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Use of Surveillance Evidence Under Title III

Thomas C. Banks

NOTES

Use of Surveillance Evidence Under Title III: Bridging the Legislative Gap Between the Language and Purpose of the Sealing Requirement

I. INTRODUCTION

Title III of the Omnibus Crime Control and Safe Street Act of 1968[1] establishes a statutory scheme designed to regulate the use of nonconsensual electronic surveillance.[2] The Act subjects any person who obtains or uses wiretap evidence in violation of its provisions to both criminal punishment[3] and civil sanctions.[4] The statute enumer-

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1. 18 U.S.C. §§ 2510-2520 (1976).

2. Nonconsensual electronic surveillance encompasses both wiretapping and electronic eavesdropping. Wiretapping results from the installation of a particular piece of equipment that intercepts telephone, telegraph, or other wire communications. Electronic eavesdropping, or "bugging," is the interception of orally transmitted communications. In either situation, the interception is without the consent or knowledge of the participants to the conversation. Recording the conversation with the consent of one of the participants does not require judicial authorization. *See* United States v. Grammatikos, 633 F.2d 1013 (2d Cir. 1980); United States v. Mendoza, 574 F.2d 1373, 1377 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978); United States v. Head, 586 F.2d 508 (5th Cir. 1978). Such consent renders the interception lawful. 18 U.S.C. § 2511(2)(c) (1976).

3. Section 2511 of Title III provides in pertinent part:

> (1) Except as otherwise provided in this chapter any person who—
>
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;
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> (b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication . . . ;
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> (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or
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> (d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;
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> shall be fined not more than $10,000 or imprisoned not more than five years, or both.

ates the conditions and limits the circumstances under which law enforcement officials may petition a judge to issue a wiretap order.[5] Furthermore, the government in executing the surveillance must comply with specific statutory guidelines before the contents of the intercepted communications are admissible in a judicial proceeding.[6]

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18 U.S.C. § 2511 (1976).

4. Section 2520 of Title III provides in pertinent part:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use such communication, and (2) be entitled to recover from any such person—
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> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
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> (b) punitive damages; and
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> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.

18 U.S.C. § 2520 (1976).

5. Subject to specified limitations, Title III permits court-ordered electronic surveillance and prohibits all wiretapping and eavesdropping by anyone other than law enforcement personnel. *See* 18 U.S.C. § 2510(7) (1976); H.R. REP. No. 488, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2156 [hereinafter cited as LEGISLATIVE HISTORY].

6. *See* Gelbard v. United States, 408 U.S. 41 (1972). The decisions in Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967), provide a constitutional framework that controls the use of electronic surveillance by law enforcement agencies. *See infra* notes 63-82 and accompanying text. In enacting Title III, Congress endeavored to establish a detailed statutory procedure for electronic surveillance consistent with the standards set forth in *Berger* and *Katz*. Section 2516(1) of Title III permits a judge to authorize electronic surveillance for the investigation of the following federal offenses: Murder, kidnapping, robbery, extortion, bribery, transmission of wagering information, obstruction of justice, various racketeering offenses, violations of narcotics laws, and conspiracy to commit any of these enumerated offenses. The attorney general or assistant attorney general must authorize the application to the judge. 18 U.S.C. § 2516(1) (1976 & Supp. V 1981). The applicant must present evidence constituting probable cause to believe that an offense to which Title III applies "has been, is being, or is about to be committed." *Id.* § 2518(1)(b). The applicant also must submit a detailed description of the particular offense under investigation, the nature and location of the facilities the government will place under surveillance, the type of communications sought, and the identity, if known, of the person whose conversations the government will intercept. *Id.* A law enforcement official applying for a surveillance order must specify the period of time during which the interception will take place. If the surveillance will not terminate upon the initial interception of the targeted communication, the officer must set forth facts that establish probable cause to believe that the targeted communications repeatedly will occur. *Id.* § 2518(1)(d). The applicant must show that the government attempted other investigative procedures and failed, and why the government likely would not succeed using alternative procedures or that these alternatives would be too dangerous to employ. *Id.* § 2518(1)(c). Title III further provides that no court may authorize the interception of communications for any period longer than necessary to accomplish the objective, nor in any event longer than thirty days. *Id.* § 2518(5). Finally, every order or extension must contain a directive that the government minimize the interception of communications otherwise not subject to interception. *Id.* Congress and the drafters of the statute believed that the provisions of Title III sufficiently circumscribe lawful electronic surveillance to bring it within the scope of the fourth amendment. LEGISLATIVE HISTORY, *supra* note 5, at 2153.

