The Minimization Requirement in Electronic Surveillance: Title III, the Fourth Amendment, and the Dread Scott Decision

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The "Minimization" Requirement in Electronic Surveillance: Title III, The Fourth Amendment, and the Dread Scott Decision*

CLIFFORD S. FISHMAN**

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 empowers law enforcement officials to seek, and judges to issue, warrants authorizing the interception of wire and oral communications without the knowledge or consent of participants to those conversations. The legislation was controversial when enacted and remains so. No other form of official

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2. The terms "wire communication," "oral communication," and "intercept" are defined in 18 U.S.C. § 2510(1), (2), (4) (1976). For a discussion of "wire communication" and "oral communication," see Fishman, The Interception of Communications Without a Court Order: Title III, Consent, and the Expectation of Privacy, 51 ST. JOHN'S L. REV. 41, 54-66 (1977). For an extensive discussion of the statutory definition of "intercept," see notes 70-78 & accompanying text infra. As used in this article, "eavesdropping" includes the interception of "wire communications" (wiretapping) and "oral communications" (bugging).

3. Certain types of eavesdropping, such as particular activities of switchboard operators, employees of communications common carriers, and the Federal Communication Commission (F.C.C.) were exempted from the warrant requirement of Title III. 18 U.S.C. § 2511(2)(a)-(b) (1976). Title III authorizes law enforcement officials and private citizens to transmit, overhear and/or record conversations so long as one participant to the conversation consents in advance and the conversation is not being intercepted for an unlawful or tortious purpose. 18 U.S.C. §§ 2511(2)(c)-(d) (1976). For a detailed discussion of consensual interceptions, see Fishman, supra note 2, at 41-98.


surveillance is as drastic an intrusion upon our thoughts, words, or lives. Many fear that “[w]e are becoming a society that must exist in constant hazard from official snooping,” and that “[w]hatever incidental good flows from this invasion of privacy is submerged by the growing appearance of police surveillance so typical of totalitarian states.”

Congress enacted Title III with four specific goals in mind. First, it sought to provide law enforcement officials with a much needed weapon in their fight against crime, particularly organized crime. Second, it sought to safeguard the privacy of wire and oral communications and, in particular, the privacy of innocent persons. Third, it endeavored to satisfy the procedural and substantive requirements previously enunciated by the Supreme Court in Berger v. New York and Katz v. United States as constitutional prerequisites to a valid eavesdropping statute. Finally, it attempted to define “on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized.”

Title III. See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (1976) [hereinafter cited as NWC Report]. A substantial number of commissioners, however, concluded that Title III had failed to serve the purposes it was intended to further, and called for its repeal. Id. at 177, 179-92 (minority report of Sen. Abourezk, Reps. Kastenmeier and Seiberling, and Prof. Westin) & 213-17 (separate statement of Prof. Westin). See also H. Schwartz, Taps, Bugs, and Fooling the People (1977); Margolis, Human Rights Commentator, 50 Conn. B.J. 559 (1976).


10. 388 U.S. 41 (1967). Berger delineated the constitutional prerequisites to the issuance of an eavesdropping warrant: (1) there must be probable cause to believe that a particular offense has been or is being committed; (2) the conversations to be intercepted must be particularly described; (3) eavesdropping must be limited in duration; (4) extensions may be granted only on a new showing of probable cause; (5) eavesdropping must terminate once the sought-for evidence has been obtained; (6) there must be notice unless a showing of exigent circumstances is made; and (7) there must be a return on the warrant. Id. at 54-60.


In most respects, Title III has been more than adequate in accomplishing these goals. The statute controls when eavesdropping warrants may be issued, and the circumstances under which resultant evidence may be utilized. Yet, although Congress carefully defined what must be done before and after conversations are intercepted, it did little to define what is required during the period that police agents are intercepting conversations occurring over the tapped telephone or in the bugged premises. On the critical question of how extensively monitoring agents are permitted to listen to and record conversations once a warrant has been issued, the statute contains a single ambiguous passage, commonly referred to as the “minimization provision.” Unfortunately, there is virtually no legislative history to which courts may look in construing this provision. Yet, the issue of what agents monitoring a wiretap or bug may or may not listen to, and how their performance should be measured, is of vital importance if privacy is to be protected and constitutional prerequisites are to be satisfied.

The confusion surrounding the minimization issue is, perhaps, inevitable, given the procedural and conceptual difficulties inherent in applying fourth amendment concepts to the electronic surveillance of communications. First, there are substantial differences between the nature and scope of searches authorized by a search warrant and searches authorized by an eavesdropping warrant. A search warrant application must establish probable cause to believe that particularly described items will be found in specified premises.

The preceding list was compiled in Comment, Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing and Inventories, 61 CORNELL L. REV. 92, 94 n.9 (1975) [hereinafter cited as Post-Authorization Problems].

14. During eight years as a prosecutor in the New York County District Attorney's Office and Special Narcotics Prosecutor's Office, the author drafted the application for and supervised the execution of approximately forty wiretaps and bugs. Despite the cogent arguments of critics of electronic surveillance, see notes 4-5 supra, the author is convinced that court authorized eavesdropping is essential to effective law enforcement. The reader should, of course, evaluate this article with the author's experience and biases in mind.

15. See notes 30-49 & accompanying text infra.

16. See notes 50-54 & accompanying text infra.

17. The minimization provision requires every eavesdropping warrant to state explicitly that "the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ." 18 U.S.C. § 2518(5) (1976).


and, once issued, authorizes a single, overt entry and search of these premises. If the sought-for evidence is not found, no second entry or search is permitted unless a new warrant, supported by a new showing of probable cause, is obtained. In contrast, an eavesdropping application must establish probable cause to believe that particularly described communications, which have not yet taken place, will be seized over a specific telephone or telegraph, or at another specified location. On this single showing of probable cause, an eavesdropping warrant may authorize a series of surreptitious intrusions for up to thirty days, subject only to discretionary periodic review by the judge issuing the warrant.

Second, problems arise in defining the scope of police conduct authorized by an eavesdropping warrant, and the remedy to be applied if that conduct oversteps what has been authorized. When police are executing a search warrant, they usually know as soon as they see an object whether it falls within the ambit of items subject to seizure. If the police seize items not specified in the warrant or found in plain view, such items are not admissible in evidence and must be restored to their lawful owner. On the other hand, when a wiretap or bug is being executed, the listener often does not know whether a conversation contains the evidence he is seeking until after he has heard it in its entirety. There is no way to "restore" a conversation, or the nonpertinent parts, to its participants. Moreover, it is uncertain whether effective remedies are available to the participants, and whether any practical deterrents to excessive overhearing exist. Although Title III contains a statutory exclusionary rule and sets forth the grounds and procedures for the suppression of evidence, these provisions do not deal adequately with the discrete and unique questions raised by eavesdropping. Indeed, the legislative history of the exclusionary provision indicates that it was not intended "to press the scope of the suppression role beyond present search and seizure law."

The third problem in applying fourth amendment concepts to eavesdropping is defining what is meant by a "search" for, or the "seizure" of, a conversation. This problem is compounded by the failure of Congress to define adequately the statutory term "intercept," a term that is central both to the minimization provision and to the entire statute.

20. See notes 32–33 & accompanying text infra.
21. See text accompanying note 46 infra.
22. See notes 45 & 186–93 & accompanying text infra.
24. Title III creates a civil cause of action for victims of illegal eavesdropping. See 18 U.S.C. § 2520 (1976). This remedy, however, is unlikely to afford any real relief to one complaining of excessive monitoring pursuant to an apparently valid eavesdropping warrant. See note 212 infra.
25. See note 53 infra.
26. See notes 54–56 & accompanying text infra.
Judicial treatment of problems raised by the minimization requirement lacks uniformity. Courts often have approached these questions in terms of convenient labels rather than careful analyses. The most recent example is *Scott v. United States*, where the Supreme Court comes dangerously close to eviscerating the minimization provision altogether.

This article addresses the problems raised by the Title III minimization requirement with particular emphasis on the Supreme Court's decision in *Scott*. Section I outlines the provisions of Title III that govern the issuance of eavesdropping warrants and the use of derivative evidence. Section II discusses the minimization provision and the definitional problems it presents. Section III analyzes judicial treatment of the minimization provision in light of *Scott*, and factors that have been held to affect a monitoring agent's ability to minimize interceptions. Section IV discusses judicial approaches to minimization litigation with respect to the problems of standing, guidelines for minimization hearings, and appropriate remedies. Finally, Section V offers alternative solutions to the difficult problems raised by the Supreme Court's interpretation of the minimization requirement.

I. TITLE III RESTRICTIONS ON EAVESDROPPING AND USE OF DERIVATIVE EVIDENCE

A. OBTAINING AN EAVESDROPPING WARRANT

An eavesdropping warrant is in essence a search warrant and must comply with fourth amendment requirements. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 permits the issuance of eavesdropping warrants only on probable cause and requires the application and warrant to contain a particular description of the evidence sought. The statute,

30. The fourth amendment provides:
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 person or things to be seized.

U.S. CONST. amend. IV.
32. The application for an eavesdropping warrant must establish probable cause to believe "that an individual is committing, has committed, or is about to commit a particular offense," 18 U.S.C. § 2518(3)(a) (1976); see also id. § 2518(1)(b)(i), (iv). It must also establish probable cause to believe that "particular communications concerning that offense will be obtained" through the use of eavesdropping on a specific phone or in specific premises. *Id.* § 2518(3) (b), (d). "[T]he order will link up specific person, specific offense and specific place. Together they are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity . . . ." S. REP. NO. 1097, supra note 4, at 102, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2191 (citing Berger v. New York, 388 U.S. 41, 58-60 (1967) and Katz v. United States, 389 U.S. 347, 355-56 (1967)).
33. The application and warrant must specify:
however, does more than merely parallel the language of the fourth amendment. In its effort to comply with fourth amendment standards enunciated in Berger v. New York\textsuperscript{34} and Katz v. United States\textsuperscript{35} and to protect the privacy of innocent conversations and innocent persons,\textsuperscript{36} Congress included within the statute several procedural and substantive safeguards, many of which are not applicable to warrants that authorize only a physical search and seizure. These provisions restrict the use of eavesdropping and the use of intercepted communications and derivative evidence.\textsuperscript{37}

Title III specifies the law enforcement officials empowered to seek an eavesdropping warrant,\textsuperscript{38} the appropriate judges to whom applications may be submitted,\textsuperscript{39} the enforcement agencies empowered to execute eavesdropping warrants,\textsuperscript{40} and the types of criminal investigations in which eavesdropping may be used.\textsuperscript{41} An application must satisfy the judge that "normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or to be too dangerous."\textsuperscript{42} The judge to whom an

(a) the identity of the person, if known, whose communications are to be intercepted; (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; and (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates . . . .

18 U.S.C. § 2518(4)(a)-(c) (1976); see also id. § 2518(1)(b). Title III provisions governing the application and warrant are discussed extensively in C. Fishman, Wiretapping and Eavesdropping §§ 41-127 (1978).

34. 388 U.S. 41 (1967).
36. See notes 7-12 & accompanying text supra.
38. Only the attorney general or a specially designated assistant attorney general may authorize federal applications. 18 U.S.C. § 2516(1) (1976). State applications may be authorized by "[t]he principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof," if empowered to do so by state law. Id. § 2516(2).

[These] provision[s] centralize . . . 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. [These] provision[s] in [themselves] should go a long way toward guaranteeing that no abuses will happen.

39. Federal warrants may be issued only by district or circuit court judges. 18 U.S.C. § 2510(9)(a) (1976). State warrants may be issued only by "a judge of any court of general criminal jurisdiction" who is authorized by state statute to do so. Id. § 2510(9)(b). The Senate report notes that "[e]xisting Federal search warrant practice permits U.S. Commissioners and city mayors to issue warrants . . . . This practice is too permissive for the interception of wire or oral communications." S. REP. NO. 1097, supra note 4, at 91, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2112, 2179. The restrictions in 18 U.S.C. § 2510(9) are "intended to guarantee responsible judicial participation in the decision to use these techniques." Id.
40. See 18 U.S.C. §§ 2510(7), 2516 (1976). The application and warrant must specify the agency that will execute the warrant. Id. § 2518(1)(a), (4)(d).
41. The crimes against which eavesdropping may be used are set forth in 18 U.S.C. §2516 (1976). They include federal crimes punishable by death or imprisonment for more than one year such as espionage, sabotage, treason, bribery, interstate commerce violations, gambling, narcotics, fraud and conspiracy. See id.
42. 18 U.S.C. § 2518(1)(c), (3)(c) (1976). In addition, the application must inform the issuing judge of
application is submitted is authorized to demand additional information before acting on the application and is empowered to reject the application even if it complies fully with statutory requirements. The judge also has the power to include within the warrant a requirement that periodic reports be made disclosing what steps have been taken toward accomplishing the permissible objective and the necessity for continued surveillance. The application and warrant must specify the period of time during which interceptions are to be conducted and whether interception of more than one incriminating conversation is authorized. Interceptions must cease when the authorized objective has been attained. Special provisions govern extensions of the initial warrant.

In addition to the provisions governing procedures for obtaining an eavesdropping warrant, the statute contains provisions regulating how intercepted conversations are to be preserved, safeguarded and stored; when and

all known previous eavesdropping applications "involving any of the same persons, facilities or places specified in the application, and the action taken . . . on each such application . . . ." Id. § 2518(1)(e).

43. Id. § 2518(2).

44. Title III provides that if the application complies with all statutory requirements, "the judge may enter" an eavesdropping warrant (emphasis added). 18 U.S.C. § 2518(3) (1976). The "provision recognizes that the judge may properly deny the application altogether, or grant it as suitably modified." S. REP. No. 1097, supra note 4, at 102, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2191. Compare FED. R. CRIM. P. 41(c)(1), which provides that if an affidavit in support of a search warrant contains the required showing of probable cause, the magistrate "shall issue" the warrant. Nevertheless most witnesses who testified before the National Wiretap Commission, including most judicial witnesses, concluded that "[i]f the statute provides for surveillance in the investigation of the offense, and the application is sufficient, then the judge has an obligation to issue the [warrant]." NWC REPORT, supra note 5, at 77.

45. 18 U.S.C. § 2518(6) (1976). "Such reports shall be made at such intervals as the judge may require." Id.

The reports are intended as a check on the continuing need to conduct the surveillance. At any time the judge is convinced the need is no longer established, he may order the surveillance discontinued . . . . This provision will serve to insure that surveillance is not unthinkingly or automatically continued without due consideration. S. REP. No. 1097, supra note 4, at 104, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2193.

46. 18 U.S.C. § 2518(1)(d) (1976)(application) and id. § 2518(4)(e) (warrant). The warrant must be executed as soon as is practicable. Id. § 2518(5). Although Title III authorizes warrants of up to 30 days duration, id., most federal warrants permit surveillance for only 15 or 20 days, and some state statutes restrict the duration of warrants to shorter periods. See, e.g., CONN. GEN. STAT. ANN. § 54-41(e)(11) (West Supp. 1978)(10 days); GA. CODE. ANN. § 26-3004(e) (1978)(20 days); MINN. STAT. ANN. § 626A 06(4)(h) (West Supp. 1979)(10 days); N.J. STAT. ANN. § 2A:156A-12(f) (West Supp. 1979)(20 days). See also MASS. GEN. LAWS ANN. ch. 272 § 991(2) (West Cum. Supp. 1978).


