518(10)(a)(i)-(iii).

55. *See* United States v. Chavez, 416 US. 562, 572-73 (1974); United States v. Giordano, 416 U.S. 505, 528 (1974); *cf.* J. CARR, *supra* note 5, at 354-55 (determining the availability of suppression by analyzing *Chavez* and *Giordano*); C. FISHMAN, WIRETAPPING AND EAVESDROPPING § 252 (1978) (*Chavez* and *Giordano* define the scope of § 2518(10)(a)(i)).

In *United States v. Giordano*,[56] the Supreme Court determined that authorization of an application for a surveillance warrant by the Executive Assistant to the Attorney General violated section 2516(1), which requires that the Attorney General or a specially designated Assistant Attorney General authorize an interception order.[57] The Court then considered whether this violation necessitated suppression of evidence obtained from the illegal wiretap.[58] The Court examined the legislative history of Title III to determine the purpose of section 2516(1)[59] and concluded that the authorization procedures occupied a central role in the statutory scheme.[60] Thus, in the Court's view, the violation warranted suppression of the intercepted communication.[61]

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56. 416 U.S. 505 (1974).

57. *Id.* at 510-11. *See* 18 U.S.C. § 2516(1) (1982).

58. 416 U.S. at 525.

59. *Id.* at 516-23. The Court determined that § 2516(1) ensures that government officials will not use electronic surveillance as in investigatory technique unless a senior officer in the Department of Justice decides that the situation warrants such an intrusion on personal privacy. *Id.* at 528.

The Senate Report accompanying Title III provides additional purposes of § 2516(1):

> 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 might 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.

LEGIS. HIST., *supra* note 31, at 2185.

60. 416 U.S. at 528-29.

61. *Id.* The *Giordano* Court also held that § 2515, which requires suppression of "evidence derived" from an unlawful interception, and § 2518(10)(a), which permits an "aggrieved person" to move to suppress "evidence derived" from an unlawful interception, mandated the suppression of evidence from an extension order.

In construing the two suppression sections of Title III, the Supreme Court ignored § 2515 in favor of § 2518(10)(a). Pulaski, *Authorizing Wiretap Applications Under Title III: Another Dissent to* Giordano *and* Chavez, 123 U. PA. L. REV. 750, 782, 788 (1975). The practical effect of *Giordano* was to narrow the scope of § 2515 to the specific grounds of suppression listed in § 2518(10)(a)(i)-(iii). Pulaski, *supra*, at 782.

The *Giordano* Court, in interpreting § 2518(10)(a), rejected the government's argument that § 2518(10)(a)(i) ("the communication was unlawfully intercepted") only reaches constitutional violations. 416 U.S. at 525. The Court held that § 2518(10)(a)(i) covers both constitutional and statutory violations. *Id.* at 527. The Court also held that § 2518(10)(a)(ii) ("the order of authorization or approval under which it was intercepted is insufficient on its face") and § 2518(10)(a)(iii) ("the interception was not made in conformity with the order of authorization or approval") relate only to statutory violations. *Id.* at 526. Professor Pulaski, in contrast, finds this dichotomy between the various subsections artificial. Pulaski, *supra*, at 788.

The Court in *Giordano* stated explicitly that the suppression decision did not depend on the application of the "judicially fashioned" exclusionary rule, but upon the provisions of Title III. 416 U.S. at 524.

The Court in *United States v. Chavez*[62] considered a different violation of Title III and reached a contrary conclusion. In *Chavez*, the Court considered the applicability of the suppression sanction to violations of sections 2518(1)(a)[63] and 2518(4)(d),[64] which require both the application for the warrant and the order authorizing the interception to contain the name of the authorizing officer.[65]

Justice White, writing for the Court, asserted that Congress did not intend these sections to serve a "substantive role" in Title III.[66] Rather, Congress included these sections merely to ensure compliance with the authorization procedures of section 2516[67] and to facilitate the "fixing of responsibility" for the approval of the application.[68] Justice White accordingly found suppression inappropriate,[69] concluding that these purposes had been served despite the violations.[70]

C. *Principal Tests for Suppression:* Chun *and "But For"*

Applying the standards announced by the Supreme Court in *Giordano* and *Chavez*, the Ninth Circuit Court of Appeals, in *United States v. Chun*,[71] formulated a three-part test for determining which violations of Title III require suppression.[72] Under *Chun*, the first inquiry is whether

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62 416 U.S. 562 (1974).

63. 18 U.S.C. § 2518(1)(a) (1982).

64. *Id.* § 2518(4)(d).

65. 416 U.S. at 568. In *Chavez*, the Attorney General reviewed and authorized an application for electronic surveillance; however, the Assistant Attorney General signed his name to the application and order. *Id.* at 566.

66. *Id.* at 578.

67. *Id.* at 575; *see also supra* notes 57-61 and accompanying text (reviewing the *Giordano* Court's discussion of § 2516).

68. 416 U.S. at 575. *See supra* note 59 (quoting the Senate Report's determination of the need to place responsibility for applications on a particular person). The Court found nothing in the legislative history to indicate that Congress intended sections 2518(1)(a) and 2518(4)(d) to play a central role in the statutory scheme. 416 U.S. at 579; *see also* LEGIS. HIST., *supra* note 31, at 2189, 2191.

69 416 U.S. at 579-80. The Court added a cautionary note to its conclusion, asserting "we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." *Id.* at 580.

70 *Id.* at 578. The Court held that the purpose of sections 2518(1)(a) and 2518(4)(d) was to "simplify the assurance that those whom Title III makes responsible for determining when and how wiretapping and electronic surveillance should be conducted have fulfilled their roles in each case . . . " 416 U.S. at 577.

71. 503 F.2d 533 (9th Cir. 1974).

72. The *Chun* court initially addressed the question whether the alleged Title III violation re-

the violation relates to a "central or functional safeguard" of Title III.[73] If so, the reviewing court should then determine whether the purpose of the safeguard was satisfied, despite the violation.[74] The Ninth Circuit held that a reviewing court should suppress illegally intercepted communications whenever government officials violate a central safeguard of the statute and fail to satisfy the purpose of the safeguard.[75] Third, the *Chun* court suggested that courts should suppress intercepted conversations whenever government officials deliberately ignore statutory requirements to their tactical advantage.[76]

The Supreme Court adopted a different approach to the suppression question in *United States v. Donovan*,[77] decided three years after *Chun*.[78] In *Donovan*, the Court employed a "but for" analysis, focusing on the "substantive role" of the violated procedure in the judicial authorization of electronic surveillance.[79] If "but for" the violation the judge would not have issued the surveillance warrant, the reviewing court should suppress the intercepted conversations.[80] If, however, the judge would have issued the warrant even if government officials had fully complied with the statute, suppression is inappropriate.[81]

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quired suppression under the fourth amendment exclusionary rule. *Id.* at 536. Finding no constitutional violation, the court applied the three-part test. *Id.* at 538.

73. *Id.* at 542 (citing United States v. Chavez, 416 US. 562, 578 (1974); United States v. Giordano, 516 U.S. 505, 516 (1974)).

74. *Id.* (citing United States v. Chavez, 416 U.S. 562, 573-74 (1974); United States v. Giordano, 416 U.S. 505, 524-28 (1974)).

75. *Id.*

76. *Id.* The *Chun* court based the third part of its test on "an implicit suggestion" in United States v. Chavez, 416 U.S. 562 (1974) without citing a specific section of the *Chavez* opinion. In *Chavez*, however, the Court responded to allegations that the violation of § 2518(1)(a) and § 2518(4)(d) was deliberate and designed to mislead the issuing court, 416 U.S. at 573, by stating that no purpose would be served by misleading the court when the Attorney General himself approved the application. The Court's statement could be read to suggest that suppression may be appropriate if the government deliberately misleads the court to secure an advantage.

77. 429 U.S. 413 (1977). *Donovan* is the only Supreme Court decision since *Giordano* and *Chavez* to address the applicability of Title III's suppression remedies to Title III violations. *See infra* notes 87-116 and accompanying text (discussing *Donovan*).

78. The Supreme Court cited the *Chun* analysis in deciding whether government officials violated the notice requirement. 429 U.S. at 431 & n.21. The Court did not, however, apply or discuss the *Chun* test in its consideration of the suppression sanction.

79. *Id.* at 435. "The issue is whether the identification in an intercept application of all those likely to be heard in incriminating conversations plays a 'substantive role' with respect to judicial authorization of intercept orders . . . ." *Id. See infra* note 96 and accompanying text.

80. 429 U.S. at 435-36.

81. *Id.* The *Donovan* Court did not explicitly use the "but for" language in formulating its approach to the suppression question. Lower federal courts have characterized the *Donovan* ap-

Application of the *Donovan* "but for" test is generally limited to preauthorization violations and errors in the issuance of the warrant because the inquiry is whether the violation would have affected the decision to issue the surveillance warrant.[82] The *Donovan* Court did not decide whether the suppression sanction applies to deliberate violations of the statute.[83] The *Chun* test, on the other hand, is broader in scope and applies by its terms to all Title III violations.[84]

III. THE SUPPRESSION SANCTION'S APPLICABILITY TO TITLE III PROVISIONS

Giordano, *Chavez*, *Donovan*, and *Chun* have provided subsequent courts with substantive guidance in deciding which Title III violations require suppression.[85] The Supreme Court and lower federal courts have

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proach as a "but for" test and have utilized the test in resolving the suppression question in different contexts. *See, e.g.*, United States v. Williams, 565 F. Supp. 353, 366, 368 (N.D. Ill. 1983). In *Williams*, FBI agents obtained a warrant without revealing to the issuing judge how they intended to enter the site of the requested surveillance. The court held that Title III did not require suppression because the judge would have issued the warrant even if there had been full disclosure. In United States v. Dorfman, 542 F. Supp. 345 (N.D. Ill. 1982), *aff'd*, 690 F.2d 1217 (1982), the same court stated that suppression of only those items the government would not have been able to seize had there been no violation was appropriate. *Id.* at 377 n.30; *see also* United States v. Civella, 533 F.2d 1395 (8th Cir. 1976). In *Civella*, the Eighth Circuit decided that suppression was inappropriate when an application for surveillance warrant falsely stated that an affidavit was attached. The court reasoned that the failure of the issuing judge to read the affidavit did not influence his decision to issue the warrant; therefore, the omission was irrelevant for suppression purposes. *Id.* at 1401.