Congress enacted a sweeping exclusionary rule[7] in Title III to compel governmental compliance with these preinterception and executional requirements. Title III also requires the twenty-eight jurisdictions[8] that have statutes authorizing electronic surveillance[9] to comply with its minimum standards.[10]

In passing Title III, Congress set four goals: First, to restrain unfettered use of wiretapping and to safeguard the privacy of wire and oral communications, particularly those of innocent persons;[11] second, to facilitate law enforcement officials' battle against crime, especially against organized crime;[12] third, to comply with the constitu-

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7. *See infra* notes 83-106 and accompanying text.

8. ARIZ. REV. STAT. ANN. §§ 13-3004 to -3014 (1978 & Supp. 1982-1983); COLO. REV. STAT. §§ 16-15-101 to -105 (1973 & Supp. 1981); CONN. GEN. STAT. ANN. §§ 54-41a to -41s (West Supp. 1982); DEL. CODE ANN. tit. 11, § 1336 (1979); D.C. CODE ANN. §§ 23-541 to -556 (1981); FLA. STAT. ANN. §§ 934.01-.10 (West 1972 & Supp. 1982); GA. CODE ANN. §§ 16-11-60 to -69 (1982); HAWAII REV. STAT. §§ 803-41 to -50 (Supp. 1979); IDAHO CODE §§ 18-6701 to -6709 (Supp. 1982); KAN. STAT. ANN. §§ 22-2514 to -2519 (1981); LA. REV. STAT. ANN. §§ 15:1301-:1312 (West 1981); MD. CTS. JUD. PROC. CODE ANN. §§ 10-401 to -412 (1980 & Supp. 1982); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1970); MINN. STAT. ANN. §§ 626A.01-.23 (West Supp. 1982); NEB. REV. STAT. §§ 86-701 to -712 (1976 & Supp. 1978); NEV. REV. STAT. §§ 179.410-.525 (1979 & 1981); N.H. REV. STAT. ANN. §§ 570-A:1-:11 (1974 & Supp. 1981); N.J. STAT. ANN. §§ 2A:156A-1 to -26 (West 1971 & Supp. 1982-1983); N.M. STAT. ANN. §§ 30-12-1 to -11 (1978 & Supp. 1982); N.Y. CRIM. PROC. LAW §§ 700.05-.70 (McKinney 1971 & Supp. 1982-1983); OR. REV. STAT. §§ 133.721-.739 (1981); 18 PA. CONS. STAT. ANN. §§ 5701-5726 (Purdon 1982-1983); R.I. GEN. LAWS §§ 12-5.1-1 to -16 (1981); S.D. CODIFIED LAWS ANN. §§ 23A-35A-1 to -21 (Supp. 1982); TEX. STAT. ANN. art. 18.20 (Vernon Supp. 1982-1983); UTAH CODE ANN. §§ 77-23a-1 to -11 (1982); WIS. STAT. ANN. §§ 968.27-.33 (West 1971 & Supp. 1982-1983), § 885.365 (West 1966 & Supp. 1982-1983) (suppression provision).

9. Indeed, several states have enacted restrictions more stringent than those under Title III. *See, e.g.*, People v. Conklin, 12 Cal. 3d 259, 271, 522 P.2d 1049, 1057, 114 Cal. Rptr. 241, 249, *appeal dismissed*, 419 U.S. 1064 (1974); Commonwealth v. Vitello, 327 N.E.2d 819, 833 (Mass. 1975); State v. Siegel, 266 Md. 256, 292 A.2d 86 (1972).

10. U.S. CONST. art. IV declares that all laws made pursuant to the Constitution and all treaties made under the authority of the United States shall be the "supreme law of the land" and shall enjoy legal superiority over any conflicting provision of a state constitution or law. Therefore, any state regulatory scheme that seeks to authorize electronic surveillance at a minimum must comport with Title III guidelines, standards, and restrictions.

11. LEGISLATIVE HISTORY, *supra* note 5, at 2153.

12. Most law enforcement officials view electronic surveillance as an indispensable tool in the investigation and prosecution of organized criminals. U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME, ANNOTATIONS AND CONSULTANT'S PAPERS 17 (1967) [hereinafter cited as PRESIDENT'S COMMISSION]. Congress designed Title III to accomplish two seemingly adverse objectives: guaranteeing an individual's constititional right to privacy and preserving a valuable investigatory tool for law enforcement officials. NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 3, 4, 33 (1976) [hereinafted cited as NATIONAL WIRETAPPING COMM'N REP.]; PRESIDENT'S COMMISSION, *supra*, at 17-19; LEGISLATIVE HISTORY, *supra* note 5, at 2156.