48. Id. § 2518(5).

49. See id. § 2518(1)(f), (5).

50. See id. § 2518(8)(a), which provides, inter alia, that intercepted conversations shall be recorded on tape or on wire "in such a way as will protect the recording from editing or other alterations," that "[i]mediately upon the expiration of the [warrant], or extensions thereof such recordings shall be made available to the [issuing judge] and sealed under his directions," and that the recordings may not be destroyed except on court order, "and in any event shall be kept for ten years." For an extensive discussion of this provision, see FISHMAN, supra note 33, at §§ 145, 187, 190-97. See also Post-Authorization Problems, supra note 13, at 139-41; Note, Judicial Sealing of Tape Recordings Under Title III—A Need for Clarification, 15 AM. CRIM. L. REV. 89 (1977).
under what circumstances intercepted conversations or derivative evidence may be disclosed or used;\(^{51}\) who is to receive notice that eavesdropping was conducted; and when such notice is to be served.\(^{52}\)

**B. SUPPRESSING INTERCEPTED CONVERSATIONS OR DERIVATIVE EVIDENCE**

The statute also includes a general exclusionary rule\(^{53}\) and sets forth three grounds upon which an individual may move to suppress intercepted conversations or derivative evidence.\(^{54}\) Most suppression litigation has fo-

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51. The contents of intercepted communications and derivative evidence may be disclosed, used, or testified to only by a law enforcement official who is authorized to intercept such communications, and only "to the extent that such [disclosure, use or testimony] is appropriate to the proper performance of his official duties." 18 U.S.C. § 2517(1)-(3) (1976). Privileged communications are specifically protected from unauthorized disclosure. Id. § 2517(4). Finally, if conversations concerning crimes other than those specified in the warrant are intercepted, such conversations or derivative evidence may be testified to only if an appropriate judge first finds that the conversations "were otherwise intercepted in accordance with the provisions of" Title III. Id. § 2517(5). See Fishman, supra note 33, at §§ 161-72 (analysis of § 2517(5)); Comment, Subsequent Use of Electronic Surveillance Interceptions and the Plain View Doctrine: Fourth Amendment Limitations on the Omnibus Crime Control Act, 9 U. Mich. J. L. Ref. 529, 544-53 (1976); Post-Authorization Problems, supra note 13, at 92, 126-39; Schwartz, The Legitimization of Electronic Eavesdropping: The Politics of 'Law and Order,' 67 Mich. L. Rev. 455, 463-66 (1969).


53. 18 U.S.C. § 2515 (1976) provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of [Title III].

54. 18 U.S.C. § 2518(10)(a) (1976) provides:

Any aggrieved person in any trial, hearing or proceeding . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—(i) the communication was unlawfully intercepted; (ii) the [eavesdropping warrant] under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the [eavesdropping warrant].

"Aggrieved person" is defined in 18 U.S.C. § 2510(11) as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." The phrase "party to any intercepted communication" is basically self-explanatory although one court has expanded it somewhat. See United States v. King, 478 F.2d 494, 506 (9th Cir. 1973)(message sent at third party's direction sufficient to confer standing on third party to object to interception), cert. denied, 417 U.S. 920 (1974). The phrase "person against whom the interception was directed" was interpreted by the Supreme Court in Alderman v. United States, 394 U.S. 165 (1969), as including only someone whose premises was bugged or whose telephone was tapped. Id. at 394 U.S. 176-80.

The phrase "trial, hearing or proceeding" generally does not include grand jury proceedings. S. Rep. No. 1097, supra note 4, at 106, reprinted in [1968] U.S. Code Cong. & Ad. News 2112, 2195. A grand jury witness, however, is entitled to refuse to answer questions that are based upon illegal eavesdropping by which he was aggrieved. Gelbard v. United States, 408 U.S. 41 (1972). Concerning the procedures by which a grand jury witness' claim is to be litigated, see Fishman, supra note 33, at §§ 223-37; Comment, Intercepted Communications: "Just Cause" for Refusing to Answer the Questions of the Grand Jury, 29 U. Miami L. Rev. 334 (1975); Comment, Claiming Illegal Electronic Surveillance: An Examination of 18 U.S.C. § 3504(a)(1), 11 Harv. C.L.-C.R. L. Rev. 632 (1976).
cussed on the first ground, the unlawful interception of communications. What constitutes unlawful interception for purposes of suppression was addressed by the Supreme Court in United States v. Giordano and United States v. Chavez, in which Attorney General Mitchell had failed to comply with Title III's application authorization provisions. In both cases the Court held that although Congress mandated suppression if "central" eavesdropping provisions of Title III were violated, suppression was not required if less significant provisions of the statute were violated. Thus, once it is established that a provision of Title III has been violated, a court then must determine whether Congress intended that provision to serve as an integral part of the legislative scheme. If the provision plays a decisive role in effectuating Congress' intent to restrict the utilization of surveillance, suppression is mandated. If the provision does not play a "central role," suppression need not follow.

II. THE MINIMIZATION PROVISION: SEARCHES, SEIZURES AND INTERCEPTIONS

A. REQUIREMENTS OF THE MINIMIZATION PROVISION

Title III offers little guidance to law enforcement officials or judges concerning which conversations may be intercepted once a warrant is issued. The statute merely provides that "[e]very order and extension thereof shall

57. In Giordano, a Justice Department official other than one of those specified in 18 U.S.C. § 2516(1) had authorized an eavesdropping application; the Court held the warrant invalid and the resultant conversations "unlawfully intercepted." In Chavez, an appropriate official had authorized the application, but a different official was identified in the application and warrant as the authorizing official. Although this violated 18 U.S.C. § 2518(1)(a) and (4)(d), the Court concluded that the warrant was nonetheless valid and the resultant conversations were not subject to suppression. See Fishman, supra note 33, at §§ 42-46, 253; Pulaski, Authorizing Wiretap Applications Under Title III: Another Dissent to Giordano and Chavez, 123 U. Pa. L. Rev. 750 (1975).
61. Id. at 527. Among the provisions of Title III that have been or are likely to be considered "central," and that require suppression when violated, are the following: 18 U.S.C. § 2516(1) (designation of authorizing official); § 2516(1)(a)-(g) (designation of offenses); § 2518(1)(b)(i)-(iii) & (3)(a), (b), (d) (establishment of probable cause); § 2518(1)(c) & (3)(e) (inadequacy of normal investigative procedures); and § 2518(1)(e) (notification of prior applications). See United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974).
contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ."63 Despite the lack of legislative history,64 this provision apparently was included in Title III as part of the congressional effort to protect the privacy of innocent persons65 and to comply with the constitutional prerequisites enunciated in Berger v. New York.66 Yet, the minimization provision does not specify how these goals are to be accomplished.

Although the statute requires that each warrant include a minimization provision, it does not specify what a warrant's minimization clause must contain. Several courts have upheld the validity of warrants that did not contain such a clause.67 In most cases, there has been a minimization clause consisting only of a general restatement of the statutory language. Although some courts have expressed a preference for warrants containing specific minimization instructions rather than a general directive, these same courts have acknowledged that it is usually difficult to formulate precise instructions concerning what the monitoring officers can and cannot listen to and record before they know who and what they will be overhearing.68

The fundamental problem has been defining what the minimization provision requires and how law enforcement officials should attempt to comply with it. The thrust of the provision is that conversations that are irrelevant to an investigation should be treated differently from conversations that are relevant. For example, a monitor should either not listen to, or only spot check, a conversation between spouses concerning intimate family matters; he should, however, listen to and record in full a conversation

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64. See note 18 & accompanying text supra.
65. See note 9 & accompanying text supra.
66. 388 U.S. 41 (1967). See note 10 supra. See also text at notes 75-76 infra.

Three federal courts, confronted with cases in which specific minimization instructions contained in a warrant were ignored, reached different conclusions as to what sanctions should be imposed. In United States v. George, 465 F.2d 772 (6th Cir. 1972), the instructions were ignored because the monitors were never informed of them; all conversations intercepted pursuant to the tap were suppressed. In United States v. Principie, 531 F.2d 1132, 1140-41 (2d Cir. 1976), cert. denied, 430 U.S. 905 (1977), only those conversations intercepted in violation of the specific provision were suppressed. In United States v. Diadone, 558 F.2d 775 (5th Cir. 1977), cert. denied, 434 U.S. 1064 (1978), where the issuing judge was informed that the provisions could not be adhered to and permitted the monitors to disregard them, no conversations were suppressed.
between identified participants in the criminal scheme under investigation. Clearly, avoiding interception of all irrelevant conversations is impossible.69 The distinction between conversations that are “subject to interception” and conversations that are “not otherwise subject to interception,” however, sometimes has been difficult to draw.70

Perhaps the most difficult problem in interpreting the minimization provision is applying fourth amendment terminology to eavesdropping—how does one distinguish between the “search” for a conversation and the “seizure” of it? When the police execute a search warrant, they necessarily examine many objects while searching for the items particularly described in the warrant, but they are said to have seized only those things that they take into their physical custody. When officers monitor a wiretap or bug, on the other hand, the distinction between “hearing” a conversation and “seizing” it is more metaphysical than actual.

The definitional problem is compounded because Title III does not refer to searches for or seizures of communications, but rather to “interceptions.” “Intercept” is defined as “the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.”71 The phrase “aural acquisition” is extremely ambiguous—has a conversation been “intercepted” when it has been overheard but not recorded; when it has been recorded but not overheard; when it has been both recorded and overheard; or only when, after it has been recorded and/or overheard, its contents are later disclosed? The Supreme Court has yet to consider these questions,72 and few federal courts have commented upon them.73 Although one state court has held that listening to a conversation without recording it does not constitute an interception,74 most state courts have not addressed

69. See notes 85–87, 158–69 & accompanying text infra.
70. Under a permissive approach, monitors are authorized to intercept a conversation unless, at the outset of the conversation, it is apparent that no information helpful to the attainment of the authorized objective will be obtained. Under a restrictive approach, monitors are not authorized to intercept a conversation unless, at the outset of the conversation, it is probable that information necessary to the attainment of the authorized objective will be obtained. The particular circumstances of each case determine which approach is appropriate. See text at notes 151–71 infra.
72. Justice Harlan, dissenting in Berger v. New York, 388 U.S. 41 (1967), argued that overhearing or recording a conversation constituted only a “search,” but not a “seizure,” of the conversation. Justice Harlan further concluded that a conversation was “seized” only if, after the initial overhearing and/or recording, some use was made of it by the eavesdropper. Id. at 98 (Harlan, J., dissenting). But see Bynum v. United States, 423 U.S. 952 (1975) (Justice Brennan, with whom Justices Douglas and Marshall concurred, dissenting from denial of certiorari).
this issue. Furthermore, most state statutes either echo the Title III definition of “intercept” or provide no definition at all.

The definition of “intercept” is critical because it affects the constitutionality of Title III. Among the reasons that the Court in Berger held New York’s eavesdropping statute unconstitutional was the determination that it failed to limit unauthorized invasions of privacy, thus sanctioning the use of electronic devices to effect a general search. The absence of a provision requiring that warrants specify the conversations to be monitored in effect gave agents “a roving commission to seize any and all conversations.” The particularity and minimization provisions appear to be designed to avoid giving a similar “roving commission” under Title III. Yet, if authorities can overhear or record a conversation without “intercepting” it, the particularity and minimization provisions are rendered ineffective, and Title III, like the statute condemned in Berger, fails to protect against unauthorized invasions of privacy. Until a more adequate definition of “intercept” wins general acceptance, analogies to traditional search and seizure concepts do little more than compare substance to a vacuum.

B. MINIMIZATION PROCEDURES

Given the definitional and conceptual difficulties inherent in the minimization provision, it is not surprising that courts have endorsed four separate procedures to “minimize” the interception of communications not otherwise subject to interception: extrinsic, intrinsic, dual recorder, and after-the-fact. On occasion, more than one procedure has been used in executing an eavesdropping warrant.

1. Extrinsic minimization

Extrinsic minimization limits the time period during which monitoring is conducted. Although Title III authorizes eavesdropping warrants of up to

76. Id. at 59.
77. See note 33 & accompanying text supra.

New York State’s eavesdropping statute avoids the ambiguities of Title III, by defining an “intercepted communication” as one that has been “intentionally overheard or recorded,” without the consent of a participant, “by means of any instrument, device or equipment.” N.Y. CRIM. PROC. LAW § 700.05(3) (McKinney 1971). This definition, which in effect declares that there is no distinction between a “search” for a conversation and the “seizure” of it, makes explicit what is implicit in Berger. Coupled with the particularity and minimization provisions, it also better implements the congressional intention to protect “the privacy of innocent persons.” Other substantially similar statutes are: Ariz. Rev. Stat. Ann. § 13–3005 (Supp. 1978); Conn. Gen. Stat. Ann. § 54–41(a)(2) (West Supp. 1978); Ga. Code Ann. § 26–3001(a) (1972).
thirty days' duration, current federal practice is to issue warrants valid for only fifteen or twenty days. Another extrinsic minimization practice is the termination of interceptions prior to a warrant's expiration, or the restriction of eavesdropping to certain hours each day. This latter practice, while appropriate in the context of gambling investigations, may not be effective in other situations.

2. Intrinsic minimization

Intrinsic minimization attempts to screen out nonpertinent conversations while they are taking place. Two variations on intrinsic minimization have emerged from the case law. The first requires monitoring officers to make a reasonable, good-faith effort to avoid both listening to and recording nonpertinent conversations. If, during the first portion of the conversation, the

79. See note 46 supra.

80. "[O]ne of the most obvious ways to minimize is to use the tap only for a short time." United States v. Chavez, 533 F.2d 491, 493 (9th Cir.) (twenty-day tap terminated after nine-and-one-half days), cert. denied, 426 U.S. 911 (1976). See United States v. Losing, 539 F.2d 1174, 1176, 1179 (8th Cir. 1976) (twenty-day tap terminated after twelve or thirteen days), cert. denied, 434 U.S. 969 (1977); Lawson v. State, 236 Ga. 770, 225 S.E.2d 258, 260 (twenty-day tap terminated after two days), cert. denied, 429 U.S. 857 (1976). Accord, United States v. Abascal, 564 F.2d 821, 827 (9th Cir. 1977) (tap terminated after twelve days), cert. denied, 435 U.S. 953 (1978). Spease v. State, 275 Md. 88, 89, 338 A.2d 284, 290 (1975) (tap limited to two weeks). See also United States v. Scott, 504 F.2d 194, 195 n.3 (1974) (original warrant renewed after twenty days, interceptions ceased after thirty days). But see Rodriguez v. State, 297 So. 2d 15, 19-20 (Fla. 1974) (warrant authorized taps on three phones; early termination of interception on one phone did not excuse total conversation of all other phones for duration of warrant).