82. 429 U.S. at 435; *see supra* note 79 and accompanying text.

83. The *Donovan* Court suggested that an intentional violation would present a "different case." 429 U.S. at 436 n.23; *see infra* note 93 and accompanying text (discussing intentional violations of the identification requirement). If the Supreme Court were to decide that a deliberate Title III violation is grounds for suppression, then the "but for" test could apply to both pre and post-authorization violations.

84. *See supra* notes 71-76 and accompanying text. The "but for" test is distinguishable from the three-part *Chun* test in that the threshold inquiry in *Chun* is whether the requirement serves a central function in the statutory scheme as a whole. The "but for" test focuses on whether the violation would affect the judicial authorization of the warrant. The two tests are similar in other respects. *Chun*'s second inquiry as to whether government officials satisfied the purpose of the requirement, despite their violation, is analogous to the question under the "but for" test whether the judge would have issued the surveillance warrant if the government had fully complied with the statute. The third *Chun* inquiry, whether the government deliberately violated the procedure to its tactical advantage, is similar to the question that the *Donovan* Court specifically reserved for future resolution. *See supra* note 83 and accompanying text.

85. *See* United States v. Chavez, 416 U.S. 562, 584 (1974) (Douglas, J., concurring in part, dissenting in part) (characterizing process as picking and choosing); *see also* Pulaski, *supra* note 61, at 789 (same).

considered the applicability of the suppression sanction to various Title III provisions and have reached inconsistent results.

A. The Identification Requirement

Title III requires that the officers applying for a warrant name all persons who will be the subjects of intercepted communications.[86] In *United States v. Donovan*,[87] the Supreme Court decided that a violation of the identification requirement does not mandate suppression.[88]

In *Donovan*, government officials applying for a surveillance warrant failed to name three persons whom they had probable cause to believe were committing gambling-related offenses and whose conversations they expected to intercept.[89] The Court employed the "but for" test[90] and concluded that even if the government had satisfied the identification requirement, the judge would have issued the surveillance warrant.[91] Accordingly, the Court refused to suppress the intercepted conversations.[92]

The *Donovan* Court did not directly address the question whether suppression is appropriate when a defendant demonstrates that the government deliberately withheld information from the issuing judge.[93] In

86. 18 U.S.C. § 2518(1)(b)(iv) (1982). "Each application shall include the following information . . . (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted." *Id. See* United States v. Kahn, 415 U.S. 143, 152-53 (1974) (government need not name in an application for a surveillance warrant those persons whose existence is known but whom the government does not believe are committing a crime).

The Supreme Court held in United States v. Donovan, 429 U.S. 413 (1977), that § 2518(b)(iv) requires that the government name in its application all persons whom it has probable cause to believe are committing the offense under investigation and whose conversations it expects to intercept. *Id.* at 429.

87. 429 U.S. 413 (1977); *see supra* note 77.

88. 429 U.S. at 440; *see also* J. CARR, *supra* note 5, at 178 (summarizing and criticizing *Donovan*).

89. 429 U.S. at 419-20.

90. *See supra* notes 79-81 and accompanying text.

91. 429 U.S. at 435.

92. Id. at 435-36. *But see* J. CARR, *supra* note 5, at 178 (stating that the *Donovan* Court's presumption that the judge would have issued the warrant if the applying officers had satisfied the identification requirement is irrelevant and "misapplies" United States v. Chavez, 416 U.S. 562 (1974)).

Other statutory factors justifying the issuance of a surveillance warrant, according to Justice Powell, include the existence of probable cause, 18 U.S.C. § 2518(3)(a)-(b), (d) (1982), and the failure of normal investigative techniques, *id.* § 2518(3)(c). For a discussion of the probable cause standard in electronic surveillance cases, see *supra* note 45. For a discussion of the necessity requirement, see *infra* notes 117-19 and accompanying text.

93. The Court suggested that a showing that the government deliberately violated the identification requirement would present a "different case." 429 U.S. at 436 n.23; *see also* J. CARR, *supra*

addition, one court has added the possibility of prejudice to the defendant as grounds for suppression whenever the warrant application does not name the defendant.[94]

Suppression as a sanction for unintentional violations of the identification requirement is similarly inappropriate under the *Chun* test.[95] The Court in both *Chavez* and *Donovan* observed that the identification requirement is not "central" to Title III's statutory framework.[96] The

note 5, at 178 (*Donovan* suggests that intentional failure to name an individual in the application for electronic surveillance might lead to suppression); *supra* note 83 and accompanying text (discussing the "but for" test and intentional violations of Title III).

For cases decided since *Donovan* that have considered deliberate violations of the identification requirement, see United States v. Martin, 599 F.2d 880, 886 (9th Cir.) (suppression for an identification requirement violation requires an allegation of intentional omission), *cert. denied,* 441 U.S. 962 (1979); United States v. Rotchford, 575 F.2d 166, 174 (8th Cir. 1978) (*Donovan* does not require suppression in the absence of a suggestion of improper government motive); United States v. Cox, 567 F.2d 930 (10th Cir. 1977) (contention that *Donovan* requires suppression because of a violation of the identification requirement is without merit), *cert. denied,* 434 U.S. 927 (1978); United States v. Sklaroff, 552 F.2d 1156, 1160 (5th Cir. 1977) (*Donovan* does not foreclose bad faith on the government's part as a grounds for suppression), *cert. denied,* 434 U.S. 1009 (1978); United States v. Jackson, 549 F.2d 517 (8th Cir.) (Title III does not require suppression in the absence of any suggestion that the government deliberately failed to name defendants in an attempt to keep information from the court), *cert. denied,* 430 U.S. 985 (1977).

94. *See* United States v. Rotchford, 575 F.2d 166, 174 (8th Cir. 1978). The court stated that the failure to name the defendant in the application did not warrant suppression because the omission did not prejudice the defendant in any way. *See also* United States v. Donovan, 429 U.S. 13, 439 n.26 (1977) (reserving "prejudice" as grounds for suppression in the event of a violation of the postinterception notice requirement); *infra* notes 100-04 and accompanying text (discussing the notice requirement). The *Rotchford* court did not reveal what would constitute prejudice to the defendant in an identification requirement violation. In finding that there was no prejudice, however, the court noted that the unnamed defendant received postinterception notice. 575 F.2d at 174; *see also* United States v. Costanza, 549 F.2d 1126, 1130 (8th Cir. 1977) (failure to state the defendants' names in an order not prejudicial because the defendants received notice within the statutory time). *But see* United States v. Sklaroff, 552 F.2d 1156, 1158-59 (5th Cir. 1977) (contending that the Supreme Court in *Donovan* foreclosed prejudice as a ground for suppression where the government violates the identification requirement), *cert. denied,* 434 U.S. 1009 (1978).

95. *See supra* notes 71-76 and accompanying text (discussing *Chun* test). The *Chun* court itself found the notice provisions central to the statute's protection. 503 F.2d at 542. The statute only mandates notice to those named in the warrant. *Id.*; *infra* note 101 and accompanying text. Thus, the *Chun* court might have suppressed wiretap evidence because of a violation of the identification requirement if the persons omitted from the warrant did not receive discretionary notice. In *Donovan*, the persons omitted from the warrant received discretionary notice. 429 U.S. at 436 n.23. The *Donovan* Court's holding that a violation of the notice requirement does not compel suppression thus negates the *Chun* court's conclusions as to the centrality of the notice provision and its probable conclusion as to the centrality of the identification requirement.

96. *See* United States v. Donovan, 429 U.S. 413, 434-37 (1977); United States v. Chavez, 416 U.S. 562, 578 (1974). Although the *Donovan* Court did not use the *Chun* test, Justice Powell, writing for the Court, began his consideration of the applicability of the suppression sanction to a violation of the identification requirement by determining that the requirement does not play a "cen-

Donovan Court also examined the legislative history of Title III and concluded that Congress intended the identification provision to satisfy the "constitutional command of particularization."[97] The Court found that the government satisfied this requirement even though it omitted the names of three persons from the application.[98] The *Chun* test does, however, warrant suppression whenever government officials intentionally violate the identification requirement to their advantage.[99]

B. The Notice Requirement

The *Donovan* Court also decided whether a violation of the notice requirement of Title III requires suppression.[100] Section 2518(8)(d) requires mandatory notice to persons named in the application and, at the issuing judge's discretion, notice to others overheard.[101] In *Donovan*, the government inadvertently omitted two names from a list it gave the judge of persons overheard in an interception.[102] The Court determined that this omission violated section 2518(8)(d)[103] but held that the violation

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tral . . . role in guarding against unwarranted use of wiretapping or electronic surveillance." United States v. Donovan, 429 U.S. at 437 (quoting United States v. Chavez, 416 U.S. at 578).