The paramount purpose of Title III is to eradicate organized crime in the United States by supplying law enforcement officials with technologically superior legal tools for use in gathering

tional procedural and substantive requirements articulated by the Supreme Court in *Berger v. New York*[13] and *Katz v. United States*;[14] and last, to outline specific circumstances and conditions for lawful interception of wire and oral communications.[15]

Section 2518(8)(a) of Title III[16] delineates the sealing requirement, which provides that the government present to a judge[17] all tape recordings of intercepted communications "[i]mmediately upon the expiration of the period of the order"[18] and seal them "under his

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evidence, establishing new penal prohibitions, enhancing sanctions, and providing new remedies to deal with the activities of organized criminals. LEGISLATIVE HISTORY, *supra* note 5, at 2157, 2177-97.

13. 388 U.S. 41 (1967).

14. 389 U.S. 347 (1967). The *Katz* Court reaffirmed the constitutional principles outlined by *Berger*. The *Berger* Court outlined seven requirements for the issuance of a valid eavesdropping warrant: (1) probable cause must exist to believe that a particular offense has been or is being committed; (2) the warrant must describe particularly the targeted conversation; (3) the government must limit the duration of the eavesdropping; (4) a court may grant extensions only on a showing of probable cause; (5) eavesdropping must terminate once the government has obtained the evidence it sought; (6) notice must exist unless the government shows exigent circumstances; and (7) the government must make a return on the warrant. *Id.* at 352.

15. LEGISLATIVE HISTORY, *supra* note 5, at 2177-96.

16. Section 2518(8)(a) provides:

> The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. *The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations.* Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the *judge issuing such order* and *sealed under his directions*. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for *use or disclosure* pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the *use or disclosure* of the contents of any wire or oral communicaton or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. § 2518(8)(a) (1976) (emphasis added).

17. In United States v. Cantor, 470 F.2d 890 (3d Cir. 1972), the court addressed the issue of the meaning of "sealed by the judge." In *Cantor* the judge instructed the government agent to seal the documents in an envelope and store it away. The judge, however, did not observe the agent seal the envelope because he had left his chambers prior to the actual sealing. The Third Circuit held that no violation of the statute occurred because defendant failed to challenge the accuracy of the tapes and because he did not allege alteration of the documents. The court implied that the judge, rather than the agent, should seal the documents, yet the court stated that the tapes would not be necessarily more confidential if the judge himself had sealed the documents. *Id.* at 893.

18. 18 U.S.C. § 2518(8)(a) (1976). *See* United States v. Vazquez, 605 F.2d 1269, 1275-78 (2d Cir. 1979) (only the termination of continuous surveillance activates the Title III sealing duty, although many similar state laws impose the sealing requirement at the expiration of each order or extension); United States v. Fury, 554 F.2d 522, 532-33 (2d Cir. 1977) (back-to-back extensions continued the same wiretap on the same telephone under the same warrant, and

directions."[19] If the tapes have no seal, the government must provide "a satisfactory explanation for the absence thereof."[20] By implication, the sealing provision requires a "satisfactory explanation" if a judicial seal is present but the government did not immediately obtain the seal.[21] The government also must seal the applications for wiretap orders and the orders themselves.[22]

If law enforcement officials do not comply with the sealing requirement, section 2517(3)[23] of Title III prohibits the disclosure or

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Title III, therefore, only requires the government to seal the tapes after the termination of the extensions to the original order).

19. 18 U.S.C. § 2518(8)(a) (1976). In United States v. Vazquez, 605 F.2d 1269 (2d Cir. 1979), the court considered that tapes sealed by a judge other than the issuing judge were sealed properly if the latter is absent or unavailable. *Id.* at 1280 n.25. In United States v. Abraham, 541 F.2d 624 (6th Cir. 1976), the court explained that § 2518(8)(a) does not compel the presence of the judge during the physical sealing of the recorded evidence. Sealing of the recordings only must be pursuant to the judge's direction; sealing does not require his presence. *Id.* at 627.

20. 18 U.S.C. § 2518(8)(a) (1976).

21. *Id.* Although § 2518 of Title III prohibits interception of wire or oral communication for more than thirty days, § 2518(5) allows judges to grant extensions until the government achieves the objective of the surveillance order. Courts measure sealing delays from the date interception ends, notwithstanding the number or length of judicially granted extensions. *See, e.g.*, United States v. Vazquez, 605 F.2d 1269 (2d Cir. 1979).