81. E.g., State v. Dye, 60 N.J. 518, 527, 291 A.2d 825, 829 (tap limited for use between hours of 10:00 a.m. and 3:00 p.m. daily, except Sundays), cert. denied, 409 U.S. 1090 (1972). This approach has been incorporated into New Jersey's eavesdropping statute, N.J. STAT. ANN. § 2A:156A-12(f) (West Supp. 1978). See also People v. Floyd, 41 N.Y.2d 245, 247, 360 N.E.2d 935, 937, 392 N.Y.S.2d 257, 260 (1976) (although four successive thirty-day wiretaps authorized interceptions for total of 2,880 hours, eavesdropping conducted for only 1,210 hours). See also Post-Authorization Problems, supra note 13, at 119-20.

82. For example, gambling-related conversations over a bookmaker's phone will generally occur only in the hours before, during and after a day's races. On the other hand, the telephone utilized by an active narcotics dealer may be used for drug-related conversations virtually around the clock.

83. See generally Post-Authorization Problems, supra note 13, at 119, 121-22.

84. Until the Scott decision, this was probably the single most widely adopted approach to minimization. See, e.g., United States v. Hinton, 543 F.2d 1002, 1011-12 (2d Cir.), cert. denied, 429 U.S. 980 (1976); United States v. Turner, 528 F.2d 143, 156 (9th Cir.), cert. denied, 423 U.S. 942 (1975); People v. Floyd, 41 N.Y.2d 245, 251, 360 N.E.2d 935, 941, 392 N.Y.S.2d 257, 262 (1976); Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819, 842 n.22 (1975); Rodriguez v. State, 297 So. 2d 15, 21 (Fla. 1974). See also United States v. Quintana, 508 F.2d 867, 874-75 (7th Cir. 1975). The Supreme Court, however, rejected the concept of assessing the monitors' good faith in evaluating compliance with the minimization provision. Scott v. United States, 436 U.S. 128 (1978), discussed infra.

85. Several courts have upheld the practice of intercepting the first few minutes of every conversation, to enable monitors to ascertain whether the conversation is likely to be, or to become, pertinent. See United States v. Scott, 516 F.2d 751, 757 n.15 (D.C. Cir. 1975) (two minutes), aff'd, 436 U.S. 128 (1978); United States v. Losing, 560 F.2d 906, 909 n.1 (8th Cir.) (two to three minutes), cert. denied, 434 U.S. 969 (1977); United States v. Turner, 528 F.2d 143, 157 (9th Cir.) (one minute), cert. denied, 423 U.S. 996 (1975); United
monitor hears a discussion relating to criminal activity, or identifies the
conversants as participants in the crime under investigation, he continues to
listen to and record the conversation. If, on the other hand, the conversants
are not suspected of criminal involvement and the conversation appears to be
unrelated to such matters, the monitor deactivates both the listening and
recording devices.\textsuperscript{86} When the monitor is uncertain whether one or more
conversants are engaged in the criminal activity under investigation, he may
spot-monitor the conversation by periodically reactivating the listening and
recording devices until he can ascertain whether the conversants or subject
matter of the conversation have changed.\textsuperscript{87} If the conversation becomes
relevant to the investigation, or the conversants can be identified as targets of
the investigation, the monitor listens to and records the remainder of the
conversation; if not, he deactivates the equipment and continues to spot-
monitor the conversation. The second variation on intrinsic minimization
involves listening to every conversation, but recording only pertinent conver-
sations.\textsuperscript{88} The Maryland Court of Appeals has endorsed this technique for use
in wiretaps.\textsuperscript{89} The Fourth Circuit has expressed concern regarding the
government's failure to record all conversations overheard in bugging

\textsuperscript{86} A number of courts have acknowledged that monitoring officers must be permitted a reasonable
amount of flexibility to guard against the possibility that "a conversation which appears innocent at first
may later turn to a discussion of criminal activity." United States v. Armocida, 515 F.2d 49, 53 (3d Cir.),
cert. denied, 423 U.S. 858 (1975). To require the minimization of every conversation that is not obviously
and immediately relevant "would be an open invitation to criminals to escape detection by the simple
device of devoting the initial part of each call to non-criminal matters." United States v. Scott, 516 F.2d

\textsuperscript{87} Several courts have accepted spot-monitoring as evidence of a good-faith, reasonable effort to
minimize the interception of nonpertinent conversations. See United States v. Hinton, 543 F.2d 1002, 1011-12 (2d Cir.),
cert. denied, 429 U.S. 980 (1976). See also United States v. James, 494 F.2d 1007, 1019

\textsuperscript{88} This approach might be held to violate 18 U.S.C. § 2518(8)(a) (1976), which requires that the
contents of intercepted communications "shall, if possible, be recorded on tape or wire or other comparable
device. The recording . . . shall be done in such a way as will protect the recording from editing or other
(1976). \textit{But see} United States v. Daly, 535 F.2d 434, 442 n.9 (8th Cir. 1976), which suggests that not only is
the recording of spot-checks not required but also that complete recording might violate the minimization
provision. The uncertainty is complicated by the absence of a precise definition of the statutory term
"intercept." See text accompanying notes 70-78 supra.

situations, although it did not find that this failure warranted reversal of convictions.90

3. Dual recorder minimization

Dual recorder minimization utilizes two tape recorders. Monitors follow intrinsic minimization by listening and recording on one tape recorder only when they think a conversation is, or is about to become, pertinent. A second recorder, the speaker of which is disconnected, records every conversation in full. This second tape is never played back. Thus, the monitors hear only what they are recording on the first recorder.91

4. After-the-fact minimization

After-the-fact minimization involves recording every conversation and then restricting disclosure of nonpertinent conversations by transcribing only pertinent conversations,92 or by re-recording only pertinent conversations and then sealing the original tapes.93

These methods of minimizing the interception of nonpertinent communications suggest the difficulties inherent in limiting eavesdropping efforts to pertinent conversations. Even assuming a good faith effort to minimize, inevitably, at least some interceptions will contain information irrelevant to the crimes under investigation. The question remains whether the requirements of the minimization provision and the fourth amendment have been violated if these procedures, or other good faith efforts at minimization, are not utilized. In Scott v. United States,94 the Supreme Court addressed this question.

90. United States v. Clerkley, 556 F.2d 709, 718 (4th Cir. 1977), cert. denied, 436 U.S. 390 (1978). In Clerkley, the monitors listened to all conversations taking place in bugged premises whenever any of three partners were present. They recorded only those conversations pertinent to gambling. Id. at 712. The defendants argued that all conversations listened to should have been recorded. Id. at 718. The rationale for recording all overheard conversations is to ensure that conversations introduced into evidence have not been taken out of context. Id. at 719 n.8.

91. This procedure was followed by law enforcement officials in Nassau County, New York. NATIONAL WIRETAP COMMISSION STAFF STUDIES AND SURVEYS, 235 (1976) [hereinafter cited as NWC STAFF STUDIES AND SURVEYS]. The nonminimized, unmonitored tape "is kept for the sole purpose of rebutting any charges that the police, in producing the minimized tape . . ., have cut out exculpatory remarks." Id. The practice, however, may have a fringe benefit: if agents subsequently realize that they mistakenly minimized an important conversation, they could apply for a search warrant to listen to that conversation on the nonminimized tape. See Post-Authorization Problems, supra note 13, at 122 n.144.


III. Scott v. United States: Judicial Interpretation of the Minimization Provision

In Scott v. United States, the Supreme Court ruled that in some circumstances monitoring officers can knowingly and willfully ignore the minimization provision of Title III altogether. Scott involved successive wiretaps on the home telephone of Geneva Jenkins with whom Bernis Thurmon, a suspected participant in a narcotics importation and distribution network, was then living. Each warrant contained a minimization clause.

Every one of the 384 calls occurring during thirty days of monitoring was overheard and recorded in full. The defendants moved to suppress the conversations and derivative evidence on the ground that the monitoring agents had failed to minimize the interception of nonpertinent conversations. The district court concluded that the agents had made no effort to minimize, and granted the suppression motion. On appeal, the United States Court of Appeals for the District of Columbia Circuit concluded that the district court had applied inappropriate standards for measuring minimization, and remanded for further proceedings. After a four-day evidentiary hearing, the district court again suppressed the conversations and was reversed again on

95. Id. Eight and a half years elapsed between the time that the tap was placed on the targeted telephone and the Supreme Court decision. The case had a long and complicated journey through the courts. The complete history of the case is as follows: 331 F. Supp. 233 (D.D.C. 1971)(first suppression motion granted), rev'd and remanded (for consideration in light of United States v. James, 494 F.2d 1007 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974)), 504 F.2d 194 (D.C. Cir. 1974); in an unreported decision, the suppression motion was once again granted, rev'd and remanded. 516 F.2d 751 (D.C. Cir. 1975), rehearing and rehearing en banc denied, 522 F.2d 1333 (D.C. Cir. 1975) (four judges dissenting), cert. denied, 425 U.S. 917 (1976) (three justices dissenting); Scott was found guilty in an unreported nonjury trial, aff'd, 551 F.2d 467 (D.C. Cir. 1977), cert. granted. 434 U.S. 888 (1977), aff'd 436 U.S. 128 (1978).

96. Although the tap revealed only a local operation, rather than the anticipated extensive multistate network, United States v. Scott, 436 U.S. at 142 n.15, the investigation did result in the arrest of twenty-two persons and the indictment of fourteen. Id. at 132.

97. "The order . . . required the agents to conduct the wiretap in 'such a way as to minimize the interception of communications that are [not] otherwise subject to interception' . . . ." Id. at 131-32. The Court noted that "the word 'not' was inadvertently omitted, but the agents apparently understood the intent of the order." Id. at 132 n.3.

98. United States v. Scott, 516 F.2d 751, 754 n.3 (D.C. Cir. 1975), aff'd, 436 U.S. 128 (1978). The only deviation from this policy occurred when agents accidentally tapped the wrong telephone. United States v. Scott, 436 U.S. at 133 n.7. The issuing judge was not informed that every conversation was being intercepted in full even though each warrant required periodic progress reports. United States v. Scott, 516 F.2d at 759-60.


100. United States v. Scott, 504 F.2d 194, 195 (D.C. Cir. 1974). Subsequent to the district court's initial suppression order in Scott, the circuit court in United States v. James, 494 F.2d 1007 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974), held that the reasonableness of minimization must be evaluated in light of specified circumstances: the scope of the criminal enterprise under investigation, the location and operation of the subject telephone, the government's expectations of the contents of the calls, and the degree of judicial supervision by the issuing judge. Id. at 1019-21. In Scott, 504 F.2d at 199, the circuit court directed the district court to reevaluate the minimization issue in light of the standards enunciated in James.

101. At the hearing, the prosecutor offered a statistical "call analysis" that categorized 40% of the
appeal. The appellate court concluded that "interception of all 384 conversations was not unreasonable under the circumstances of this case . . . ." A petition for rehearing en banc was denied with four judges dissenting, and certiorari was denied with three justices dissenting. Following a nonjury trial on stipulated evidence, Scott and Thurmon were convicted of various narcotics offenses.

On appeal, the Supreme Court considered two separate issues: (1) whether the government's failure to make any effort to minimize the interception of nonpertinent conversations automatically rendered the interceptions unreasonable under the fourth amendment and violative of the minimization provision of Title III, and, (2) whether the total interception of each of the 384 calls, if not a per se violation, was "reasonable" under the particular circumstances in Scott.

A. FAILURE TO ATTEMPT MINIMIZATION DOES NOT CONSTITUTE A PER SE VIOLATION OF THE FOURTH AMENDMENT OR TITLE III

Justice Rehnquist, speaking for the majority, rejected the defendants' contention that failure to make good faith efforts to comply with the minimization requirement was, in itself, violative of the fourth amendment or Title III. Adopting the government's viewpoint, the Court held that in ruling on suppression motions, courts should make an objective evaluation of monitoring agents' actions in light of the circumstances confronting them at the time to determine whether a statutory or constitutional violation has occurred. The Court observed that subjective intent alone does not transform lawful conduct into an illegal or unconstitutional act. Subjective intent may be relevant to the deterrent purposes of the exclusionary rule in fourth amendment litigation only "after a statutory or constitutional violation has been established."
1. The Fourth Amendment and Failure to Attempt Minimization

In analyzing whether a failure to make any attempt to minimize violated the Constitution, the Court reviewed prior fourth amendment decisions and concluded that good faith was not a factor to be considered in assessing the reasonableness of an officer's conduct. The Court thus adopted a "standard of objective reasonableness" to be applied ex post facto. In support of this position, the Court relied upon United States v. Robinson, Terry v. Ohio, Beck v. Ohio, and Henry v. United States. These cases do not directly support the principle for which they are cited, much less justify the application of that principle to electronic surveillance.

Each of the four cases involved a physical search not authorized by a warrant. In each, the constitutionality of the search was contingent upon the reasonableness of the prior warrantless stop or arrest. Because electronic surveillance is conducted pursuant to a warrant, and involves a "search" of a

need not necessarily follow that the evidence thus seized must be suppressed for all purposes if the officer was acting in good faith. In support of this principle the Court in Scott, 436 U.S. at 139 n.13, cited United States v. Janis, 428 U.S. 433, 458 (1976), and United States v. Ceccolini, 435 U.S. 268, 276-77 (1978). In Janis, the Court held that where a state law enforcement officer, acting in good faith, seized evidence in violation of Janis' constitutional rights, the suppression of such evidence in a criminal trial was sufficient to satisfy the exclusionary rule. The evidence was admissible, however, in civil proceedings brought by the Internal Revenue Service for the payment of wagering excise taxes. In Ceccolini, a police officer casually but illegally perused the contents of an envelope, containing money and betting slips, that was lying on a counter in defendant's store. An employee identified it as belonging to the defendant. This information was transmitted to the F.B.I. which, some months later, contacted the employee who willingly provided information about the defendant's activities. The Court held that defendant's motion to suppress the witness' testimony should have been denied, noting that the illegal search had not been motivated by a desire to identify witnesses who might testify against the defendant. Id. at 276 n.4.


111. Id. at 138. The Court conceded that its prior opinions had not addressed the question of whether bad faith might render an otherwise reasonable search unlawful, but noted that "[t]he Courts of Appeals which have considered the matter have . . . examin[ed] the challenged searches under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." Id (citing United States v. Bugarin-Casas, 484 F.2d 853, 854 n.1 (9th Cir. 1973), cert. denied, 414 U.S. 1136 (1974)); Dodd v. Beto, 435 F.2d 868, 870 (5th Cir. 1970), cert. denied, 404 U.S. 845 (1971); Klingler v. United States, 409 F.2d 299, 304 (8th Cir.), cert. denied, 396 U.S. 859 (1969); Green v. United States, 386 F.2d 953, 956 (10th Cir. 1967); and SirimARCO v. United States, 315 F.2d 699, 702 (10th Cir.), cert. denied, 374 U.S. 807 (1963)). The Court acknowledged that in citing these cases it endorsed neither their language nor holdings. Id. at 138 n.12. In Bugarin-Casas, the police lawfully stopped a car with the intention of conducting an illegal search of it. After the stop, but prior to the search, the officers discovered additional information that established probable cause to search the auto. The Ninth Circuit held the search to be valid. 484 F.2d at 853. In Klingler, a police officer arrested robbery suspects for vagrancy because he did not think he had probable cause to arrest them for robbery. 409 F.2d at 304. Stressing that the record revealed no bad faith, the Eighth Circuit concluded that the officer simply was mistaken in specifying the grounds for arrest. Since probable cause to arrest for the robbery, viewed objectively, existed, the arrest was lawful. Id. at 305. The evidence seized pursuant to the arrest, therefore, was not subject to suppression. 409 F.2d at 307.

nature and duration far greater than a physical search, the analogy to a warrantless search is inherently flawed.\textsuperscript{116} Even if such an analogy were appropriate, however, the elimination of good faith as a constitutional requirement is not a logical extension of the precedents offered.