97. 429 U.S. at 437. The *Donovan* Court observed that the legislative history of Title III does not reveal a "central" or "functional" purpose to the identification requirement:

> The only explanation given in the Senate Report for the inclusion of the broad identification provision was that it was intended to reflect what Congress perceived to be the constitutional command of particularization . . . . No additional guidance can be gleaned from the floor debates, since they contain no substantive discussion of the identification provision.

Id.

98. *Id.* at 435-37.

99. *See supra* note 76 and accompanying text.

100. 429 U.S. at 417.

101. 18 U.S.C. § 2518(8)(d) (1982) provides as follows:

> Within a reasonable time but not later than ninety days after the filing of an application for an order of approval . . . the issuing . . . judge shall cause to be served, on the person named in the order of the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—
>
> (1) the fact of the entry of the order or application;
> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
> (3) the fact that during the period wire or oral communications were or were not intercepted.

102. 429 U.S. at 420-21.

103. *Id.* at 433. Justice Powell maintained that the government may fulfill its duties under § 2518(8)(d) in two ways. He noted that the government may provide the court with a general description of the classes of persons who were the subject of electronic surveillance. *Id.* at 430-31 (citing United States v. Chun, 503 F. 2d 533, 540 (9th Cir. 1974)). Under such an approach, a court can exercise its discretion as to which classes of interceptees should receive notice. The second way,

did not require suppression.[104]

The Court examined the legislative history of Title III to determine the purpose of the notice provisions.[105] The Court determined that Congress intended the notice requirement merely to promote responsible use of electronic surveillance[106] and not to operate as an independent restraint on the wiretap procedure.[107] Observing that Congress did not manifest any intention to regard conversations intercepted without postinterception notice as unlawful,[108] the Court concluded that a violation of the notice requirement does not mandate suppression.[109]

The *Donovan* Court left open the possibility of suppression for intentional violations of the notice requirement.[110] In addition, the Court's consideration of prejudice to the defendant[111] has led lower courts to conclude that prejudice to the defendant may be grounds for suppressing

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which the government chose to pursue in *Donovan,* is to provide the court with a list of individual interceptees. 429 U.S. at 432. Because the government must supply the court with a complete list if it chooses the latter method, the omission of two names in *Donovan* violated § 2518(8)(d). *Id.* at 433.

104. 429 U.S. at 435, 440-41.

105. *Id.* at 439-40.

106. *Id.* at 438-39. The Senate Report accompanying Title III assumes that the notice requirement will ensure reasonable surveillance techniques:

> The intent of the provision is that the principle use of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress for example, section 2520 if he feels that his privacy has been unlawfully invaded.

LEGIS. HIST., *supra* note 31, at 2194. *But see* J. CARR, *supra* note 5, at 286 (contending that postinterception notice does not ensure reasonable surveillance techniques because statutory notice is private, rather than public, and need not be given to those persons not named in the warrant). Professor Carr asserts that the discretionary aspect of the notice requirement will increase the fear of secret, undisclosed electronic surveillance. *Id.*

107. 429 U.S. at 440.

108. *Id.* at 439.

109. *Id.* at 440.

110. 429 U.S. at 439 n.26. *See supra* note 93 and accompanying text (noting that *Donovan* leaves open the possibility of suppression for intentional violations of the identification requirement); *see also* United States v. DiGirlomo, 550 F.2d 404 (8th Cir. 1977) (remanding the case to determine if the government's omission was intentional).

One court has held that suppression for intentional violations of the identification appropriate only upon a showing of bad faith omissions by the government. United States v. Barletta, 565 F.2d 985, 990-91 (8th Cir. 1977). In *Barletta* government agents mistakenly withheld names from a notice list. The court refused to suppress the evidence from the wiretap because the defendants did not allege bad faith on the government's part.

111. The Court observed that the notice requirement violation did not prejudice the defendants. 429 U.S. at 439 n.6.

wiretap evidence gathered in contravention of this requirement.[112]

The *Donovan* Court's "but for" test[113] focuses on the judicial authorization of the wiretap and thus does not apply to postauthorization violations of the notice requirement.[114] The Court's approach in *Donovan* resembles the *Chun* analysis[115] in its examination of the role of the notice requirement in the overall structure of Title III. Because the Court found that the notice requirement does not serve a central function,[116] it did not have to decide whether the violation obstructed the statutory purpose.

C. The Necessity Requirement

Title III requires an affidavit supporting a wiretap application to state

112. *See, e.g.*, United States v. DiGirlomo, 550 F.2d 404 (8th Cir. 1977) (remanding for a consideration of prejudice to the defendants for lack of notice).

Courts have been reluctant to suppress on the grounds of prejudice to the defendant, even when a substantial period of time has lapsed between the time of interception and the time of pretrial notice. *See* United States v. Barletta, 565 F.2d 985, 991 (8th Cir. 1977) (time delay in giving notice was not prejudicial to defendants because the wiretap evidence was not subject to the problems of human memory); United States v. Harrigan, 557 F.2d 879, 885 n.6 (1st Cir. 1977) (*Donovan* forecloses the claim that prejudice in the form of staleness can be grounds for suppression); United States v. Lawson, 545 F.2d 557, 565 (7th Cir. 1975) (two-year delay between interception and notice did not require suppression because defendants received notice three months before trial); United States v. Lamonge, 485 F.2d 197 (6th Cir. 1972) (failure of defendant to receive notice until one day before trial did not require suppression); United States v. Geller, 560 F. Supp. 1309, 1327 (E.D. Pa. 1983) (six-month delay was not prejudicial despite defendants' claims that they were unable to reconstruct their conversations); United States v. La Gorga, 336 F. Supp. 190 (W.D. Pa. 1971) (suppression was inappropriate where the defendants eventually received notice and did not allege prejudice). *But see* United States v. DiGirlomo, 550 F.2d 404 (8th Cir. 1977) (although the defendants had pretrial access to the recordings, the court remanded for a determination of prejudice).

In United States v. Harrigan, 557 F.2d 879 (1st Cir. 1977), the First Circuit rejected the defendant's contentions that he did not know that he was the target of a grand jury investigation and that he was not aware of the incriminating nature of his statements because he did not receive notice. The court reasoned that the defendant should have realized the incriminating nature of statements made at a grand jury proceeding and rejected his contention that failure to recieve timely notice of wiretapping resulted in prejudice. *Id.* at 885.

113. *See supra* notes 79-81 and accompanying text.

114. The Supreme Court may, however, expand the scope of the "but for" test to cover deliberate violations of Title III procedures. *See supra* note 93 and accompanying text.

115. *See supra* notes 71-76 and accompanying text.

116. This finding is implicit in the Court's statement that Congress did not intend the notice requirement to serve as an independent restraint on the use of electronic surveillance. 429 U.S. at 438-39; *see supra* notes 106-07 and accompanying text. The *Donovan* Court contended that it did not "think that the failure to comply fully with [the notice requirement] renders unlawful an intercept order. . . ." 429 U.S. at 434. The *Chun* court came to a different conclusion as to the centrality of the notice provision. 503 F.2d at 542. *See supra* note 95.

why other investigative techniques have not been or would not be successful.[117] The wiretap order must also state that normal investigative procedures are inadequate to meet the situation.[118] These two provisions are collectively known as the necessity requirement.[119]

Courts have been reluctant to find a violation of this requirement.[120] In the event that the defense proves a violation, the Second and Ninth Circuits require suppression of all wiretapping evidence.[121] These cir-

117. 18 US.C. § 2518(1)(c) (1982).

118. 18 U.S.C. § 2518(1)(c) (1982).

119. *See* Note, *supra* note 2, at 572.

Courts have held that the necessity requirement requires an applying officer to assert more than that, merely from experience, the nature of the crime under investigation requires electronic surveillance. *See, e.g.,* United States v. Gerardi, 586 F.2d 996 (1st Cir. 1978) (conclusory statement that normal investigative techniques are usually unsuccessful in dealing with government operations is insufficient to satisfy necessity requirement); United States v. Williams, 580 F.2d 578, 588 (D.C. Cir.) (general statements that other investigatory procedures have been unsuccessful does not satisfy requirement), *cert. denied,* 439 U.S. 832 (1978). The legislative history of Title III indicates that the necessity requirement should be read in a commonsense fashion and should not preclude electronic surveillance until law enforcement officials have tried every imaginable investigatory technique. *See* LEGIS. HIST., *supra* note 31, at 2190. "Merely because a normal investigative technique is theoretically possible, it does not follow that it is unlikely. What the provision envisions is that the showing be tested in a practical and commonsense fashion . . . ." *Id.*

120. United States v. Steinberg, 525 F.2d 1126 (2d Cir.) (holding that the government satisfied the necessity requirement even though it should have included more information), *cert. denied,* 425 U.S. 971 (1975); United States v. Caruso, 415 F. Supp. 847, 852 (S.D.N.Y.) (holding the necessity requirement met although the government should have admitted that a traditional search would have been useful), *aff'd without opinion,* 553 F.2d (2d Cir. 1977).

The government's burden in proving compliance with the necessity requirement is "not great." United States v. Anderson, 542 F.2d 428, 431 (7th Cir. 1976); United States v. Baynes, 400 F. Supp. 285, 299 (E.D. Pa.), *aff'd,* 517 F.2d 1399 (3d Cir. 1975).

121. *See* United States v. Lilla, 699 F.2d 99 (2d Cir. 1983); United States v. Santora, 600 F.2d 1317 (9th Cir. 1979). In *Lilla,* an undercover police officer investigating a drug conspiracy employed electronic surveillance techniques in place of other available methods of investigation that had been successful in the past. The Second Circuit held that the use of electronic surveillance was unwarranted, notwithstanding the government's contentions that the conspiracy was large and that the conspirators often used telephones. 699 F.2d at 104-05. After finding a violation of the necessity requirement, the court suppressed the wiretap evidence without discussion. *Id.* at 100, 105. In *Santora,* the Ninth Circuit held that the inadequacy of normal investigative techniques with respect to one conspirator did not automatically operate to the benefit of all other conspirators. The court found a violation of the necessity requirement, however, and automatically suppressed all surveillance evidence. 600 F.2d at 1320; *see also* United States v. Spagnuolo, 549 F.2d 705, 711 n.3 (9th Cir. 1977) (because Congress clearly intended § 2518(1)(c) to limit the use of wiretaps, the remedy of § 2515 applies to violations of the necessity requirement); United States v. Adams, 536 F.2d 303, 303 (9th Cir. 1976) (per curiam) (finding that the factual situation was indistinguishable from that in United States v. Kalustian, 529 F.2d 585 (9th Cir. 1975), and reversing a district court decision not to suppress the evidence); United States v. Kalustian, 529 F.2d 585, 589-90 (9th Cir. 1976) (finding a violation of the necessity requirement and suppressing the evidence without discussing why suppression was appropriate).

cuits have indicated[122] that the necessity requirement is an important precondition to the use of electronic surveillance[123] and is, therefore, an important safeguard of privacy.[124]

Courts have not explicitly used the *Chun* test[125] in determining whether a violation of the necessity requirement mandates suppression of evidence of electronic surveillance. Application of this test, however, probably would result in suppression. Courts have determined that the necessity requirement is a central safeguard of Title III,[126] satisfying the first *Chun* inquiry. The second *Chun* inquiry, requiring a determination of the purpose of the requirement, would also militate toward suppression. The purpose of the necessity requirement is two-fold: to ensure that law enforcement officers do not employ electronic surveillance as their first investigatory tactic and to ensure that the issuing judge agrees with law enforcement's assessment of the need for electronic surveillance.[127] If facts supporting the wiretap are not presented to the issuing judge, the purpose of the necessity requirement is not fulfilled and the second prong of the *Chun* test is not satisfied.[128]

A "but for" test[129] rarely applies in this context because a finding that a violation of the necessity requirement has occurred assumes that the

122. *See* cases cited *supra* note 121. These courts devoted most of their analysis to determining whether there had been a violation of the neccesity requirement and not to whether suppression was appropriate once a violation had been established.

123. *See* United States v. Lilla, 699 F.2d 99, 100-01 (2d Cir. 1983) (citing United States v. Kahn, 415 U.S. 143 (1974)) (asserting that the necessity requirement ensures that law enforcement officers do not employ electronic surveillance as their first investigative technique); United States v. Spagnuolo, 549 F.2d 705, 711 n.3 (9th Cir. 1977) (contending that Congress clearly intended the necessity requirement to limit the use of wiretaps); *see also* United States v. Kalustian, 529 F.2d 585, 590 (9th Cir. 1976) (suggesting that a reviewing court must make sure that the issuing judge has carefully scrutinized the necessity for electronic surveillance).

124. United States v. Kalustian, 529 F.2d 585, 590 (9th Cir. 1976) (stating that the necessity requirement serves the congressional purpose of protecting privacy).

125. *See supra* notes 71-76 and accompanying text.

126. *See supra* notes 123-24 and accompanying text.

127. *See, e.g.*, United States v. Messersmith, 692 F.2d 1315 (11th Cir. 1982); United States v. Martinez, 588 F.2d 1227 (9th Cir. 1978); United States v. Landmesser, 553 F.2d 17 (6th Cir.), *cert. denied*, 434 U.S. 855 (1977); United States v. Napolitano, 552 F. Supp. 465 (S.D.N.Y. 1982); *see also* LEGIS. HIST., *supra* note 31, at 2190.

128. The third *Chun* inquiry, whether the government deliberately violated the necessity requirement to its tactical advantage, is inapplicable because the government does not directly control whether or not a violation occurs. Government officials may intentionally misstate their reasons for believing that electronic surveillance is necessary; however, the judicial determination of necessity is the focus of this requirement, not the actions of applying officers. *See infra* text accompanying note 129.

129. *See supra* notes 79-81 and accompanying text.

judge's assessment of the need for electronic surveillance was incorrect. Reviewing courts usually apply this test in situations in which law enforcement officers did not reveal facts that, if revealed, may have influenced the judge's decision to issue the warrant.[130] Courts may be able to apply the "but for" test if unstated facts exist that would support a finding of necessity. In applying the "but for" test, a reviewing court could find that if the application for a surveillance warrant had included these facts, the issuing judge properly would have discerned a need for electronic surveillance and would have issued the warrant.

D. Previous Applications

Title III requires applying officers to disclose all previous applications for electronic surveillance to the issuing judge.[131] Courts have interpreted this requirement to mean that the applicant need only reveal to the judge all previous applications directed against persons named in the present application.[132] In addition, courts have distinguished between previous applications and previous interceptions, concluding that only the former require disclosure.[133]

In the leading case of *United States v. Bellosi*,[134] the District of Columbia Circuit found that the previous applications requirement serves a central function in Title III by restricting use of electronic surveillance by law enforcement officials.[135] The court's examination of the requirement

130. *See, e.g.*, United States v. Donovan, 429 U.S. 413 (1977) (government omitted two names from a list of persons who were subject to electronic surveillance); United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974) (government failed to reveal prior applications).

131 18 U.S.C. § 2518(1)(e) (1982).

132. *See, e.g.*, United States v. Sklaroff, 552 F.2d 1156, 1160 (5th Cir. 1977), *cert. denied*, 434 U.S. 1009 (1978).

133. *See, e.g., id.*; United States v. Florea, 541 F.2d 568, 572 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); *see also* J. CARR, *supra* note 5, at 187 (discussing purpose of requirement).

The previous applications requirement does not require the government to disclose the details of prior applications. United States v. Dorfman, 542 F. Supp. 345, 400 (N.D. Ill. 1982), *aff'd*, 690 F.2d 1217 (7th Cir. 1982).

134. 501 F.2d 833 (D.C. Cir. 1974).

135. *Id.* at 841. The court stated that an issuing judge requires information concerning prior applications to protect the public from overzealous law enforcement officials. *Id. See also* J. CARR, *supra* note 5, at 187 (disclosure of prior applications permits issuing judge to assess information in the application).

In *Bellosi*, the court found that the applying officers deliberately chose not to reveal a previous application to the judge. *Id.* at 835. The officers feared that an earlier wiretapping may have been illegal and did not want to establish any connection between the previous interception and the requested surveillance. *Id.*

revealed several purposes. First, the previous applications requirement precludes the government from "judge shopping."[136] In addition, compliance with the requirement permits the issuing judge to consider both the effect of another intrusion on the suspect's privacy and the actions of other judges in approving or denying previous applications.[137] The court also asserted that judicial scrutiny of prior applications ensures that evidence from previous illegal wiretaps will have no bearing on the present wiretap.[138] The court accordingly suppressed the information derived from the illegal wiretaps.[139]

Some courts have limited the *Bellosi* holding to situations in which the government intentionally omits disclosure of previous applications.[140] For example, one court held that a page missing from an affidavit revealing previous applications was not grounds for suppression.[141]

Although it did not explicitly utilize the three-part *Chun* test,[142] the *Bellosi* court, after finding that the previous applications requirement is essential to Title III, explored whether the government's violation obstructed the purposes of the requirement.[143] The court initially stated that selective government disclosure of prior applications would increase the likelihood of judicial authorization of electronic surveillance.[144] The court also emphasized that the government officials in *Bellosi* acted egregiously in deliberately choosing not to reveal a previous application that they believed might be illegal.[145] Therefore, suppression of the intercepted conversations in *Bellosi* satisfied the purposes of the previous applications requirement.

The analysis in *Bellosi* also suggests application of the "but for" test.[146]

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136. *Id.* The government argued that avoiding this practice was the principle purpose behind the previous applications requirement. *Id.*

137. *Id.* at 838.

138. *Id.*

139. *Id.* at 835. *But see* United States v. Martorella, 455 F. Supp. 459, 462 (W.D. Pa. 1978) (suggesting that suppression would have been inappropriate if the court had found a violation of the requirement).

140. United States v. Sklaroff, 552 F.2d 1156, 1160 (5th Cir. 1977) (the court found no evidence of a deliberate government attempt to hide pertinent information), *cert. denied*, 434 U.S. 1009 (1978); United States v. Harvey, 560 F. Supp. 1040 (S.D. Fla. 1982) (distinguishing United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974), as involving an intentional omission).

141. United States v. Harvey, 560 F. Supp. 1040, 1057 (S.D. Fla. 1982).

142. *See supra* notes 71-76 and accompanying text.

143. 501 F.2d at 841.

144. *Id.* at 840-41.

145. *Id.* at 840; *see supra* note 135.

146. *See supra* notes 79-81 and accompanying text.