\textit{Beck} and \textit{Henry} involved searches incident to arrests for which no probable cause was established.\textsuperscript{117} In applying the exclusionary rule, the Court stated that good faith is \textit{not enough} to validate an otherwise unlawful search.\textsuperscript{118} This language was echoed in \textit{Terry}\textsuperscript{119} in which the defendant claimed that absent probable cause to arrest, evidence seized in the course of a stop and frisk was inadmissible in evidence.\textsuperscript{120} The Court rejected this argument stating that a two-step analysis is required to determine reasonableness.\textsuperscript{121} The first question to be asked is whether the officer's action is "justified at its inception";\textsuperscript{122} the second is whether the action is "reasonably related in scope to the circumstances which justified the interference in the first place."\textsuperscript{123} The

\textsuperscript{116} See notes 20–28, 61–62 & accompanying text supra; see also Scott, 436 U.S. at 142 (Brennan, J., dissenting). The objective judicial assessment of reasonableness for a warrantless search is made only after the entire episode has taken place. When a search is made pursuant to a warrant, on the other hand, the reasonableness of such action is assessed by a judge before the search occurs. Nevertheless, courts are still required to assess the reasonableness of the manner in which the warrant was executed; and on this issue, subjective good faith may be highly relevant. See note 134 & accompanying text infra.

\textsuperscript{117} The Court in \textit{Beck} suppressed the fruits of a search incident to an arrest when the suppression record did "not contain a single objective fact to support a belief by the officers that the petitioner was engaged in criminal activity at the time they arrested him." 379 U.S. at 95. In \textit{Henry}, two F.B.I. agents investigating the theft of whiskey from interstate commerce, saw Henry and a companion twice pick up cartons at a residence and load them into a car. Solely on this basis, the agents stopped the two men, searched the car, and seized the cartons which contained stolen radios. 361 U.S. at 99–100. The Court concluded that, viewed objectively, the suspects' activities did not give rise to probable cause. Id. at 104.


\textsuperscript{119} \textit{Terry} v. Ohio, 392 U.S. 1, 22 (1968). In \textit{Terry}, a police officer observed three men apparently casing a store. He stopped them to investigate and when they failed to identify themselves, frisked them for weapons. Id. at 5–7. The Court held that when an officer has reasonable suspicion to believe a suspect is armed and dangerous, he may conduct a limited search for weapons. Id. at 30.

\textsuperscript{120} Id. at 15.

\textsuperscript{121} Id. at 19–20.

\textsuperscript{122} Id. at 20. The Court concluded that the officer was justified in stopping \textit{Terry} and his companions to question them about behavior which, in the officer's experience, indicated that they were preparing to commit a robbery. Id. at 22–23, 28. Recently, the Court reemphasized that the initial action must be justified before subsequently discovered evidence is admissible. In \textit{Delaware v. Prouse}, 99 S. Ct. 1391 (1979), the Court affirmed the suppression of marijuana seized following a random traffic stop. Citing \textit{Scott}, id. at 1396 n.9, the Court stated that the "reasonableness standard usually requires, at a \textit{minimum}, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard.' " \textit{Id.} at 1396 (emphasis added). The Court went on to say that where situations preclude "an insistence upon some 'quantum of individualized suspicion,' " other safeguards are generally relied upon" to ensure privacy rights. \textit{Id.} at 1396–97. The Court, again echoing the language of \textit{Terry}, stated that there must be an "articulable and reasonable suspicion" that the law is being violated to justify the initial intrusion. \textit{Id.} at 1401 Because the officer in \textit{Prouse} had no reason to stop the defendant's car, the evidence subsequently seized was inadmissible. \textit{Id.} at 1394. See \textit{Pennsylvania v. Mimms}, 434 U.S. 106 (1977)(per curiam)(ordering driver out of car after lawful stop for traffic violation justified as reasonable safety precaution; frisk of suspicious bulge under defendant's jacket therefore reasonable and weapon found admissible in evidence).

\textsuperscript{123} 392 U.S. at 20. The Court concluded that the frisk was properly limited to a superficial pat-down for weapons. \textit{Id.} at 29–30.
officer's subjective belief is critical to such an inquiry because he "must be able to point to specific and articulable facts which . . . reasonably warrant that intrusion." It is these facts that are later subjected to the scrutiny of a detached, neutral judge to determine whether or not the conduct also meets the test of objective reasonableness. Simply stated, without either a warrant or probable cause, the officer must have a good reason to justify a search.

The Terry standard of a limited search for weapons was urged upon the Court in United States v. Robinson. In Robinson, the defendant claimed that his arrest for a traffic violation did not justify a search because neither of the historical rationales—protection of the officer and preservation of evidence—for such a search was present. Characterizing the search of the person incident to arrest exception to the fourth amendment warrant requirement as "unqualified," the Court refused to carve out an exception to the exception. Almost as an afterthought, the Court dealt with the issue of the arresting officer's subjective beliefs and declared that his lack of fear was "of no moment." In so asserting, the Court left undisturbed the fourth amendment principle that there must be a reasonable basis for the officer's initial action that legitimizes his subsequent action.

To require a good faith effort to minimize simply means that the monitor "must be able to point to specific and articulable facts" that justify intercepting any conversation. The warrant satisfies this requirement for conversations that are clearly related to the criminal activity under investigation; compelling reasons must exist that justify the monitor's interception of nonrelevant conversations—otherwise the interception should be regarded as constitutionally unreasonable.

By eliminating good faith as a factor to be considered, the Court has casually dispensed with the fundamental fourth amendment principle that the reasonableness of a search cannot be measured by what in fact was seized. The ex post facto analysis endorsed by the Court in Scott, then, completely substitutes the judgment of the court for that of the monitoring agent instead

125. Terry v. Ohio, 392 U.S. at 21–22. In making this objective determination, the judge should consider "the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience." Id. at 27. The officer's expertise introduces a subjective factor into an otherwise objective determination. Further, courts frequently have relied upon police expertise in assessing whether probable cause exists for an eavesdropping warrant. See Fishman, supra note 33, at § 73.
127. Id. at 233.
128. Id. at 230.
129. Id. at 235.
130. Id. at 236.
131. Id. at 235. No additional justification to search is required after a full-custody arrest. Id. See notes 121–23 & accompanying text supra.
of serving as a check on the agent's discretion. With knowledge of all the circumstances ultimately discovered by monitors in the course of a lengthy surveillance, courts are invited to apply what best can be described as twenty-twenty hindsight in making an "objective" determination of whether the monitors' conduct was reasonable.

Finally, in assessing the constitutionality of the failure to minimize, the Court completely ignored the distinction between an isolated physical search and seizure and a continuing series of surreptitious interceptions. A considerable body of case law has developed under the fourth amendment that strictly circumscribes the circumstances under which, and the the procedures by which, a physical search can be conducted.134 This is true even though a physical search is of limited duration and usually is conducted with the knowledge of the suspect. A prolonged investigation utilizing electronic surveillance presents increased opportunities for abuse; those utilizing the telephones or premises under surveillance can neither observe nor complain about the conduct of the police during the course of the search because they are unaware of it. Such factors would seem to dictate more rigorous procedures to meet constitutional requirements. After Scott, however, police officers are left with little guidance as to what a court will later deem "reasonable" and with no effective deterrent to a practice of gathering as much information as possible whether pertinent or not.135 Ultimately, this advances neither the interests of law enforcement nor the rights of citizens.

134. When police officers execute a standard search warrant, e.g., they are usually forbidden to forcibly enter the premises to be searched unless, after stating their authority and purpose, they encounter resistance or hear sounds that indicate that the sought-after evidence is being destroyed. See, e.g., 18 U.S.C. § 3109 (1976). If, without these grounds, the police break down the door and come upon a suspect who might have destroyed the evidence had the officers knocked and announced, the post hoc assessment of objective reasonableness might indicate that the officers were correct in failing to knock; their blatant disregard of the law, however, renders the search and seizure, which had been found objectively reasonable in advance by the judge who issued the warrant, unlawful. See Ker v. California, 374 U.S. 23, 37-41 (1963). For a discussion of this proposition, see id. at 40 n.12 (Clark, J., writing for a four-justice plurality). See also id. at 53-60 (Brennan, J., with whom Warren, C.J., & Douglas & Goldberg J.J. concurred, dissenting); United States v. Likas, 478 F.2d 607 (7th Cir. 1971); State v. Gassner, 6 Or. App. 452, 488 P.2d 822 (1971).

135. If the suppression of nonrelevant conversations only is the standard applied by the court, aggrieved persons are left with only civil remedies. See note 24 & accompanying text supra and notes 211-213 & accompanying text infra. The same approach as that discussed in note 134 supra, should govern where officers executing an eavesdropping warrant blatantly disregard the minimization provisions of the statute and the warrant. Assume, for example, that at 7:00 p.m. each evening the suspected leader of a narcotics conspiracy telephones his mother and talks with her about personal matters that are totally unrelated to the investigation. After several days, a pattern of nonpertinence should be apparent to the monitors. See text accompanying notes 158-59 infra. Absent exigent circumstances, such calls are no longer subject to interception. See note 168 & accompanying text infra. Nevertheless, the officers continue to monitor. The interception of the 7:00 p.m. call, finally producing vital evidence on the thirtieth day of the tap, undoubtedly would be deemed unreasonable by a standard of objective reasonableness. It is less certain whether interception of an incriminating 7:00 p.m. call on the seventh, eighth, or ninth day would be so regarded; such interceptions are neither clearly reasonable nor clearly unreasonable. An ex post facto
2. Title III and Failure to Attempt Minimization

Having rejected subjective good faith as a relevant consideration in eavesdropping interceptions under the fourth amendment, the Court likewise rejected the argument that the minimization provision of Title III requires agents to make a subjective good faith effort to minimize. The Court concluded that Congress did not intend such a result:

[I]n the very section in which it directs minimization Congress, by its use of the word “conducted,” made it clear that the focus was to be on the agents’ actions not their motives. Any lingering doubt is dispelled by the legislative history which . . . declares that [18 U.S.C. § 2515, the statutory exclusionary rule] was not intended “generally to press the scope of the suppression role beyond present search and seizure law.”

This interpretation of the minimization provision misconstrues congressional intent. Title III requires law enforcement officials and judges to make subjective assessments throughout the eavesdropping process. The law enforcement official who authorizes the submission of an eavesdropping application to a judge must first make a subjective decision whether the level of criminality under investigation merits the use of eavesdropping. The judge to whom the application is submitted is empowered to make the same subjective assessment. Once a warrant has been issued, moreover, the issuing judge is authorized to supervise the manner in which the warrant is executed and to make periodic, and necessarily subjective, assessments to determine whether interceptions should be allowed to continue. If evidence assessment of these calls, using a purely “objective” test, may well be influenced by what, in fact, was intercepted. A good-faith effort to minimize, then, would supply an additional—and essential—standard by which reasonableness can be determined. If an overall effort to minimize had been made, it would be appropriate for the judge to accept the monitors’ decision to intercept these calls.

137. The Court places more emphasis on Congress’s selection of the word “conducted” than it merits. The verb conduct focuses neither on actions nor motives.
138. See note 38 supra.
139. See text accompanying notes 42–44 supra. The warrant may be rendered invalid if information necessary for such judicial assessment is wrongfully withheld. See United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974). Objection may be raised to describing judicial assessments as “subjective” rather than “objective,” since the role of the judge in fourth amendment litigation is to assess the justification for a search and seizure “against an objective standard” of reasonableness. Terry v. Ohio, 392 U.S. 1, 21–22 (1968). All such judicial assessments are by definition “objective” in that they are made by “a neutral and detached magistrate” rather than by “the officer engaged in the often competitive enterprise of ferreting out crime.” Johnson v. United States, 333 U.S. 10, 13–14 (1947). See also Aguilar v. Texas, 378 U.S. 108, 111 (1964). In deciding whether to issue an eavesdropping warrant, however, the judge is called upon to evaluate, not only whether as a matter of law there is sufficient probable cause to justify the intrusion, but whether as a matter of policy the level of criminality to be uncovered is serious enough to make the intrusion worthwhile. Such a decision is “subjective” in the sense that it is made by an individual judge who is unable to refer to prior case law or to confer with any collective, “objective” consciousness. The judge’s personal judgment is simply a check on the authorizing official’s personal judgment.
140. See text accompanying notes 45 supra & 186–93 infra.
of crimes other than those specified in the warrant is obtained, such evidence may be disclosed in a grand jury or court proceeding only if, prior to such disclosure, an appropriate judge concludes, *inter alia*, that the original warrant "was sought *in good faith* and not as a subterfuge search, and that [conversations involving other crimes were,] in fact, incidentally intercepted during the course of a *lawfully executed* order." Thus, the statute requires subjective judicial evaluation of the judgment and good-faith conduct of law enforcement officials before the warrant issues and after it has been executed. It constitutes a substantial misreading of the spirit and the letter of Title III to conclude that judicial evaluation of the manner in which the monitors "conducted" interceptions is to be made solely from an "objective" assessment of what was intercepted. The Court's elimination of good faith from the Title III minimization provision is ironic in light of congressional treatment of minimization in the Foreign Intelligence Surveillance Act of 1978, which regulates the use of electronic surveillance to acquire foreign intelligence information within the United States. This statute contains a minimization provision which is "meant generally to parallel the minimization provision in [Title III]." The

141. S. REP. No. 1097, supra note 4 at 100, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2189 (commenting on 18 U.S.C. § 2517(5))(emphasis added). Neither Title III nor the Senate report contain a specific definition of the phrase "lawfully executed." Clearly, however, execution of a warrant, to be lawful, must be conducted in compliance with the provisions of the warrant and in compliance with the provisions of Title III. Title III has only one provision which directly discusses how a warrant is to be executed. 18 U.S.C. § 2518(5) requires that each warrant contain a provision that the warrant be executed as soon as is practicable, that interceptions cease "upon attainment of the authorized objective, or in any event in thirty days," and that each warrant contain a minimization provision. Since the minimization directive is an integral part of the one section of the statute which speaks to the execution of eavesdropping warrants, minimization must be an integral aspect of "lawful execution."

142. An analogy to principles of administrative law may be helpful. Given the nature of eavesdropping and the duration of the search it authorizes, agents monitoring a wiretap or bugging warrant necessarily exercise judgment and discretion far beyond that normally permitted of law enforcement officials in searches and seizures. *See* notes 20-28 & accompanying text *supra*. *See also* Delaware v. Prouse, 99 S. Ct. 1391 (1979), holding that it is constitutionally impermissible for the "agent in the field" to have unregulated discretion to stop an automobile for a random license and registration check. Where broad discretion is given to a regulatory agency, the actions of the agency are subject to judicial review based on one or more of several theories. One approach is to assess whether the official action was objectively reasonable. Courts, however, frequently go beyond that assessment and consider whether agency action was arbitrary and capricious or constituted an abuse of discretion. *See* Administrative Procedure Act, 5 U.S.C. §§ 551, 706 (1976). By analogy, if monitors fail to exercise any discretion in deciding which conversations to intercept, their bad-faith disregard of the statutory and warrant minimization mandate constitutes an arbitrary and capricious abuse of discretion.