The court noted that the issuing judge might have been reluctant to issue an interception order if he had known of the undisclosed previous application.[147] Some courts have failed to examine the underlying purposes of the disclosure requirement and have in fact applied a narrow "but for" test.[148] After finding a violation of the prior applications requirement, these courts have examined the application to determine whether the omission may have affected the judge's finding of necessity and probable cause.[149]

E. The Minimization Requirement

Title III requires the government to execute every surveillance order so as to minimize the interception of nonpertinent communications.[150] Neither the statute nor the legislative history provides any guidance to reviewing courts in defining a violation of this requirement.[151]

In *United States v. Scott*,[152] the Supreme Court held that in determining compliance with the minimization requirement, courts must assess the objective reasonableness of agents' actions[153] rather than their subjec-

147. 501 F.2d at 840-41; *cf.* United States v. Chavez, 416 U.S. 562, 582 (1979) (no tactical advantage in the government's representation that an Assistant Attorney General authorized an application that in fact had been authorized by the Attorney General).

148. *See, e.g.*, United States v. Abrahmson, 553 F.2d 1164, 1167 (8th Cir.), *cert. denied*, 433 U.S. 911 (1977); United States v. Harvey, 560 F. Supp. 1040 (S.D. Fla. 1982).

149. *See, e.g.*, United States v. Abrahmson, 553 F.2d 1164, 1173 (8th Cir.), *cert. denied*, 433 U.S. 911 (1977). In *Abrahmson*, the government disclosed a previous application but failed to inform the issuing judge that a reviewing court had suppressed evidence from the previous surveillance. The Eighth Circuit did not suppress the evidence from the present wiretap because it found sufficient showing of probable cause and necessity in the warrant. *Id. See also* United States v. Harvey, 560 F. Supp. 1040, 1070 (S.D. Fla. 1982) (utilizing the "but for" approach in determining the applicability of the suppression remedy to a violation of the previous applications requirement).

150. 18 U.S.C. § 2518(5) (1982); *see supra* note 48 and accompanying text.

151. *See* LEGIS. HIST. *supra* note 31, at 2,192 (repeating the statutory language without additional discussion); *see also* J. CARR, *supra* note 5, at 255-56 (asserting that the statute is ambiguous and case law is neither clear nor consistent); Note, *Minimization of Wire Interceptions: Pre-Search Guidelines and Post-Search Remedies*, 26 STAN. L. REV. 1411, 1411 n.4 (1975) (stating that the factual basis for determining compliance " remains a legislative secret") [hereinafter cited as Note, *Pre-Search Guidelines*]; Note, *Minimization Requirement after* United States v. Scott*: Myth or Reality*, 1979 WASH. U.L.Q. 601, 608 (arguing that uncertainty surrounds the minimization requirement because neither the statute nor the legislative history provide courts with any guidelines to determine compliance) [herinafter cited as Note, *Minimization Requirement.*]

152. 436 U.S. 128 (1978).

153. *Id.* at 137. The Court stated that courts should review the actions of government agents "in light of the facts and circumstances then known to [them]." *Id.* The defendants contended that because Title III requires good faith efforts to minimize, a lack of good faith minimization efforts constitutes a Title III violation. The Court rejected this argument and held that the statute ad-

tive intent.[154] The Court asserted that relevant factors in this determination include the nature and extent of suspected criminal activity,[155] the normal use of the monitored telephone,[156] the length and nature of the conversation,[157] the procedures the government used to limit interceptions,[158] and the degree of judicial supervision.[159]

The Supreme Court has never addressed the appropriate remedy for violations of the minimization requirement.[160] Lower courts have uti-

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dresses the conduct, not the motivation, of executing officers. The Court further suggested that the legislative history demonstrates that Congress did not intend § 2515 to go beyond general search and seizure law. *Id.* at 138-39 (quoting LEGIS. HIST., *supra* note 31, at 2185).

154. The Court was careful to reserve motive as one factor in determining whether suppression is appropriate after a court has found a violation. *Id.* at 139. Because the Court found that government agents in *Scott* satisfied the minimization requirement, however, it did not address the appropriate remedy for a violation. *Id.* at 135-36 n.10.

155. *Id.* at 141. The Court contended that the scope of permissable surveillance is greater in investigations of suspected crimes involving widespread conspiracies than in suspected crimes involving conspiracies limited to certain, identified persons. *Id. See, e.g.,* United States v. Martin, 599 F.2d 880, 887 (9th Cir. 1979); United States v. Hyde, 574 F.2d 856, 860 (5th Cir. 1978); United States v. Clemente, 482 F. Supp. 102, 106 (S.D.N.Y. 1979).

156. 436 U.S. at 141. Courts addressing the adequacy of minimization efforts have distinguished between wiretapping of public and private telephones. These courts generally hold that government agents must make more diligent efforts to minimize when tapping public telephones. *See, e.g,* United States v. Clemente, 482 F. Supp. 102 (S.D.N.Y. 1979), *aff'd without opinion,* 633 F.2d 207 (2d Cir. 1980); United States v. Picone, 408 F. Supp. 255, 259 (D. Kan. 1975).

157. 436 U.S. at 141-42. If the conversation is short, the parties use a code, or the agent does not know one party to the conversation, the agent may have a difficult time ascertaining whether the call is pertinent. *See, e.g.,* United States v. Losing, 539 F.2d 1174 (8th Cir. 1976) (law enforcement officials had difficulty identifying speakers because the calls often mixed business with pleasure); United States v. Cale, 508 F. Supp. 1038 (S.D.N.Y. 1981) (because the parties to the conversation spoke in Croatian, government officials intercepted all calls until they located a translator); United States v. Clemente, 482 F. Supp. 102 (S.D.N.Y. 1979) (officials had difficulty distinguishing relevant conversations from innocent conversations because the calls were often short and ambiguous, and the subject matter of the conversations changed quickly), *aff'd without opinion,* 633 F.2d 207 (2d Cir. 1980); United States v. DePalma, 461 F. Supp. 800 (S.D.N.Y. 1978) (conversants used coded and foreign language).

158. *See, e.g.,* United States v. Terry, 702 F.2d 299, 312 (2d Cir. 1983) (minimization requirement met because the agents took reasonable steps to limit interceptions); United States v. DePalma, 461 F. Supp. 800, 817-23 (S.D.N.Y. 1978) (each agent read and initialed written procedures that limited surveillance to a specified period of time).

159. *See, e.g.,* United States v. Feldman, 606 F.2d 673 (6th Cir. 1979), *cert. denied,* 445 U.S. 961 (1980); United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979); United States v. Clemente, 482 F. Supp. 102 (S.D.N.Y. 1979), *aff'd without opinion,* 633 F.2d 207 (2d Cir. 1980).

For a thorough discussion of compliance with the minimization requirement, see Note, *Post-Search Authorization Problems in the Use of Wiretaps Minimization, Amendment, Sealing and Inventories,* 61 CORNELL L. REV. 92 (1975); Note, *Pre-Search Guidelines, supra* note 151; Note, *Minimization Requirement, supra* note 151.

160. The Court in *Scott* found that the government had complied with the minimization require-

lized three separate strategies in assessing violations of the requirement.[161] The first strategy calls for the suppression of all conversations seized under the interception order.[162] The second strategy demands suppression only of improperly seized interceptions.[163] The final strategy determines the extent of suppression based on the level of good faith demonstrated by the law enforcement officers executing the surveillance warrant.[164]

The first strategy presumes that total suppression deters law enforcement officers from intercepting nonpertinent calls.[165] Courts employing the first strategy contend that the sanction of partial suppression does not afford the public the full deterrent protection of the minimization requirement.[166] These courts maintain that partial suppression encourages

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ment and thus did not address the appropriate remedy for a violation of the requirement. 436 U.S. at 136 n.10.

161. *See* Note, *Pre-Search Guidelines*, *supra* note 151 at 1435 n.116 (noting the three approaches to the suppression problem); *see also* United States v. Principie, 531 F.2d 1132, 1139-45 (2d Cir. 1976) (discussing the relative strengths and weaknesses of each strategy).

162. *See, e.g.*, United States v. Focarile, 340 F. Supp. 1033, 1046-47 (D. Md.), *aff'd on other grounds*, (4th Cir. 1972), *rev'd on other grounds*, 416 U.S. 505 (1974); United States v. Leta, 332 F. Supp. 1357, 1360 n.4 (M.D. Pa. 1971); United States v. Scott, 331 F. Supp. 233, 246-49 (D.D.C. 1971); *see also* United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974); United States v. Shakur, 560 F. Supp. 318 (S.D.N.Y. 1983); United States v. Dorfman, 542 F. Supp. 345, 394-95 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (7th Cir. 1982); United States v. Sisca, 361 F. Supp. 735, 745-46 (S.D.N.Y. 1973); United States v. Bynum, 360 F. Supp. 400 (S.D.N.Y. 1973); United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971).

163. *See* United States v. Prinicipie, 531 F.2d 1132 (2d Cir. 1976) (suppression limited to telephone calls that the government intercepted in violation of a specific order).

164. *See* United States v. Feldman, 606 F.2d 673 (6th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); United States v. Hyde, 574 F.2d 856 (5th Cir. 1978); United States v. Turner, 528 F.2d 143 (9th Cir. 1975), *cert. denied*, 429 U.S. 837 (1976); United States v. Armocida, 515 F.2d 29 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); United States v. Clemente, 482 F. Supp. 102 (S.D.N.Y. 1979), *aff'd without opinion*, 633 F.2d 207 (2d Cir. 1980); United States v. Webster, 473 F. Supp. 586 (D. Md. 1979), *aff'd*, 639 F.2d 174 (4th Cir. 1981); *see also* J. CARR, *supra* note 5, at 266 (arguing that partial suppression is appropriate when government agents acted in good faith).

165. *E.g.*, United States v. Focarile, 340 F. Supp. 1033, 1047 (D. Md.) (contending that suppression of only "innocent" calls would encourage government officials to intercept all calls), *aff'd on other grounds*, (4th Cir. 1972), *rev'd on other grounds*, 416 U.S. 505 (1974); *see also* United States v. Scott, 331 F. Supp. 233, 246-49 (D.D.C. 1971) (noting that government interception of obviously personal calls constituted blatant disregard for the requirement).

166. United States v. Focarile, 340 F. Supp. 1033, 1044 (D. Md.) (quoting United States v. Scott, 331 F. Supp. 233, 248 (D.D.C. 1971)) (contending that indiscriminate government interception of private conversations would render the minimization requirement illusory), *aff'd on other grounds*, (4th Cir. 1972), *rev'd on other grounds*, 416 U.S. 505 (1974); United States v. Scott, 331 F. Supp. 233, 248 (D.D.C. 1971) (permitting government agents to intercept conversations that are clearly not pertinent to the investigation would reduce the minimization requirement to "meaningless verbiage").

law enforcement officials to listen to all conversations, knowing that the only conversations subject to suppression at trial are those not pertinent to the investigation.[167] Courts applying the total suppression sanction further suggest that because a "seized" conversation can never be returned, the minimization must take place by the agent during the surveillance and not by the courts after the surveillance.[168]

The partial suppression approach emphasizes the legality of the interception order. Courts applying this approach maintain that evidence seized under a lawful order should not be suppressed simply because agents seized other items outside the scope of the order.[169] The partial suppression view invokes language in the legislative history that suggests that Congress did not intend the Title III exclusionary remedy[170] to be more expansive than that in general search and seizure law.[171] Depend-

167. United States v. Focarile, 340 F. Supp. 1033, 1047 (D. Md.) (contending that partial suppression would benefit overzealous agents), *aff'd on other grounds,* (4th Cir. 1972), *rev'd on other grounds,* 416 U.S. 505 (1974).

168. *Id.* (observing that a "conversation once seized can never truly be given back as can a physical object"). The court in *Focarile* also compared "seized" conversations with normal seizures and stated:

> The right of privacy protected by the fourth amendment has been more invaded where a conversation which can never be returned has been seized than where a physical object which can be returned has been seized. There is more reason, therefore, to require a more strict rule than the partial suppression remedy . . . .

Id. *See also* J. CARR, *supra* note 5, at 267 (advocating the use of total suppression when eavesdropping takes on the character of a general search).

169. *See* United States v. Losing, 539 F.2d 1174 (8th Cir.) (courts should not suppress interceptions within the scope of the order because agents intercepted conversations outside the order), *cert. denied,* 434 U.S. 969 (1977); United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972) (courts should not suppress all wiretapping evidence solely because agents gathered extraneous evidence), *cert. denied,* 417 U.S. 918 (1974); United States v. Shakur, 560 F. Supp. 318 (S.D.N.Y. 1983) (asserting that although officers wrongfully intercepted privileged calls, suppression was appropriate only for the wrongfully intercepted calls); United States v. Sisca, 361 F. Supp. 735 (S.D.N.Y. 1973) (contending that courts should not suppress validly intercepted calls because government agents failed to satisfy the minimization requirement with respect to other calls), *aff'd,* 503 F.2d 1337 (2d Cir.), *cert. denied,* 419 U.S. 1008 (1974).

170. *See* 18 U.S.C. § 2515 (1982).

171. *See* United States v. Sisca, 361 F. Supp. 735, 746 (S.D.N.Y. 1973) (stating that the legislative history does not reveal any attempt to go beyond general search and seizure law); *see also* LEGIS. HIST., *supra* note 31, at 2190 (indicating that Congress did not intend § 2515 to "press the scope of the suppression role beyond general search and seizure law").

For authority concluding that courts should suppress only those items wrongfully seized, *see* Thweatt v. United States, 433 F.2d 1226, 1232 n.7 (D.C. Cir. 1970) (suggesting that courts should suppress illegally seized evidence and permit introduction of all other evidence at trial); United States v. Langford, 303 F. Supp. 1387, 1388-89 (D. Minn. 1969). In *Langford,* authorities conducted a search in areas not specified in the search warrant. The reviewing court refused to suppress evidence lawfully seized under the search warrant, concluding that the good faith actions of the officers

ing on the circumstances, this approach may deter violations of the minimization requirement.[172] Courts endorsing the partial suppression approach observe that Title III provides civil remedies[173] for those persons who suffer an invasion of their privacy.[174]

The third approach links the scope of suppression with the minimization attempt.[175] If agents show a high regard for privacy and make a good faith effort to comply with the minimization requirement, courts adhering to this approach will employ the partial suppression sanction.[176] When, in contrast, agents show a blatant disregard for the minimization requirement, total suppression may be appropriate.[177] This flexible approach encourages the government to comply with the minimization requirement but does not penalize it for its good faith, yet not wholly successful, efforts.[178]

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did not warrant suppression of all the evidence. Although *Langford* seems to support the third response to minimization violations, *see infra* notes 175-78 and accompanying text, courts and commentators have cited the case in support of the partial suppression approach. *See* United States v. LaGorga, 336 F. Supp. 190, 194 (W.D. Pa. 1971), *amended,* 340 F. Supp. 1397 (W.D. Pa. 1972), *aff'd,* 530 F.2d 965 (3d Cir. 1976); Note, *Pre-Search Guidelines, supra* note 151, at 1435 n.116.

172. *See, e.g.,* United States v. Principie, 531 F.2d 1132, 1140-41 (2d Cir. 1976) (court suppressed only those conversations intercepted in violation of a court order prohibiting the interception of calls after 7:30 p.m.), *cert. denied,* 430 U.S. 905 (1977); *see also* United States v. Dorfman, 542 F. Supp. 345, 389-98 (N.D. Ill.) (court contended that it should suppress conversations that began innocently), *appeal dismissed,* 690 F.2d 1217 (7th Cir. 1982).

173. 18 U.S.C. § 2520 (1982).

174. *See* United States v. Cox, 462 F.2d 1293, 1301-02 (8th Cir. 1972) (suggesting that courts should suppress only nonpertinent calls and permit lawsuits by aggrieved persons), *cert. denied,* 417 U.S. 918 (1974); United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971) (better approach is to give notice to persons who were subject to unlawful surveillance so they can sue).

175 United States v. Principie, 531 F.2d 1132, 1140 (2d Cir. 1976), *cert. denied,* 430 U.S. 905 (1977); Note, *Pre-Search Guidelines, supra* note 151, at 1436 n.116.

176. *See* United States v. Turner, 528 F.2d 143, 158 (9th Cir. 1975) (suppression is inappropriate when agents employ good faith minimization efforts), *cert. denied,* 429 U.S. 837 (1976); United States v. Clemente, 482 F. Supp. 102 (S.D.N.Y. 1979) (courts should admit surveillance evidence only if agents exhibit a high regard for privacy), *aff'd,* 633 F.2d 207 (2d Cir. 1980).

177. *See* United States v. Feldman, 606 F.2d 673 (6th Cir. 1979) (suppression inappropriate when the court found that government officials satisfied the minimization requirement and were not demonstrably disrespectful of privacy), *cert. denied,* 445 U.S. 961 (1980); United States v. Hyde, 574 F.2d 856 (5th Cir. 1978) (blatant disregard for minimization requirement may justify suppression); United States v. Armocida, 515 F.2d 29 (3d Cir.) (suppression inappropriate when the government proved that its conduct avoided unnecessary intrusion and did not flagrantly violate the minimization requirement), *cert. denied,* 423 U.S. 858 (1975); United States v. Webster, 473 F. Supp. 586 (D. Md. 1979) (suggesting that courts should suppress only improperly intercepted calls in the absence of bad faith on the government's part), *aff'd,* 639 F.2d 174 (4th Cir. 1981), *modified,* 669 F.2d 185 (4th Cir.), *cert. denied,* 456 U.S. 935 (1982).

178. *See* Note, *Pre-Search Guidelines, supra* note 151, at 1436 n.116.

The "but for" test[179] is inapplicable to violations of the postauthorization minimization requirement.[180] Application of the *Chun* analyses[181] to these cases reveals that the minimization requirement is a central safeguard in Title III under all three strategies. This conclusion is apparent because all three approaches require some suppression for a violation.[182] Disagreement over the extent of suppression arises from differing opinions as to whether selective suppression satisfies the purpose of the minimization requirement. Courts adhering to the first approach emphasize that improperly "seized" conversations can never be returned and urge that improper interception of conversations does not serve the purpose of the minimization requirement.[183] Courts employing the second approach, however, reason that the purpose of the minimization requirement is served as long as the government does not use improperly seized conversations at trial.[184] The third approach also gives implicit consideration to the third inquiry of the *Chun* test, questioning whether the government deliberately violated the requirement.[185] Where the court finds a deliberate violation it will suppress all evidence of wiretapping.[186]

F. The Sealing Requirement

When an intercept order expires, law enforcement officials must immediately present the tape recordings to the judge and seal the tapes according to the judge's instructions.[187] The government may introduce the recordings at trial if the seal is absent or if there was a delay in the sealing process as long as it provides a satisfactory explanation for the absence or delay.[188]

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179. *See supra* notes 79-81 and accompanying text.

180. The Supreme Court may, however, expand the scope of the "but for" test to cover intentional violations of Title III procedures. *See supra* note 83 and accompanying text.

181. *See supra* notes 71-76 and accompanying text.