144. The statute requires the establishment of procedures "that are reasonably designed . . . to minimize the acquisition and retention, and prohibit [except in specified circumstances] the dissemination, of nonpublicly available information concerning nonconsenting United States persons" that does not relate to foreign intelligence matters. 50 U.S.C.A. § 1801(h)(2) (West Supp. 1979). United States persons are defined as *citizens*, resident aliens, and domestic organizations and corporations. *Id.* at § 1801(i).

Senate committees that participated in drafting the 1978 statute cited with approval pre-Scott Title III case law to emphasize that good faith is required. It thus appears reasonable to hope that Congress will consider legislation to reverse Scott by incorporating good faith as an explicit requirement of Title III's minimization provision. The remainder of this article seeks to demonstrate the logic of and need for such corrective legislation.

B. FACTORS AFFECTING MINIMIZATION: WHAT CONSTITUTES REASONABLENESS UNDER TITLE III

After deciding that the failure to attempt to minimize interceptions is neither inherently unreasonable under the fourth amendment, nor a violation of Title III, the Court considered whether the monitoring agents in Scott had acted reasonably under the circumstances. Prefatory to its "objective" assessment of whether the full interception of all 384 calls was "reasonable," the Court observed:

[B]ecause of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case. The statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to "minimize" the interception of such conversations. Whether the agents have in fact conducted the wiretap in such a manner will depend on the facts and circumstances in each case.

The Court ultimately upheld the circuit court's conclusion that total interception of every conversation was reasonable under the particular circumstances presented in Scott. This finding was based on several factors which, the Court held, affect a monitor's ability to minimize: the type of use to which the targeted telephone was normally put, the government's goals and expectations, the scope of criminal activity revealed by the eavesdropping, the degree to which patterns of nonpertinent conversations could be discerned, the use of ambiguous, guarded or coded language, and the brevity of some

146. Both of the Senate committee reports cited in note 145 supra, were ordered printed before the Scott decision and contain the following passage:

In assessing the minimization effort, the court's role is to determine whether "on the whole, the agents have shown a high regard for the right to privacy and have done all they reasonably could to avoid unnecessary intrusion." Absent a charge that the minimization procedures have been disregarded completely, the test of compliance is "whether a good faith effort to minimize was attempted."


conversations. These and other factors that affect an agent’s ability to minimize had been the subject of extensive commentary prior to Scott. Because of the brevity with which the Court discussed these factors, it is worthwhile to examine how these factors have been treated by other courts in determining whether a monitoring agent’s failure to minimize was reasonable.

1. Factors Affecting Minimization

Courts have identified a number of factors that affect the ability of monitoring agents to minimize the interception of nonpertinent conversations. When several of these factors are present, courts have tended to take a lenient attitude toward practices that otherwise might be viewed as a failure to minimize.

a. Nature and Use of Telephone or Premises

The manner in which the targeted telephone or premises normally is used clearly affects the degree to which interception of nonpertinent conversations can and should be minimized.

b. Goals of the Investigation; Scope of Criminal Activity

A key factor affecting the propriety of extensive monitoring is the purpose for which the eavesdropping warrant was obtained. For example, when a widespread conspiracy is suspected, courts have permitted extensive surveillance in an attempt to determine the “precise scope of the enterprise,”

148. Id. at 140-42.
149. See text accompanying notes 194-97 infra.
150. One of the difficulties in evaluating minimization case law is the courts’ tendency to cite similar concepts and to use identical language in cases with substantially different facts. As compliance with the minimization provision “will depend on the facts and circumstances of each case,” Scott v. United States, 436 U.S. at 140, it is difficult to evaluate the cases cited herein without a summary of the facts and circumstances presented in each case. To assist the reader, a brief factual summary of several important minimization cases is provided as an appendix to this article.
152. Scott v. United States, 436 U.S. 128, 140 (1978). The Court in Scott observed that although “the conspiracy turned out to involve mainly local distribution, rather than major interstate and international importation, . . . there is little doubt on the record that, as the agents originally thought, the conspiracy can fairly be characterized as extensive.” Id. at 142 n.15. Twenty-two persons were arrested, and fourteen indicted, as a result of the investigation. Id. at 132.
particularly with regard to conversations involving at least one suspected member of the conspiracy. Courts have been permissive regarding investigations of complex narcotics conspiracies, frequently finding acceptable the interception of every conversation for the duration of the investigation. Wide latitude is given to police because the intricacies of these conspiracies make them unusually difficult to monitor.

Permissive minimization standards, however, are not unique to narcotics conspiracy cases. The goals of an investigation and the scope of criminal activity have been cited as justifying extensive interception in cases involving other crimes.

c. Expectations at the Outset of Monitoring

Several courts have suggested that investigators' reasonable expectations at the outset of an investigation are particularly relevant in evaluating the manner in which an eavesdropping warrant has been executed. For example, if at the outset of the investigation police are aware of the identities of the suspects and know the hours during which the telephone or premises will be

154. Id. at 140. Accord, United States v. Chavez, 533 F.2d 491, 494 (9th Cir.) ("even calls involving doctors, real estate agents, telephone employees, and other apparently legitimate business or personal calls could not be above suspicion"), cert. denied, 426 U.S. 911 (1976); United States v. James, 494 F.2d 1007, 1019 (D.C. Cir.) ("some sophisticated narcotics conspiracies closely resemble advanced commercial enterprises with production and distribution networks, collection personnel, internal security forces, and so forth"), cert. denied, 419 U.S. 1020 (1974); United States v. Manfredi, 488 F.2d 588, 599 (2d Cir. 1973) ("a narcotics conspiracy . . . is one of the most difficult things to surveil and obtain evidence on . . . in modern law enforcement"), cert. denied, 417 U.S. 936 (1974).

James, Manfredi, Chavez and all but one of the cases cited in Chavez, as well as Scott, uphold the interception in full of every conversation for the duration of the wiretaps. Perhaps the most extreme example is United States v. Bynum, 485 F.2d 490, 500-02 (2d Cir. 1973), vacated on other grounds, 417 U.S. 952 (1974), where the total interception of more than 2,000 phone calls, including 73 lengthy "conversations of Bynum's infant daughter's babysitter, Donna, with her friends and classmates, which were clearly innocent," was held not to constitute a failure to minimize. 485 F.2d at 502.

Other courts have cited the goals and scope of a narcotics investigation as justifying extensive monitoring in cases where substantial minimization was nevertheless achieved. See, e.g., United States v. Armocida, 515 F.2d 29, 44 (3d Cir.), cert. denied, 423 U.S. 858 (1975); People v. Floyd, 41 N.Y.2d 245, 251-52, 360 N.E.2d 935, 941, 392 N.Y.S.2d 257, 263 (1976); Spease v. State, 275 Md. 88, 101, 338 A.2d 284, 291 (1975) (minimization achieved by listening to every conversation while recording only pertinent conversations). But see, e.g., United States v. King, 335 F.Supp. 523, 538-45 (S.D. Cal. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir.), cert. denied, 414 U.S. 846 (1973) and People v. Brenes, 42 N.Y.2d 41, 48, 364 N.E.2d 1322, 1326-27, 396 N.Y.S.2d 629, 634 (1977), both of which involved narcotics investigations of limited scope. In both cases, total interception of all conversations was condemned as excessive.

155. See, e.g., United States v. Clerkley, 556 F.2d 709, 717 (4th Cir. 1977) (gambling) cert. denied, 436 U.S. 390 (1978); United States v. Daly, 535 F.2d 434, 441 (8th Cir. 1976) (mail fraud); Commonwealth v. Vitello, 367 Mass. 224 n.21, 327 N.E.2d 819, 842 n.21 (1975) (gambling); State v. Dye, 60 N.J. 518, 536-40, 291 A.2d 825, 834-36 (organized crime-bookmaking), cert. denied, 409 U.S. 1090 (1972). Some conversations were minimized in Clerkley and Daly; in Dye, the court endorsed a combined extrinsic and after-the-fact approach to minimization; Vitello does not specify whether conversations were in fact minimized.
used to discuss the crimes under investigation, they should tailor their monitoring practices to avoid intercepting conversations of other individuals and conversations that occur at other times.  

On the other hand, a much more inclusive approach has been permitted when law enforcement officials expect to uncover evidence of a complex conspiracy, the extent and membership of which are unknown. Several courts have found it reasonable to intercept all calls at the initial stages of surveillance so that categories of irrelevant calls can be established.

d. Patterns and Categories of Conversations

Courts frequently have observed that monitoring agents should attempt to discern patterns of nonpertinent conversations, because it is unreasonable to continue intercepting conversations that are clearly and identifiably innocent. This is particularly important where agents have intercepted every call in full at the outset of the investigation. Unfortunately, this practice of initial, total interception often has led to the interception in full of every conversation for the duration of the investigation. All-inclusive interception is difficult to distinguish from the general eavesdropping warrant condemned

156. United States v. James, 494 F.2d 1007, 1020 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974), quoted in United States v. Daly, 535 F.2d 434, 441 (8th Cir. 1976); United States v. Armacida, 515 F.2d 29, 44 (3d Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Quintana, 508 F.2d 867, 874 (7th Cir. 1975). See also Scott v. United States, 436 U.S. 128, 141 (1978). In all but Daly, however, this viewpoint is only dictum. In James, Scott, Armacida and Quintana, each of which involved narcotics conspiracies of some complexity, every conversation was intercepted in full throughout the duration of the wiretap.

157. Scott v. United States, 436 U.S. 128, 142 (1978). See also United States v. Chavez, 533 F.2d 491, 493–94 (9th Cir.), cert. denied, 426 U.S. 911 (1976), where the court observed:

In the early stage of the use of the [wire]tap, it may be necessary to listen to all or substantially all conversations in order to find out how extensive the conspiracy is, who the conspirators are, where and when they meet, how they do business, and the other important and often complex details that make up the conspiracy.


158. Scott v. United States, 436 U.S. 128, 141 (1978). See text accompanying note 157 supra. See also United States v. Abascal, 564 F.2d 821, 827 (9th Cir. 1977), cert. denied, 435 U.S. 953 (1978); United States v. Daly, 535 F.2d 434, 441 (8th Cir. 1976); United States v. Turner, 528 F.2d 143, 156–57 (9th Cir.), cert. denied, 423 U.S. 996 (1975); United States v. Quintana, 508 F.2d 867, 874 (7th Cir. 1975); United States v. James, 494 F.2d 1007, 1020–21 (D.C. Cir.), cert. denied, 423 U.S. 952 (1975). In Scott, Abascal, Quintana, James, and Bynum, every conversation was intercepted in full for the duration of the eavesdropping.

159. See note 157 supra.

160. Every conversation was intercepted in full throughout the duration of the wiretapping in James (forty days), Bynum (five weeks on one phone, three weeks on a second phone), Scott (thirty days), Quintana (twenty days), Abascal (twelve days), and Chavez (nine and one-half days) without reproach. Occasionally, the failure to perceive a pattern of innocence can only be described as extraordinarily myopic. See discussion of "babysitter Donna's" conversations in Bynum, note 154 supra. Cf. United States v. King, 335 F. Supp. 523, 541 (S.D. Cal. 1971) (discussion of "King-Phyllis" conversation), rev'd on other grounds, 478 F.2d 494 (9th Cir.), cert. denied, 414 U.S. 846 (1973).
in *Berger v. New York*,161 and may effectively nullify the minimization requirement.162

Patterns of innocent conversations may emerge with respect to persons, telephone numbers, and time periods. Several courts have suggested that monitors should attempt to ascertain who among those using the telephone or premises being monitored actually are engaged in the criminal activity under investigation. When no participants to a conversation are suspected of involvement, continued interception of such conversations is unreasonable.163 When, however, monitors have identified one participant to a conversation as a suspect and are uncertain whether another participant is also involved in criminality, the agents may have to gather additional information before they can determine whether further conversations between the same individuals are to be minimized.164 Furthermore, complications may arise when a suspect has not been positively identified. For example, an otherwise irrelevant conversation between a suspect and nonsuspect may reveal the suspect's age, address, occupation, family ties, or other information that would enable investigators to confirm the suspect's identity.165

161. 388 U.S. 41 (1967). See text accompanying notes 75–76 supra. It is interesting to note that although the statute and warrant in *Berger* authorized unrestricted interception for up to 60 days, interception was in fact terminated after 13 days. *Id.* at 100 (Harlan, J., dissenting).

162. In the author's view spot-monitoring, described in the text accompanying notes 85–87 supra, is a better approach than initial, total interception. See text accompanying note 243 infra.

163. United States v. Scott, 516 F.2d 751, 755 (D.C. Cir. 1975), aff'd, 436 U.S. 128 (1978). Although *Scott* and most other cases cited herein involved the use of wiretaps, the principles discussed in these cases generally should apply to bugging devices as well.

164. *Id.* In *Scott*, the Supreme Court observed, “Some of the nonpertinent conversations were one-time conversations. Since these calls did not give the agents an opportunity to develop a category of innocent calls which should not have been intercepted, their interception cannot be viewed as a violation of the minimization requirement.” 436 U.S. at 142. Although the Court did not define “one-time conversation,” the phrase apparently refers to a telephone call in which at least one participant was intercepted over the tapped phone only once during the investigation. *See also* People v. Floyd, 41 N.Y.2d 245, 252, 360 N.E.2d 935, 938, 392 N.Y.S.2d 257, 263–64 (1976). *But see Minimization of Wire Interceptions*, supra note 78, at 1222.

The difficulties that sometimes arise in classifying a particular category of calls as pertinent or nonpertinent are illustrated by seven calls between Geneva Jenkins and her mother in *Scott*. The first four calls, occurring during the first three days of the tap, were relatively brief and “at least two of them indicated that the mother may have known of the conspiracy.” 436 U.S. at 142. A week later two more calls were intercepted, during which the mother said she wanted to tell Jenkins something about the “business” but did not want to do so over the phone. The seventh call was “substantially longer and likewise contained a statement which could have been interpreted as having some bearing on the conspiracy.” *Id.* Although none of these conversations turned out to be significant in the investigation or trial, the Court concluded that “the agents did not act unreasonably at the time they made these interceptions.” *Id.*

It may be fairly simple to categorize calls to a particular telephone number as not pertinent to the investigation. If several outgoing calls are made to a telephone that is neither registered to nor utilized by a suspect, and there is no indication that important information will be gleaned from further interception of conversations to that telephone, monitors should cease intercepting such conversations. Similarly, if it becomes obvious that conversations that occur before or after a certain hour are never pertinent, monitors should minimize interception of such conversations.

Once a particular category of conversation has been classified as "innocent," its continued interception generally is improper, although flexibility should be allowed in unusual circumstances. On the other hand, once a category of conversation has been classified as pertinent, courts have held that subsequent conversations in this category may be intercepted in their entirety. Although some conversations between suspected conspirators may pertain to wholly innocent and unrelated topics, it is impossible for monitors to know that such conversations are not pertinent until they have been completed.

e. Coded, Guarded or Cryptic Language

If those under investigation attempt to conceal their identities and disguise their conversations, the task of distinguishing pertinent from nonpertinent communications is more difficult. Several courts have held that when those under investigation utilize such tactics, monitors are justified in listening more extensively. In Scott, the Supreme Court acknowledged that the use of

166. See United States v. Focarile, 340 F. Supp. 1033, 1048-49 (D. Md.), aff'd sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), aff'd, 416 U.S. 505 (1974). Unfortunately, courts have occasionally excused the continued interception of exclusively personal and nonpertinent calls long after it should have been apparent that nothing relevant would be overheard. See, for example, the discussion of "babysitter Donna's" conversations in Bynum, note 154, supra.


168. For example, assume that the main suspect in a narcotics investigation telephones his mother every evening at 7 p.m. and discusses only personal matters with her. Once this pattern is discerned, the monitors should cease intercepting such calls. If, however, at 6:45 p.m. one evening a call is intercepted which reveals that a major narcotics transaction (or other serious crime) is planned for the immediate future, it would seem reasonable to intercept the suspect's 7 p.m. call to his mother because he may reveal where he will be going or with whom he will be meeting later in the evening.


codes and other ambiguities may render interpretation and categorization of many conversations virtually impossible until after the conversation is completed.171

2. Bugging Devices

The task of defining minimization standards and practices is even more complex for bugging devices than it is for wiretaps. Face-to-face conversations cannot be divided into "discrete units" or "assessed on an individual basis."172 Unless voice-activated tape recorders are utilized, there may be no way of knowing when a conversation is taking place.173 If visual surveillance of the bugged premises is impracticable, monitors may be unable to establish, aside from the listening device, whether the premises is unoccupied, occupied by only one individual, or by several. In addition, conversants may discuss diverse matters, swiftly and unexpectedly moving from one topic to another.174 Case law and commentary addressing these problems have been scanty.

The same factors that affect minimization of wiretaps are relevant to bugs. The nature and use of the premises may be the single most important consideration. If the bugged premises is primarily a residence, the practice of initially intercepting all conversations should be avoided because the percentage of nonpertinent, private and privileged discussions is likely to be extremely high. Monitoring of a residence should be restricted to situations most likely to produce pertinent conversations.175


171. 436 U.S. at 142-43.
173. Such recorders might also be activated if a radio or television is turned on in the room being bugged.
174. United States v. Clerkley, 556 F.2d 709, 717 (4th Cir. 1977), cert. denied, 436 U.S. 930 (1978). For example, two persons may be having an extended conversation about a completely innocent topic. A third person, listening to, but not joining in the discussion, and whose presence therefore may be unknown to the monitors, might briefly interrupt to issue conspiracy-related instructions to the others.
175. For example, if events that relate to the crime under investigation occur outside the home, extensive monitoring of the premises might be justified for a few hours or days in the reasonable expectation that the occupants will discuss those events. When nonmembers of the household are present,
MINIMIZATION

If the bugged premises is a business location, greater initial leeway should be permitted. In United States v. Clerkley, a complex gambling investigation, the Fourth Circuit upheld the practice of listening whenever at least one identified suspect was present. Given the difficult circumstances of the investigation, the court held that continuous interception was justifiable.

Finally, if the premises is utilized solely for criminal activity, or is a social club the membership of which is restricted to those engaged in crime, the presumption might be in favor of full interception until patterns of nonpertinent conversations emerge.

3. Intrinsic Minimization Not Practicable

The intrinsic approach to minimization has emerged as the preferred procedure in most jurisdictions. In some situations, however, intrinsic minimization may not be practicable. For example, if the targets of a wiretap or bug occasionally converse in a foreign language, it is permissible to intercept such conversations in full and have the conversations translated later. If, however, substantial portions of the conversations are in a foreign language and officers fluent in that language are available, such officers should conduct the monitoring and should intrinsically minimize nonpertinent conversations.

Occasionally, intrinsic minimization is impossible because of geography. If detection of monitoring officers is likely because of the physical peculiarities of the location of the targeted premises, use of an automatically triggered, continuously operating tape recorder may be justified.

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it is less likely that privileged or private matters will be discussed, so moderately extensive monitoring might be reasonable until it can be ascertained whether such persons are involved in criminal activity. Absent unusual circumstances, however, agents should be restricted to random spot-monitoring when only household members are present. Should it develop that crime-related conversations occur frequently even when only family members are present, monitors would be justified in increasing the extent to which conversations among family members are overheard and recorded. In such a situation, the best solution is to adopt the after-the-fact approach to minimization. See notes 92–93 & accompanying text supra.

177. Id. at 716–17.
178. Id. at 717. Although the monitors listened to all such conversations, they recorded only those that were judged to be pertinent. The court concluded that this practice violated 18 U.S.C. § 2518(8)(a), which requires that all intercepted conversations be recorded, but held that this violation did not require the suppression of evidence. Id. at 718–19.
179. With the exception of State v. Dye, 60 N.J. 518, 522–25, 291 A.2d 825, 827–28, cert. denied, 409 U.S. 1090 (1972), virtually all of the cases cited in notes 84 supra, through 180 infra, have explicitly or implicitly adopted the intrinsic approach.
An even thornier problem is presented where a defendant is preparing for or is on trial and the authorities have probable cause to believe that the defendant and his attorney are conspiring to bribe or threaten jurors or witnesses. It might be impossible to minimize interception of privileged communications concerning legitimate trial tactics and strategy while seeking to overhear conversations relating to efforts to tamper with jurors or witnesses. A possible solution might be to segregate officials involved in the prosecution from those who investigate the new offense when issuing the warrant. The judge could include a provision prohibiting investigators from disclosing any information obtained unless expressly authorized to do so by the court.

Because alternatives to intrinsic minimization increase the risk of intrusion upon the privacy of innocent persons and nonincriminating conversations, such alternatives should be utilized only with the express approval of the issuing judge. The warrant should restrict access to the nonminimized recordings to one or two officers whose duty it would be to listen to the tapes. They should rerecord only the conversations thought to be pertinent, and then seal the original tapes. The warrant also should prohibit these officers from disclosing the contents of nonrerecorded conversations unless expressly authorized to do so by the court.

Other situations might arise which have not yet been addressed in reported opinions. An eavesdropping warrant might be issued in a rural area where the law enforcement agency lacks sufficient manpower to conduct live monitoring.

183. Intrusions into attorney-client conversations could taint a concurrent trial and require dismissal of the indictment. Hoffa v. United States, 385 U.S. 293, 308 (1966) (dictum) (citing Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953)).

184. Although there appear to be no reported cases endorsing this procedure, an analogy may be drawn to cases in which a defendant alleges that a prior, illegal wiretap has tainted a subsequent wiretap or trial. See United States v. Sapere, 531 F.2d 63, 64 (2d Cir. 1976); United States v. Polizzi, 500 F.2d 856, 913 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); United States v. Cole, 463 F.2d 163, 171 (2d Cir.), cert. denied, 409 U.S. 942 (1972); Baker v. United States, 430 F.2d 499, 502–03 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970). See also United States v. Magaddino, 496 F.2d 455, 458–61 (2d Cir. 1974).

In Weatherford v. Bursey, 429 U.S. 545 (1977), the Supreme Court upheld a similar procedure in a noneavesdropping context. Bursey and two others, accompanied by Weatherford, an undercover police agent, vandalized a Selective Service office. In order not to jeopardize Weatherford's undercover status in other investigations, Weatherford was arrested and charged along with Bursey. On two occasions prior to Bursey's trial, Weatherford, at Bursey's request, participated in pretrial conferences with Bursey and Bursey's attorney. At the time, the prosecution had not intended to call Weatherford as a witness, and Weatherford did not communicate anything he had heard at these meetings to his superiors or to the prosecutor. At trial, the prosecutor decided to call Weatherford as a witness; his testimony was restricted to the break-in and events which had preceded it. Bursey was convicted, disappeared, was apprehended two years later, and served an eighteen-month sentence. Thereafter, he brought a civil action pursuant to 42 U.S.C. § 1983, alleging that by attending the conferences between Bursey and his attorney, Weatherford had violated Bursey's sixth amendment right to the effective assistance of counsel and his fourteenth amendment due process right to a fair trial. The district court entered judgment for Weatherford; the United States Court of Appeals for the Fourth Circuit reversed, 528 F.2d 483 (1975). On certiorari, the Supreme Court reversed the Fourth Circuit, holding that if, as found by the district court, Weatherford had communicated nothing about the two meetings to anyone else, Bursey's sixth and fourteenth amendment rights were not violated. 429 U.S. at 557–58.

185. A variation on this procedure was adopted in State v. Dye, 60 N.J. 518, 519–21 291 A.2d 825,
4. Judicial Supervision

Title III authorizes the issuing judge to require that periodic reports be submitted to him concerning the progress of the investigation. 186 Congress intended the progress report provision to provide a judicial “check on the continuing need to conduct surveillance.” A judge may terminate the warrant whenever he is convinced that there is no longer a need for continued surveillance. 187 A second reason for requiring such reports is to detect and remedy any possible minimization abuses. 188 A number of courts have suggested that the issuing judge’s supervision and reception of periodic reports concerning execution of the warrant constitutes substantial evidence that the monitoring procedures utilized were reasonable. 189

Unfortunately, “the protections to be enforced by the judiciary are often illusory.” 190 Because the issuing judge has discretion whether to require progress reports, trial and appellate courts have refused to evaluate the adequacy of such reports, 191 and have declined to impose sanctions when reports are submitted late or are not submitted at all. 192 Moreover, some appellate courts have relied upon the issuing judge’s supervision of monitoring to uphold the total interception of all conversations even though the judge was unaware that this practice was being followed. In such situations, judicial “supervision” may constitute little more than uninformed judicial ratification of improper conduct. 193


188. United States v. Kahn, 415 U.S. 143, 154 (1974). See note 222 infra. Investigators have discovered a third reason for submitting such reports. “[J]udicial oversight, when based upon progress reports, can in effect act as a ratification of the officers’ conduct, thereby making suppression more unlikely.” NWC REPORT, supra note 5, at 96.


193. Two widely cited cases provide clear examples. In United States v. Bynum, 485 F.2d 490 (2d Cir.
C. THE COURT'S MINIMIZATION ANALYSIS IN SCOTT

The government in Scott conceded that at least 60 percent of the intercepted conversations proved to be nonpertinent, but argued that interception of these telephone calls was reasonable under the circumstances of the case. The Court noted that in a complex case such as Scott, involving a

194. At the second suppression hearing in district court, the government offered the following statistical "call analysis" of the intercepted conversations:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Conversations</th>
<th>Percentage of Total Interceptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>NS-Communications which in substance relate to the narcotics enterprise</td>
<td>126</td>
<td>32.8</td>
</tr>
<tr>
<td>NB-Communications which relate to the narcotics enterprise in part</td>
<td>7</td>
<td>1.8</td>
</tr>
<tr>
<td>ME-Communications not concerned with the narcotics enterprise but nonetheless of important evidentiary value</td>
<td>21</td>
<td>5.4</td>
</tr>
<tr>
<td>A-Communications so ambiguous that their purpose cannot be determined</td>
<td>142</td>
<td>36.9</td>
</tr>
<tr>
<td>R-Communications consisting totally of a recorded message</td>
<td>27</td>
<td>7.0</td>
</tr>
<tr>
<td>UNRE-Communications which are unrelated to the narcotics enterprise but which were intercepted with a reasonable expectation of related material</td>
<td>55</td>
<td>14.3</td>
</tr>
</tbody>
</table>

1973), vacated on other grounds, 417 U.S. 903 (1974), aff'd, 513 F.2d 533 (2d Cir.), cert. denied, 423 U.S. 952 (1975), the Second Circuit, in upholding the total interception of all 2,000 calls, emphasized that the district judge had "closely and conscientiously supervised" the taps, 485 F.2d at 501. Yet, as Justice Brennan pointed out in his dissent from the denial of certiorari, the supervising attorney ignored the monitoring instructions given by the judge, instead issuing his own contradictory instructions to the monitoring agents; furthermore, the judge was not informed that every conversation, including at least 42 arguably privileged attorney-client conversations, was being fully recorded. 423 U.S. at 952–56. Similarly, in United States v. Scott, 516 F.2d 751 (D.C. Cir. 1975), aff'd, 436 U.S. 128 (1978), judicial supervision was cited approvingly by the United States Court of Appeals for the District of Columbia Circuit even though "the supervising judge was never specifically informed that the agents were not minimizing the interception of any conversations." 516 F.2d at 759.
wide-ranging conspiracy with a large number of participants, an experienced monitor would have found it difficult to determine the relevancy of many of these calls prior to their completion. The Court stated that the majority of the nonpertinent interceptions were either one-time conversations or were so brief or so ambiguous that the agents had little opportunity to develop a category of innocent calls. The Court discussed in detail only seven conversations between Jenkins and her mother, and found that although these conversations ultimately proved immaterial, they contained references that could have been interpreted as relevant at the time.

The Court's analysis in *Scott* appears to have been based on the assumption that in complex cases effective minimization and successful investigations are mutually exclusive. This assumption, like the Court's interpretation of congressional intent, is incorrect. It cannot be contested that the nature and use of the facilities or premises being monitored, the goals of the investigation, the scope of criminal activity involved, the government's initial expectations, and the use of codes or cryptic jargon have substantial impact upon the degree to which minimization can be achieved. Nevertheless, it appears that some courts, including the Supreme Court in *Scott*, have been too willing to cite these factors to justify a failure to minimize, without analyzing whether these factors were present to such an extent that minimization was completely impossible. There is ample evidence that such complexities do not render minimization impossible, if monitors make a good-faith effort to achieve it.

<table>
<thead>
<tr>
<th>UN-Communications which are unrelated to the narcotics enterprise and which were intercepted with no reasonable expectation of related material</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Interceptions</td>
<td>384</td>
</tr>
</tbody>
</table>

---

196. Id. at 141-42.
197. Id. at 142. The rationale for this conclusion is discussed at note 164 supra.
198. See notes 136-42 & accompanying text supra.
199. Having supervised the execution of 40 wiretaps and bugs, the author is well aware of the legal and practical demands that minimization imposes upon the monitoring agents. An individual monitor must decide from conversation to conversation and from second to second whether to listen and record, or to minimize.
200. Admittedly, it may not be possible to evaluate the complexities of a given case solely from the facts included in a reported opinion. The only opinion, however, that in the author's view, sets forth concrete facts justifying prolonged total interception is United States v. James, 494 F.2d 1007 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974), where the telephone was, in the words of one conspirator, strictly a "business phone," everyone who used the telephone was involved in narcotics traffic, 70% of the calls were related to narcotics, and only 12% involved neither narcotics nor other criminal activity. 494 F.2d at 1021-23.
201. See United States v. Losing, 560 F.2d 906 (8th Cir.), cert. denied, 434 U.S. 969 (1977); United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977), cert. denied, 436 U.S. 930 (1978); United States v. Scully,
IV. THE SUPPRESSION REMEDY

Judicial approaches to minimization have been far from uniform. There is general agreement that the ultimate issue is whether the minimization procedures followed by the monitoring agents were reasonable in light of the facts and circumstances of the investigation. Consequently, litigation has focused on three basic elements: (1) the procedures that were followed, (2) the extent to which interceptions were minimized, and (3) the underlying facts and circumstances. Beyond this general framework, however, it is difficult to synthesize a prevailing approach. There is disagreement over who has standing to contest an alleged failure to minimize. No procedural guidelines have been established for hearings on the minimization issue, and courts differ substantially on the appropriate remedy to be applied once the hearing judge has concluded that the monitors' conduct was unreasonable.