182. *See supra* notes 162-64 and accompanying text. In light of the purposes of Title III to protect the privacy of wire and oral communications, *see supra* text accompanying note 30, it would be difficult not to consider the minimization requirement central to Title III's statutory scheme.

183. *See supra* note 168 and accompanying text.

184. *See supra* note 169-74 and accompanying text.

185. *See supra* notes 175-78 and accompanying text.

186. *See supra* note 177 and accompanying text.

187. 18 U.S.C. § 2518(8)(a) (1982).

188. 18 U.S.C. § 2518(8)(a) (1982); *see, e.g.*, United States v. Robinson, 698 F.2d 448 (D.C. Cir. 1983) (unexplained four-day delay in sealing constitutes grounds for suppression); United States v. McGrath, 622 F.2d 36, 42 (2d Cir. 1980) (delay in sealing requires an explanation); United States v. Angelini, 565 F.2d 469 (7th Cir. 1977) (same), *cert. denied*, 435 U.S. 923 (1978); United States v. Diadone, 558 F.2d 775 (5th Cir. 1977) (considering whether delay required suppression); United

Courts have adopted several approaches and have reached different results in determining whether a violation of the sealing requirement compels suppression.[189] This disparity stems from the courts' tendency to use the same factors to decide whether a violation of the sealing requirement has occurred and whether a violation requires suppression.[190] The *Chun* test,[191] on the other hand, provides a useful framework for analyzing these different approaches.[192]

The *Chun* test initially calls for a determination of whether the sealing procedure serves a central function in Title III.[193] Courts generally have agreed that the purpose of the sealing requirement is to protect the integ-

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States v. Lawson, 545 F.2d 557 (7th Cir. 1975) (considering whether a fifty-seven day delay in sealing intercepted tapes required suppression); United States v. Gigante, 538 F.2d 502 (2d Cir. 1976) (rejecting the government's argument that suppression is necessary only when the seal is absent and holding that "a seal provided by this subsection" requires an "immediate" sealing).

Courts will excuse a delay in sealing if the issuing judge is unavailable when the government terminates the interception. *See* United States v. Fury, 554 F.2d 522 (2d Cir. 1977) (delay excused because judge was on vacation); United States v. Poeta, 455 F.2d 117 (2d Cir. 1972) (same), *cert. denied,* 406 U.S. 948 (1973); United States v. Aloi, 449 F. Supp. 698 (E.D.N.Y. 1978) (delay excused when judge was unavailable). Courts will also excuse a delay resulting from the government's performance of necessary administrative tasks, such as duplication of tapes. *See* United States v. McGrath, 622 F.2d 36, 42-43 (2d Cir. 1980) (delay excused because the tapes were transported to one city for duplication and to another city for sealing); United States v. Vazquez, 605 F.2d 1269 (2d Cir.) (delay excused when government officials duplicated, labeled, and checked two hundred reels of tape), *cert. denied,* 441 U.S. 981 (1979); United States v. Sklaroff, 506 F.2d 837, 840-41 (5th Cir.) (six-day delay acceptable because of the need to check and inventory tapes), *cert. denied,* 423 U.S. 874 (1975); *see also* J. CARR, *supra* note 5, at 392.

189. *See* Note, *Use of Surveillance Evidence Under Title III: Bridging the Legislative Gap Between the Language and the Purpose of the Sealing Requirement,* 36 VAND. L. REV. 325 (1983) (discussing the various approaches in dealing with violations of the sealing requirement).

190. For example, the courts have considered official tampering or lack of tampering with tapes to be an important factor in determining whether a violation of the sealing requirement exists and whether a violation compels suppression. *See, e.g.,* United States v. Robinson, 698 F.2d 448 (D.C. Cir. 1983) (lack of tampering is an important component of a satisfactory explanation for not meeting the sealing requirement); United States v. Angelini, 565 F.2d 469 (7th Cir. 1977) (suppression was inappropriate where government officials did not tamper with the tapes), *cert. denied,* 435 U.S. 923 (1978); McMillan v. United States, 558 F.2d 877 (8th Cir. 1977) (court did not suppress for a technical violation in the absence of any allegation of tampering); United States v. Diadone, 558 F.2d 775 (5th Cir. 1977) the government did not tamper with the tapes and thus did not violate the sealing requirement); United States v. Falcone, 505 F.2d 478, 484 (3d Cir. 1974) (court did not suppress for a violation of the sealing requirement because it found that the tapes were untampered), *cert. denied,* 420 U.S. 955 (1975).

191. *See supra* notes 71-76 and accompanying text.

192. The "but-for" test does not by its terms apply to the postauthorization requirement. *See supra* notes 79-81 and accompanying text. If the Supreme Court adds a deliberate violation as a grounds for suppression, *see supra* note 83, then suppression would be possible in a sealing case.

193. *See supra* text accompanying note 73.

rity of the recordings[194] and thus ensure their admissibility at trial.[195] For example, the Second and Seventh Circuits have explicitly held that the integrity function of the sealing requirement is central to Title III's statutory scheme.[196]

Courts addressing the suppression problem have focused primarily on the second prong of the *Chun* test,[197] which requires an inquiry into whether executing officers have served the purpose of the requirement despite "irregularities"[198] in the sealing process. Courts have not acted uniformly in deciding when irregularities in the sealing process subvert the integrity of the recordings and thus defeat the purpose of the sealing requirement.[199]

The Third and Eighth Circuits contend that suppression is inappropriate absent an allegation or finding of tampering.[200] Under this approach, the integrity of the recordings is maintained and the purpose of the sealing requirement is satisfied absent proof of alteration. The Second Circuit, in contrast, maintains that the purpose of the sealing requirement is

194. *See* LEGIS. HIST., *supra* note 31, at 2,193 (stating that the requirement "safeguard[s] the identity, physical integrity and contents of the recordings to assure their admissibility into evidence"). The sealing procedures should preclude the possibility of tampering with or altering tape recordings. *See* Note, *supra* note 189, at 331; *see also* United States v. Angelini, 565 F.2d 469 (7th Cir. 1977) (contending that the purpose of the sealing requirement is to preserve the integrity of tapes and prevent tampering); McMillan v. United States, 558 F.2d 877 (8th Cir. 1977) (same); United States v. Harvey, 560 F. Supp. 1040 (S.D. Fla. 1982) (asserting that the purpose of the sealing requirement is to safeguard the confidentiality of tapes and to protect the tapes from editing).

195. *See* LEGIS. HIST., *supra* note 31, at 2,193 (stating that the sealing requirement helps to ensure the admissibility for recordings at trial); *see, e.g.*, United States v. Falcone, 505 F.2d 478 (3d Cir. 1974) (contending that the sealing requirement protects the integrity of tapes after interception for evidentiary purposes).

196. *See* United States v. Lawson, 545 F.2d 557, 564 (7th Cir. 1975) ("post-interception integrity measures are . . . important"); United States v. Gigante, 538 F.2d 502, 505 (2d Cir. 1976) (contending that the sealing requirement is an integral part of the statutory scheme of judicial supervision), *cert. denied*, 435 U.S. 923 (1978).

197. *See, e.g.*, United States v. Diana, 605 F.2d 1307, 1312 (4th Cir. 1979) (court used the *Chun* analysis but never addressed whether the requirement is a central safeguard), *cert. denied*, 444 U.S. 1102 (1980).

198. The term "irregularity" is more appropriate than "violation" due to the split in the courts over whether lack of tampering is relevant to the government's explanation or only to the question of suppression once the court has found a violation of a sealing requirement. *See supra* note 189.

199. *See infra* notes 203-10 and accompanying text; and accompanying text; supra notes 190-92 and accompanying text.

200. *See* United States v. McMillan, 558 F.2d 877, 879 (8th Cir. 1977) (government agents committed a "technical" violation but nevertheless satisfied the purpose of the sealing requirement because no allegation of tampering made); United States v. Falcone, 505 F.2d 478, 484 (3d Cir. 1974) (because the trial court found that government agents did not alter the tapes, suppression was not appropriate), *cert. denied*, 420 U.S. 955 (1975).

not met and suppression is warranted if the government cannot proffer a satisfactory explanation for an irregularity in the sealing porocess.[201] Other courts have adopted a more flexible stance and have chosen to examine the particular facts in each case to determine whether irregularities in the sealing process warrant suppression.[202]

Some courts have held that no violation has occurred if the requirement's purpose has been served.[203] Other courts have held that if the purpose of the requirement has been served, suppression is inappropriate despite a violation.[204] These two variations are functionally similar in that suppression under each rests on a judicial finding that executing officers have not maintained the sealing requirement's integrity function.[205] In making this determination, courts have considered the length of the delay,[206] the reasons for the delay,[207] the location of the tapes while not sealed,[208] any precautionary measures the government might have taken,[209] and the presence or absence of allegations by the defendants that the government altered the tapes.[210]

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201. United States v. Gigante, 538 F.2d 502, 506 (2d Cir. 1976), *cert. denied,* 435 U.S. 923 (1978). The Second Circuit based its holding on the observation that government officials may easily alter tape recordings and that the sealing process provides an external safeguard against such tampering. *Id.* at 505. The Gigante court asserted that a requirement that the defendant prove tampering "would vitiate the congressional purpose of the sealing process." *Id.*

202. *See infra* notes 203-10 and accompanying text.

203. *See, e.g.,* United States v. Robinson, 698 F.2d 448, 453 (D.C. Cir. 1983) (lack of tampering is an important component of satisfactory explanation); United States v. Diana, 605 F.2d 1307, 1314 (4th Cir. 1979) (same); *see also* United States v. Johnson, 696 F.2d 115 (D.C. Cir. 1975) (in determining the adequacy of the government's explanation, courts should examine whether government officials kept the tapes in a place assuring reliability).