A. STANDING TO CONTEST AN ALLEGED FAILURE TO MINIMIZE

Two federal courts have reached different conclusions regarding standing to contest an alleged failure to minimize the interception of nonpertinent conversations. The Second Circuit has ruled that only those persons who have a privacy interest in the residence in which the tapped phone is located have standing. The United States Court of Appeals for the District of Columbia Circuit, on the other hand, has held that every party to an intercepted conversation has standing. The District of Columbia Circuit has found further that compliance with the minimization provision must be assessed by examining "the totality of the monitoring agents' conduct," rather than by "[f]ragmenting the . . . inquiry" into an assessment of whether each defendant's conversations were properly minimized. At the hearing, therefore, each person whose conversations were intercepted must be allowed to introduce any intercepted conversation in order to show that the conversa-


206. 504 F.2d at 197.
tions in which he participated were seized in violation of the warrant. The court noted, however, that if the monitoring agents failed to minimize adequately, each defendant could suppress only those conversations in which he personally participated.

B. NATURE AND SCOPE OF MINIMIZATION HEARING

Similarly, the nature and scope of a minimization hearing have not been defined uniformly by the courts. Several courts have held that the prosecutor has the initial burden of proving that a reasonable effort was made by the monitoring agents to minimize the interception of innocent communications. If the prosecutor makes a prima facie showing of reasonableness, the burden of proof shifts to the defendant to establish that more effective minimization procedures could have been used that nevertheless would have enabled the government to accomplish its surveillance goals. Beyond the allocation of burdens of proof, however, the only general principle that has emerged is that the length and scope of the hearing is within the sound discretion of the trial judge.

C. APPROPRIATE REMEDIES IN MINIMIZATION PROCEEDINGS

The courts also disagree on the appropriate remedy for excessive monitoring. Two approaches have emerged. Some courts have effectively ignored the failure to minimize, holding that while nonpertinent conversations should be suppressed, pertinent conversations should not. This approach affords a

207. Id.
208. Id. Although the standing question was raised, the Supreme Court declined to rule on the matter in Scott, 436 U.S. at 135 n.10. The Ninth Circuit likewise has noted the issue but has declined to decide it. United States v. Abascal, 564 F.2d 821, 827 (9th Cir. 1977), cert. denied, 435 U.S. 953 (1978).
211. See, e.g., United States v. Scott, 516 F.2d 751, 760 n.19 (D.C. Cir. 1975), aff'd, 436 U.S. 128
defendant no real remedy: it hardly benefits the accused if the judge suppresses only those conversations that the prosecutor had no intention of using against him.212 Moreover, if only improperly intercepted nonpertinent conversations are suppressed, the minimization provision will be stripped of all deterrent effect.213

Other courts have held that application of the suppression remedy depends upon whether a good-faith effort was made to minimize interception of nonpertinent conversations. Where monitors blatantly disregard the minimization provision, all conversations, pertinent as well as nonpertinent, must be suppressed.214 On the other hand, where a good-faith attempt was made, but the judge concludes that the effort was inadequate, the use of pertinent conversations and derivative evidence at trial should be permitted.215 This emphasis on the good faith of the monitoring officers is the

(1978), and cases cited therein. "This argument is often supported by reference to the law with regard to other sorts of search warrants, which suppresses only seized items not covered by the warrant, but does not require suppression of items properly seized." United States v. Principie, 531 F.2d 1132, 1139 (2d Cir. 1976), cert. denied, 430 U.S. 905 (1977). However, analogies to physical searches and seizures are inapposite. See text accompanying notes 20-37 supra.

212. A few courts have suggested that the only remedy is a civil suit pursuant to 18 U.S.C. § 2520 (1976), which creates a civil cause of action for victims of illegal eavesdropping. See, e.g., United States v. Cox, 462 F.2d 1293, 1301-02 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974). The Supreme Court, however, has long since rejected the proposition that the opportunity to seek civil damages is an adequate remedy for the victim of an unlawful search, see Mapp v. Ohio, 367 U.S. 643, 651-53 (1961), although this proposition has recently won new advocates, see Bivens v. Six Unknown Named Agents, 403 U.S. 388, 421-22 (1971)(Burger, C.J., dissenting). Further § 2520 provides that "[a] good faith reliance on a court order . . . shall constitute a complete defense to any civil or criminal action brought under [Title III] or under any other law."

No reported civil actions have been brought successfully where eavesdropping, however excessive, was authorized by warrant. At least one court, however, has concluded that Scott is a double-edged sword. In Higgens v. Fuessenich, 452 F. Supp. 1331 (D. Conn. 1978), Connecticut officials in 1972 obtained a wiretap and, in accord with then-existing departmental procedures, recorded every conversation (except privileged communications) for the duration of a ten-day warrant. Plaintiffs subsequently sued pursuant to 42 U.S.C. § 1983 and 18 U.S.C. § 2520, alleging that excessive monitoring violated their civil rights. Defendants moved for summary judgment, citing the good-faith provision of § 2520. The district court denied the motion. Citing Scott, the court held that the issue was whether the minimization procedures followed were objectively reasonable, and that this issue could only be decided by a jury. The district court appears to have read the explicit "good faith reliance" provision out of § 2520, just as the Supreme Court read the implicit good-faith effort requirement out of the minimization provision.

213. "Knowing that only 'innocent' calls would be suppressed, the government could intercept every conversation during the entire period of a wiretap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway . . . ." United States v. Focarile, 340 F. Supp. 1033, 1047 (D. Md.), aff'd sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), rev'd on other grounds, 416 U.S. 505 (1974), quoted with approval in United States v. Principie, 531 F.2d 1132, 1140 (2d Cir. 1976), cert. denied, 430 U.S. 905 (1977).


most logical approach to minimization; whether it will survive the reasoning of Scott v. United States is, unfortunately, uncertain.216

V. OBSERVATIONS AND SOLUTIONS

If the only purpose of Title III had been to assist law enforcement officials to ferret out crime, the logical procedure would be to intercept and record every conversation, in order to protect against the possibility that a seemingly innocent conversation might suddenly become, or in retrospect prove to be, pertinent to the investigation. Title III, however, was enacted with a second, equally important purpose: to protect the privacy of innocent persons and innocent conversations.217 This latter purpose is mandated, not only by sound policy, but by the fourth amendment.

Among the provisions designed to effectuate the second purpose is a statutory requirement that eavesdropping warrants contain "a particular description of the type of communication sought to be intercepted."218 This requirement parallels the fourth amendment provision that all search warrants "particularly describe . . . the thing to be seized."219 Yet the statutory particularity provision would be of little import if monitors routinely were permitted to intercept every conversation in full. To avoid this unconstitutional anomaly, Title III requires each eavesdropping warrant to contain a directive that those conducting the eavesdropping minimize the "aural acquisition"220 of conversations "not otherwise subject to interception."221 If it is to have any meaning at all, the phrase "not otherwise subject to interception" must refer to conversations not "particularly described" in the warrant.222

216. In Scott, the Supreme Court held that good faith on the part of the monitors was irrelevant in assessing whether the minimization provision had been violated but suggested that if a judge concluded it had been, the motives that prompted the monitors' actions might be relevant in "determining whether application of the exclusionary rule is appropriate." 436 U.S. at 139 n.13. The Court, however, expressly declined to rule on what the remedy for excessive monitoring should be. Id. at 135.

217. See text accompanying note 8-9 supra.


219. "[T]he [warrant] will link up specific person, specific offense, and specific place. Together they are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity." S. REP. No. 1097, supra note 4, at 102, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2191.

The Title III particularity provisions must be read in light of United States v. Kahn, 415 U.S. 143 (1974). Kahn held that monitoring agents are entitled to intercept crime-related conversations even if none of the participants is identified in the warrant as a person "whose communications are to be intercepted . . . ." Id. at 152. In effect, Kahn rules that the particularity requirement goes only to the subject matter of the communications, not to the identity of the participants.

220. "Intercept" is defined as the "aural acquisition" of the contents of a wire or oral communication. 18 U.S.C. § 2510(4) (1976).


At least until patterns of innocent conversations emerge, it may be impossible for an officer to be certain whether a conversation is pertinent to an investigation until after the conversation has been completed. Inevitably, some innocent conversations will be intercepted. The more complex an investigation, the more necessary and reasonable it is to listen and record extensively. Nevertheless, there must be a practical deterrent to excessive monitoring and a practical remedy available to those whose privacy is excessively invaded; otherwise, the particularity and minimization provisions of Title III are for all practical purposes nullified.

Judicial interpretation of the minimization directive has virtually eviscerated this central provision of Title III. Even before Scott, several courts had held that in complex cases, it is reasonable for monitors to intercept every conversation in full until patterns of innocent conversations emerge. Because the practice of initial, total interception tends to become self-perpetuating and self-justifying, the minimization requirement often has received little more than lip service. In concluding that the monitors' good faith or lack thereof is irrelevant in assessing whether the minimization provision has been adhered to, Scott suggests that even lip service is no longer necessary. This holding is based upon an explicit interpretation of Title III and an implicit assumption of fact, both of which are erroneous. The Court misconstrued congressional intent when it concluded that agents' good-faith efforts or lack thereof are irrelevant when analyzing whether minimization procedures are reasonable. It also erred in assuming that complex investigations cannot be conducted effectively under the constraints imposed by minimization procedures.

permitting the monitoring agents to intercept conversations between persons not named in the warrant would, in effect, authorize a constitutionally impermissible general warrant. "[T]he order required the agents to execute the warrant in such a manner as to minimize the interception of any innocent conversation. . . . Thus, [that the warrant permitted interceptions of conversations between persons not identified therein] hardly left the executing agents free to seize at will every communication that came over the wire—and there is no indication that such abuses took place in this case." Id.

Justice Brennan, dissenting in Scott, emphasized that in Kahn "the Court relied on the minimization provision as an adequate safeguard to prevent . . . unlimited invasions of personal privacy." 436 U.S. at 146 (Brennan, J., dissenting). Justice Brennan concluded that Scott therefore "undercuts" the reasoning of Kahn, "which may now require overruling." Id. He also protested that "this process of myopic, incremental denigration of Title III's safeguards raises the specter that, as judicially 'enforced,' Title III may be vulnerable to constitutional attack for violation of Fourth Amendment standards, thus defeating the careful effort Congress made to avert that result." Id. at 148.

224. See notes 147–201 & accompanying text supra.
225. See notes 211–16 & accompanying text supra.
226. Concerning classification of a Title III provision as "central" to the statute, see notes 53–62 & accompanying text supra.
227. See note 157 supra.
228. See notes 158–60 & accompanying text supra.
230. See notes 136–42 & accompanying text supra.
231. See notes 198–201 & accompanying text supra.
The Supreme Court has held consistently that the "reasonableness" of a search and seizure is to be measured objectively.\textsuperscript{232} Simple good faith on the part of the... officer is not enough."\textsuperscript{233} A purely objective analysis of reasonableness may be adequate to decide whether an officer was justified in making an isolated arrest, stop, frisk, search or seizure. Such an analysis, however, is wholly inadequate when several weeks of continuous, surreptitious interceptions of otherwise private conversations are at issue.\textsuperscript{234} Particularly in complex investigations, where the government, with superficial plausibility can retroactively defend total interception,\textsuperscript{235} it is unlikely that any minimization will be achieved unless a good-faith effort is made to do so.

Logically, therefore, the essential first step in assessing the manner in which interception was conducted is to ascertain whether monitors have made a good-faith effort to minimize.\textsuperscript{236} If they have not, intercepted conversations—pertinent as well as nonpertinent—and derivative evidence should be suppressed.\textsuperscript{237} If a court concludes that a good-faith effort was made, the court should then determine whether that effort was reasonable, viewing that effort objectively and considering all of the factors that may have made the task more difficult.\textsuperscript{238}

Although Scott is founded upon a misinterpretation of Title III and a faulty assumption of fact,\textsuperscript{239} it nevertheless is law. Corrective legislation is the most effective solution. The minimization provision should be amended to read: "Every order and extension thereof shall contain a provision that the authorization to intercept... shall be conducted in a good faith and reasonable manner in order to minimize the interception of communications not otherwise subject to interception under this chapter... ."

Short of corrective legislation, there is no single, simple solution to the problems created by Scott. Nevertheless, the balance between effective law enforcement and protection of privacy may be regained through the conscientious efforts of law enforcement officials, judges to whom eavesdropping applications are submitted, and trial and appellate courts.

\textsuperscript{232} See text accompanying notes 108-17 supra.
\textsuperscript{233} Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)).
\textsuperscript{234} See text at notes 20-28 supra.
\textsuperscript{235} See, e.g., note 194 supra.
\textsuperscript{236} Prior to Scott, several courts had held that whether the monitors made a good-faith effort was highly relevant in assessing whether their conduct was reasonable. See note 84 supra.
\textsuperscript{237} We do not enforce the basic premise of [Title III] that intrusions of privacy must be kept to the minimum by excusing failure of the agent(s) to make the good-faith effort to minimize which Congress mandated. In the nature of things it is impossible to know how many fewer interceptions would have occurred had a good-faith judgment been exercised, and it is therefore totally unacceptable to [excuse the failure to make that effort simply because of] the difficulty in predicting what might have occurred [had the mandated good-faith effort been made].
\textsuperscript{238} See notes 215-16 & accompanying text supra.
\textsuperscript{239} See text accompanying notes 156-42, 198-201 supra.
A. LAW ENFORCEMENT OFFICIALS

The first line of defense in protecting innocent conversations from excessive eavesdropping is the intelligent self-interest of law enforcement officials. It would be unwise for prosecutors and police officers to view Scott as a license to regard a tap or bug as an open microphone; to do so would be bad policy. There are many, in and out of Congress, who agree with Justice Holmes that eavesdropping is a "dirty business," and with Justice Brandeis that "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping." If law enforcement officials ignore the minimization provision, Congress ultimately may conclude that its attempt in Title III to meet the needs of law enforcement while protecting the privacy of innocent persons has failed. This could lead to the repeal of Title III and an end to all eavesdropping and bugging for law enforcement purposes.

The balance between respect for privacy and the need to ascertain the scope of, and participants in, a criminal enterprise under investigation is struck best by spot monitoring. Inevitably, spot monitoring will result in the interception of some nonpertinent matter. Concededly, the procedure also creates the risk that brief, relevant passages in otherwise irrelevant conversations might be missed. Yet, spot monitoring significantly minimizes privacy intrusions while substantially safeguarding against the loss of pertinent evidence. Use of this technique would demonstrate that the monitors have reasonably complied with restrictions imposed by the fourth amendment, Title III and the eavesdropping warrant. How long a monitor should listen before deactivating listening and recording devices, and how long he should wait before a resumption of listening and recording, are best left to the experience and instincts of the individual officer. The checks on his discretion are corrective instructions by the police supervisor, prosecutor or issuing judge if an officer listens too extensively or does not listen often enough.