204. *See, e.g.,* United States v. Lawson, 545 F.2d 557, 564 (7th Cir. 1975) (court did not accept the government's explanation but did not find a violation of the sealing requirement because the defendants did not allege prejudice).

205. *See infra* notes 206-10 and accompanying text.

206. *See* United States v. Robinson, 698 F.2d 448, 453 (D.C. Cir. 1983) (a four-day delay did not violate the statute); United States v. Lawson, 545 F.2d 557, 564 (7th Cir. 1975) (a fifty-seven day delay was acceptable only because the defendants failed to allege prejudice).

207. *See* United States v. Diana, 605 F.2d 1307, 1314 (4th Cir. 1979) (government failed to seal the original tapes because duplicate tapes were malfunctioning), *cert. denied,* 444 U.S. 1102 (1980); United States v. Angelini, 565 F.2d 469 (7th Cir. 1977) (agent listened to the original tapes because the secretary could not accurately transcribe a section of the tapes), *cert. denied,* 435 U.S. 923 (1978).

208. *See* United States v. Johnson, 696 F.2d 115 (D.C. Cir. 1982) (tapes kept in police vault); United States v. Angelini, 565 F.2d 469, 471 (7th Cir. 1977) (tapes kept in secure place), *cert. denied,* 435 U.S. 923 (1978).

209. *See* United States v. Angelini, 565 F.2d 469, 471 (7th Cir. 1977) (only one agent had access to the tapes), *cert. denied,* 435 U.S. 923 (1978).

210. *See* United States v. Diana, 605 F.2d 1307, 1314 (4th Cir. 1979) (defendants did not allege

The last inquiry under the *Chun* test requires a determination of whether the government deliberately ignored the sealing requirement to its tactical advantage.[211] At least one court has supported a decision not to suppress for a sealing irregularity by stating that the defendants did not allege that a delay in the sealing of the tapes was attributable to the government's bad faith efforts to gain a tactical advantage.[212]

IV. CONCLUSION

Despite the plain language of the suppression sanctions in Title III,[213] the Supreme Court has held that not every violation of Title III's procedural safeguards mandates the suppression of evidence from electronic surveillance.[214] Two possible approaches are available to courts in determining which violations of Title III require suppression. The first approach is the *Chun* test.[215] The second approach is the "but for" test.[216] Application of these tests to various Title III violations has revealed that the two tests may lead to contrary results.

The *Chun* test focuses attention on the "substantive role"[217] of the requirement in Title III's proscriptions against unwarranted use of electronic surveillance. A "but for" analysis, on the other hand, examines the role of the requirement in the judicial authorization of the wiretap, not in the overall framework of the statute.[218] This latter approach is narrower in scope and does not address the sanction of suppression for postauthorization violations. If the Supreme Court were to hold that suppression is an appropriate sanction for deliberate violations of the statute, then its "but for" analysis could justify suppression for a viola-

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that government officials tampered with the tapes), *cert. denied,* 444 U.S. 1102 (1980); United States v. Angelini, 565 F.2d 469 (7th Cir. 1977) (court will not find a violation of the sealing requirement when there is no allegation of tampering in an otherwise close case); *see supra* notes 190-91 and accompanying text.

211. *See supra* text accompanying note 76.

212. *See* United States v. Vazquez, 605 F.2d 1269, 1279 (2d Cir.) (court noted that there was no attempt by the government to gain a tactical advantage), *cert. denied,* 444 U.S. 981 (1979).

213. 18 U.S.C. §§ 2515, 2518(10)(a)(i)-(iii) (1982); *see supra* notes 8 & 54 and accompanying text.

214. *See* United States v. Chavez, 416 U.S. 562 (1974); United States v. Giordano, 416 U.S. 505 (1974); *see supra* notes 56-70 and accompanying text.

215. *See* United States v. Chun, 503 F.2d 533 (9th Cir. 1974); *supra* notes 71-76 and accompanying text.

216. *See supra* notes 79-81 and accompanying text.

217. United States v. Donovan, 429 U.S. 413, 435 (1977); *see supra* notes 71-76 and accompanying text (discussing *Chun* test).

218. *See supra* notes 79-81 and accompanying text (discussing "but for" test).

tion of any Title III procedure.[219]

The question whether the government has violated a Title III provision often is inextricably intertwined with the question whether suppression is an appropriate sanction for the violation. Courts rarely announce their methods of analyzing the appropriateness of suppression in a particular case. A review of recent case law, however, reveals some general patterns. The First,[220] Sixth,[221] and Eleventh Circuits[222] have apparently adopted the *Donovan* "but for" approach. The District of Columbia,[223] Third,[224] Fourth,[225] Fifth,[226] and Ninth Circuits[227] have employed the *Chun* approach, except when faced with violations of the identification and notice requirements. No clear approach to the suppression question is apparent from decisions of the Second,[228] Seventh,[229] and Eighth Circuits.[230]

A single approach to the applicability of the suppression remedy to

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219. *See supra* note 83 and accompanying text.

220. *See* United States v. Harrigan, 557 F.2d 879 (1st Cir. 1977).

221. *See* United States v. Feldman, 606 F.2d 673 (6th Cir. 1979), *cert. denied,* 445 U.S. 961 (1980); United States v. Landmesser, 553 F.2d 17 (6th Cir.), *cert. denied,* 435 U.S. 855 (1977).

222. *See* United States v. Harvey, 560 F. Supp. 1040 (S.D. Fla. 1982).

223. *See* United States v. Robinson, 698 F.2d 448 (D.C. Cir. 1983); United States v. Johnson, 696 F.2d 115 (D.C. Cir. 1982).

224. *See* United States v. Martorella, 455 F. Supp. 459 (W.D. Pa. 1978).

225. *See* United States v. Diana, 605 F.2d 1307 (4th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980); United States v. Clerkly, 556 F.2d 709 (4th Cir. 1977), *cert. denied,* 436 U.S. 930 (1980); United States v. Webster, 473 F. Supp. 586 (D. Md. 1979), *aff'd,* 639 F.2d 174 (4th Cir. 1981).

226. *See* United States v. Caggiano, 667 F.2d 1176 (5th Cir. 1982); United States v. Mendoza, 574 F.2d 1373 (5th Cir.), *cert. denied,* 439 U.S. 988 (1978); United States v. Hyde, 574 F.2d 856 (5th Cir.), *cert. denied,* 439 U.S. 988 (1978); *cf.* United States v. Alfonso, 552 F.2d 605 (5th Cir. 1977) (following *Donovan* "but for" analysis on narrow issue of suppression for violation of notice requirement).

227. *See* United States v. Santora, 600 F.2d 1317 (9th Cir. 1979); United States v. Martin, 599 F.2d 880 (9th Cir. 1979); United States v. Spagnulo, 549 F.2d 705 (9th Cir. 1977).

228. *Compare* United States v. Lilla, 699 F.2d 99 (2d Cir. 1983) (*Chun* approach) *and* United States v. Fury, 554 F.2d 522 (2d Cir. 1977) (*Chun* approach) *with* United States v. McGrath, 622 F.2d 36 (2d Cir. 1980) ("but for" test).

229. *Compare* United States v. Angelina, 565 F.2d 469 (7th Cir. 1977) (*Chun* test), *cert. denied,* 435 U.S. 923 (1978) *with* United States v. Williams, 565 F. Supp. 353 (N.D. Ill. 1983) ("but for" test) *and* United States v. Dorfman, 542 F. Supp. 345 (N.D. Ill.) ("but for" test), *appeal dismissed,* 690 F 2d 1217 (7th Cir. 1982).

230. *See* United States v. Jackson, 549 F.2d 517 (8th Cir. 1977) (employing a combination of *Chun* and "but for" tests). *Compare* United States v. Constanza, 549 F.2d 1126 (8th Cir. 1977) (*Chun* approach) *with* United States v. Rotchford, 575 F.2d 166 (8th Cir. 1978) ("but for" test); United States v. Barletta, 565 F.2d 985 (8th Cir. 1977) ("but for" test); United States v. Abrahmson, 553 F.2d 1164 (8th Cir.) ("but for" test), *cert. denied,* 433 U.S. 911 (1977) *and* United States v. DiGirlomo, 550 F.2d 404 (8th Cir. 1977) ("but for" test).

Title III violations would promote the interest of uniformity.[231] Congress enacted Title III in an effort to balance the privacy interests of citizens with law enforcement's need for effective investigative techniques.[232] The test that would effectuate these twin goals must deter government officials from unnecessarily invading individual privacy and yet not result in the automatic suppression of relevant and trustworthy evidence derived from minor violations of the statute.

Neither the "but for" nor the *Chun* test results in the suppression of evidence for minor violations of the statute. The two tests diverge in their protection of privacy rights. The "but for" test creates an artificial distinction between pre and postauthorization violations, thereby offering little or no protection to the privacy rights of citizens after a judge has issued a surveillance warrant. The *Chun* test, in contrast, applies to all violations of Title III and therefore protects privacy throughout the period of surveillance. In the absence of empirical studies measuring the effectiveness of the two approaches, the *Chun* test appears best suited to effectuate Congress' goals in enacting Title III.

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231. *See supra* note 34 (stating that a congressional purpose in enacting Title III was to delineate a uniform basis for official use of electronic surveillance).

232. *See supra* notes 33-34 and accompanying text.