B. THE ISSUING JUDGE

The second line of defense against excessive interception is the issuing judge. Title III authorizes the judge to issue an eavesdropping warrant "as requested or as modified . . . ." Even in the absence of a statutory amendment, the issuing judge should include a good faith requirement in the warrant itself. Further, an issuing judge should insist that the attorney

241. Id. at 476 (Brandeis, J., dissenting).
242. See text accompanying notes 7–9 supra.
243. Spot monitoring is described in the text accompanying notes 85–87 supra.
245. Such a provision might read: "The law enforcement officials who execute this warrant are hereby
supervising the investigation issue detailed monitoring instructions to the
agents who will execute the warrant, 246 and should be exceedingly reluctant to
permit total interception of all conversations at the outset of monitoring. 247
Unless a compelling need for total initial interception is set forth in the
application or in a recorded, \textit{ex parte} proceeding prior to issuance of the
warrant, the judge should insist that monitors only spot monitor conversa-
tions that do not appear to be pertinent to the goals of the investigation. 248
Once monitoring begins, the judge should oversee the execution of the
warrant by requiring periodic reports, specifying both the percentage of
conversations intercepted in full and the number of such calls considered
pertinent to the investigation. 249 He or she should randomly examine the
transcripts of conversations categorized as pertinent, and demand an explana-
tion if the relevance of such conversations is not readily apparent. In addition,
he should make unannounced visits to the listening post for a firsthand view
of how monitoring is being conducted. 250

\section*{C. TRIAL AND APPELLATE COURTS}

The final line of defense for conversational privacy is in the trial and
appellate courts. State courts in interpreting their own constitutions and
instructed to make a reasonable and good-faith effort to minimize the interception of conversations other
than those specifically described herein. 246 Appellate courts may reject an issuing judge's attempt to write
into a warrant a requirement that the Supreme Court has read out of the statute. 18 U.S.C. § 2518(3),
however, authorizes an issuing judge to issue a warrant, “as requested or as modified . . . .” A
modification designed to enforce respect for privacy is certainly consistent with the spirit and letter of Title
III.

Inclusion of a good-faith requirement in the warrant would free the minimization issue from the purely
“objective,” \textit{ex post facto} analysis endorsed in \textit{Scott}. Title III sets forth three grounds upon which an
aggrieved party may seek suppression, see note 54 \textit{supra}; the third is that “the interception was not made in
conformity with the warrant.” 18 U.S.C. § 2518(10)(a)(iii) (1976). If monitors fail to make a good-faith
effort to minimize, every interception would violate the warrant, and pertinent as well as nonpertinent
conversations would be subject to suppression.

246. \textit{See}, e.g., \textit{Fishman}, \textit{supra} note 33, at § 160; \textit{NWC Staff Studies and Surveys}, \textit{supra} note 91, at

247. \textit{See} text accompanying notes 157–62 \textit{supra}.

248. \textit{See} text accompanying notes 84–87 & 243 \textit{supra}.

249. Congress intended ongoing judicial oversight to be a significant check against excessive interception.
\textit{See} notes 186–89 & accompanying text \textit{supra}. In some cases, however, judicial supervision of
eavesdropping has been ineffective in checking possible abuses. \textit{See} notes 190–93 & accompanying text
\textit{supra}.

250. It may appear that judicial visits to the listening post would accomplish little more than to assure
proper minimization while the judge is present. The author's experience indicates, however, that where
monitors know that the judge may make such visits, they attempt to minimize throughout the
investigation. Not only does the judge's interest underscore the importance of minimization, but also the
officers realize that they are more likely to perform properly under judicial scrutiny if they have been
performing properly all along.

Some might find this level of judicial involvement objectionable, on the ground that the judge might
become a participant in the investigation and lose his neutral, detached role. Active judicial oversight,
however, is an integral aspect of the congressional scheme to limit intrusion of privacy. \textit{See} text
accompanying notes 186–89 \textit{supra}.
statutes may refuse to follow Scott. In addition, state and federal courts may begin to analyze more critically the "objective" reasonableness of the monitors' conduct. The judge should require the prosecutor to submit a statistical analysis of all intercepted conversations, and to identify each conversation in each category. Tapes should be made available to the defense counsel who could listen to each conversation, and request that the judge listen to any conversation which arguably has been misclassified. Similarly, counsel should attempt to discern any patterns of innocent conversations which should have been noticed by the monitoring agents. Where appropriate, individual monitors should be required to testify as to why a particular conversation was intercepted.

Such procedures would serve as a deterrent to excessive monitoring by ensuring that both the good faith and the reasonableness of monitors are subjected to close scrutiny. As in Terry v. Ohio, the monitors would be required to point to "specific and articulable facts" that justify the interception of any conversation. Excessive and unjustified interception of nonpertinent conversations should result in the suppression of pertinent conversations.

251. Prior to Scott, several state courts had held that good faith was an essential ingredient to the minimization of nonpertinent interceptions. See, e.g., People v. Floyd, 41 N.Y.2d 245, 250, 360 N.E.2d 935, 940, 392 N.Y.S.2d 257, 262 (1976)(statute requires a good-faith and reasonable effort to minimize nonpertinent calls); Commonwealth v. Vitello, 367 Mass. 224 n.22, 327 N.E.2d 819, 942 n.22 (1975)(minimization requirement not necessarily violated by listening to some nonpertinent conversations as long as good-faith effort made); Spease v. State, 275 Md. 88, 101, 338 A.2d 284, 291 (1975)(good faith a factor in determining whether minimization requirement met); Rodriguez v. State, 297 So. 2d 15, 21 (Fla. 1974)(interception of some nonpertinent calls permissible so long as good-faith effort made).

252. "[We] . . . have little doubt that as a practical matter the judge's assessment of the motives of the officers may occasionally influence his judgment regarding the credibility of the officers' claims" that minimization would have been impossible to achieve in any event. Scott v. United States, 436 U.S. 128, 139 n.13 (1978).

253. For a more detailed discussion, see FISHMAN supra note 33 at §§ 285, 288–89 (1978).

254. See the government's statistical analysis in Scott, supra note 194.

255. For example, the government might seek to justify the interception of a particular conversation on the ground that it was too ambiguous for an on-the-spot decision to minimize. If later evaluation of the conversation shows that it was both clear and obviously nonpertinent, this should be brought to the trial judge's attention.

256. For example, the government may justify interception of a conversation because one or more participants have not been identified. If counsel can direct the judge's attention to several previous conversations between the same individuals which were obviously nonpertinent, the government's classification of the conversation is unjustified. Similarly, counsel should be alert to any conversations in which children participate or which involve potentially privileged relationships, such as those between a suspect (or an unknown) and an attorney, doctor, etc.


258. 1 Id. at 21.

259. The factors that make minimization difficult, if actually present, clearly would serve as adequate reasons for listening to nonpertinent conversations. See notes 151–71 & accompanying text supra.
CONCLUSION

In Scott v. United States, the Supreme Court departed significantly from prior constitutional principles and negated congressional intent by eliminating good faith as a factor to be considered in evaluating compliance with the minimization provision. In doing so, it has paid unwarranted and unnecessary deference to the needs of law enforcement at the expense of the privacy rights of individuals. By its very nature, electronic surveillance represents an enormous intrusion into heretofore inviolate areas. That intrusion can be justified only to gather evidence of crimes that are difficult to detect and prosecute by other investigative techniques. For thirty years after electronic surveillance was technically possible, it was a forbidden weapon in the law enforcement arsenal. It was only the pervasive and insidious nature of organized crime that prompted Congress to permit its use under highly circumscribed conditions.

Title III represented Congress' effort to balance the needs of effective law enforcement and the protection of individual privacy. Experience and common sense demonstrate that effective use of electronic surveillance and protection of individual privacy can coincide if, and only if, the monitoring agents make a good faith effort to minimize the interception of nonpertinent conversations. Congress must now act to make the good faith requirement explicit. Until such legislation is passed, law enforcement officials, judges who issue eavesdropping warrants and courts that rule on the admissibility of evidence obtained through electronic surveillance must work to maintain this balance. It is only through such efforts that the damage done in Scott can be minimized.

## APPENDIX

<table>
<thead>
<tr>
<th>Case</th>
<th>Crime Investigated</th>
<th>Number of Defendants Indicted</th>
<th>Duration of Eavesdropping</th>
<th>Extent of Minimization</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scott v. United States, 436 U.S. 128 (1978)</td>
<td>Narcotics</td>
<td>14</td>
<td>30 days</td>
<td>384 calls, 2 40% pertinent, no attempt to minimize; all calls intercepted in full</td>
</tr>
<tr>
<td>United States v. Abascal, 564 F.2d 821 (9th Cir. 1977, cert. denied, 435 U.S. 953 (1978)</td>
<td>Narcotics</td>
<td>5</td>
<td>12 days on each of 2 telephones</td>
<td>All calls intercepted and recorded in full</td>
</tr>
<tr>
<td>United States v. Losing, 560 F.2d 906 (8th Cir.), cert. denied, 434 U.S. 969 (1977). See also 539 F.2d 1174 (8th Cir. 1976)</td>
<td>Narcotics</td>
<td>16</td>
<td>12-13 days</td>
<td>1,208 calls, 33% pertinent. Many non-pertinent calls less than 2-3 minutes long, 80 calls minimized</td>
</tr>
<tr>
<td>United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977), cert. denied, 436 U.S. 390 (1978)</td>
<td>Gambling</td>
<td>14</td>
<td>20 days</td>
<td>Some minimization on wiretap; total interception but not total recording on bug</td>
</tr>
<tr>
<td>United States v. Hinton, 543 F.2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976)</td>
<td>Narcotics</td>
<td>18</td>
<td>60 days on 1 telephone, duration of tap on 2d telephone unclear</td>
<td>All calls monitored; after 5 minutes, nonpertinent calls minimized</td>
</tr>
<tr>
<td>United States v. Daly, 535 F.2d 434 (8th Cir. 1976)</td>
<td>Mail fraud</td>
<td>4</td>
<td>30 days on each of 3 telephones</td>
<td>Over 90% of calls minimized</td>
</tr>
<tr>
<td>United States v. Kirk, 534 F.2d 1262 (8th Cir. 1976), cert. denied, 433 U.S. 907 (1977)</td>
<td>Narcotics</td>
<td>9*</td>
<td>20 days on each of 2 telephones</td>
<td>2,918 calls intercepted; 130 calls minimized</td>
</tr>
<tr>
<td>United States v. Chavez, 533 F.2d 491 (9th Cir.), cert. denied, 426 U.S. 911 (1976)</td>
<td>Narcotics</td>
<td>14</td>
<td>9½ days</td>
<td>All 290 calls intercepted in full; 180 calls nonpertinent</td>
</tr>
<tr>
<td>United States v. Turner, 528 F.2d 143 (9th Cir.), cert. denied, 423 U.S. 996 (1975)</td>
<td>Narcotics</td>
<td>16</td>
<td>30 days on each of 4 telephones</td>
<td>1,259 calls; 670 calls less than 1 minute long; 185 of the remainder minimized; 22% of the fully intercepted calls non-pertinent</td>
</tr>
<tr>
<td>United States v. Armocida, 515 F.2d 29 (3d Cir.), cert. denied, 423 U.S. 858 (1975)</td>
<td>Narcotics</td>
<td>10</td>
<td>17 days on each of 2 telephones</td>
<td>835 calls intercepted; 500 calls minimized; 176 calls pertinent to narcotics or criminal activity</td>
</tr>
<tr>
<td>United States v. Quintana, 508 F.2d 867 (7th Cir. 1975)</td>
<td>Narcotics</td>
<td>15</td>
<td>35 days on each of 2 telephones</td>
<td>2,000 calls all intercepted in full; only 153 calls pertinent</td>
</tr>
<tr>
<td>United States v. Capra, 501 F.2d 267 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975)</td>
<td>Narcotics</td>
<td>7*</td>
<td>2 months on 1 telephone, 1 month on 2d telephone</td>
<td>1,159 calls intercepted; 751 calls intercepted in full, of which 620 did not exceed 2 minutes</td>
</tr>
<tr>
<td>United States v. James, 494 F.2d 1007 (D.C. Cir., cert. denied, 419 U.S. 1020 (1974)</td>
<td>Narcotics</td>
<td>55</td>
<td>40 days on 1 telephone, 19 days on 2d telephone</td>
<td>5,000 calls, all intercepted in full; only 12% involved no criminality</td>
</tr>
<tr>
<td>United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974)</td>
<td>Narcotics</td>
<td>22</td>
<td>59 days on 1 telephone, 39 days on 2d telephone</td>
<td>1,595 calls intercepted in full. Of more than 1,000 calls recorded on the long tap, only about 150 were pertinent</td>
</tr>
<tr>
<td>Case</td>
<td>Crime Investigated</td>
<td>Number of Defendants Indicted</td>
<td>Duration of Eavesdropping</td>
<td>Extent of Minimization</td>
</tr>
<tr>
<td>------</td>
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</tr>
<tr>
<td>United States v. Tortorello, 480 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866 (1973)</td>
<td>Mail &amp; Securities Fraud</td>
<td>9</td>
<td>149 days on each of 2 telephones</td>
<td>All calls monitored initially; some non-pertinent calls recorded, but number found to be de minimis</td>
</tr>
<tr>
<td>Spese v. State, 275 Md. 88, 338 A.2d 284 (1975)</td>
<td>Narcotics</td>
<td>2</td>
<td>2 weeks</td>
<td>All calls monitored; only pertinent calls recorded</td>
</tr>
<tr>
<td>State v. Dye, 60 N.J. 518, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972)</td>
<td>Bookmaking</td>
<td>1</td>
<td>24 days</td>
<td>All calls during 5-hour daily period recorded; pertinent calls, totaling 2½ hours, re-recorded</td>
</tr>
<tr>
<td>People v. Floyd, 4 N.Y.2d 245, 360 N.E.2d 935, 392 N.Y.S.2d 257 (1976)</td>
<td>Narcotics</td>
<td>1</td>
<td>107 days</td>
<td>Calls intercepted during ½ of the period authorized; 85% of these minimized</td>
</tr>
</tbody>
</table>

This appendix includes major minimization cases cited in this article. In each case, the court concluded that the monitoring agents had complied reasonably with the minimization provision of Title III. Unless otherwise indicated, the information presented can be found by referring to the opinion(s) cited. Most of these cases involved the use of wiretaps rather than bugs.

The number of calls noted ordinarily reflects the number of "completed" calls made; that is, the calls reaching wrong numbers, busy signals, or recordings are ordinarily eliminated from the total call figure.

Calls of short duration are significant in that it may be impossible to determine their pertinence and terminate monitoring before the call is completed. Minimization of such calls is often a practical impossibility.

The taps in Kirk produced evidence leading to the tap in Losing, supra.

The latter 15 days were pursuant to an invalid extension of the warrant period.

The opinion lists 6 defendants; a 7th defendant had not been arrested at that point (personal knowledge of author).

Some conversations were suppressed on other grounds.