Issues associated with the "immediacy" of the sealing are beyond the scope of this Note. Courts would create an incongruous result by requiring an immediate sealing when the surveillance ends on the last day of the 30-day order, yet permitting postponement of sealing until the end of the 30-day period when, for instance, the surveillance itself terminates on the second or third day of the order. United States v. Ricco, 421 F. Supp. 401, 407 (S.D.N.Y. 1976), *aff'd*, 566 F.2d 433 (2d Cir. 1977). Accordingly, the length of the surveillance order does not affect the triggering of the sealing requirement. The length of a judicial order merely limits the period that a wiretap may remain installed. For example, the government achieves its objective stated in the application for a wiretap order when it intercepts the incriminating conversations it seeks. If the government either fails to procure a prospective amendment to the wiretap order that would authorize further interception of inculpatory conversations relating to a new crime or fails to obtain an extension, then under § 2518(5) the wiretap must cease. If the government completes the wiretap before the order's 30-day limit expires, the statute nonetheless requires immediate sealing of the evidence notwithstanding the unexpired time remaining in the wiretap order. Because the judge formulated his order based upon the time he believed the government would require to achieve its stated objective, courts should not permit any remaining time to delay sealing merely because the government achieved the objective of the wiretap earlier than the judge initially surmised.

22. Section 2518(8)(b) provides:

> Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

18 U.S.C. § 2518(8)(b) (1976). The purpose of this provision is to preserve the confidentiality of an individual's communications that law enforcement authorities have intercepted. *See* United States v. Florea, 541 F.2d 568, 575 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

23. Section 2517(3) provides:

other use of the contents of intercepted communications, or any evidence derived therefrom,[24] in judicial proceedings.[25] Failure to comply with the sealing requirement, therefore, may invalidate *post facto* an otherwise lawful electronic surveillance. Furthermore, a failure to comply with many other provisions of Title III may result in any of the following measures: Suppression of the evidence obtained,[26] penalties for contempt of court,[27] civil damages,[28] or criminal sanctions.[29]

> Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

18 U.S.C. § 2517(3) (1976).

24. For example, in United States v. Caruso, 415 F. Supp. 847 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 94 (2d Cir. 1977), the government used evidence contained in defectively sealed tapes made by state authorities to establish probable cause for a subsequent federal wiretap order. The court noted that without a satisfactory explanation for the delay in sealing the state tapes, § 2518(8)(a) probably would suppress the federal tapes derived from evidence contained in the tainted state tapes. The *Caruso* court, however, found the government's explanation for the sealing delay in this case satisfactory under § 2518(8)(a). *See* 415 F. Supp. at 850.

25. "Use" or "disclosure" prohibited by § 2518(8)(a) refers only to disclosure under subsection 3 of § 2517. *See* 18 U.S.C. § 2517(3) (1976); *supra* note 23. Section 2517(3) states in pertinent part that the "disclosure" to which it applies occurs in the "giving [of] testimony under oath or affirmation in any proceeding held under the authority of the United States or any state or subdivision thereof." 18 U.S.C. § 2517(3) (1976). Section 2518(8)(a) does not, by its terms, apply to nontestimonial uses. *See id.* § 2518(8)(a).

For example, refreshing a witness' recollection before trial falls not within § 2517(3) but rather within § 2517(2)—use by an investigator or law enforcement officer "to the extent such use is appropriate to the proper performance of his official duties." *Id.* § 2517(2). In *Ricco* the U.S. Attorney used the tapes to refresh the recollecton of a witness before trial. *See* United States v. Ricco, 421 F. Supp. 401 (S.D.N.Y. 1976), *aff'd*, 566 F.2d 433 (2d Cir. 1977). "Use" permitted by § 2517(2) therefore is not subject to the strictures of § 2518(8)(a). Only after the trial begins does refreshing a witness' recollection fall within the scope of § 2517(3) and thus within the prohibition of § 2518(8)(a).

26. *See* 18 U.S.C. § 2518(8)(a) (1976). Motions challenging violations of Title III's provisions may lead to *exclusion* of the eavesdropping evidence, People v. Nicoletti, 34 N.Y.2d 249, 251-52, 313 N.E.2d 335, 335-36, 356 N.Y.S.2d 855, 856-57 (1974), instead of outright suppression. This sanction would be less debilitating than suppression because derivative evidence nurtured during and developed from the electronic surveillance would be competent, admissible evidence. A court would prohibit absolutely testimonial reference to the substance of the intercepted communications or to the recordings themselves. One court held that complete suppression because of a missing seal is an inappropriate sanction. United States v. Falcone, 505 F.2d 478, 483-84 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975). *But cf.* United States v. Lucido, 517 F.2d 1 (7th Cir. 1975). One court has deemed suppression appropriate when the government broke affixed seals to the tape recordings without first seeking and obtaining judicial approval. People v. Sher, 38 N.Y.2d 600, 605, 345 N.E.2d 314, 317, 381 N.Y.S.2d 843, 846 (1976).

27. 18 U.S.C. § 2518(8)(c) (1976) (violation of the sealing requirement punishable as contempt of court).

28. *Id.* § 2520 (actual and punitive damages, attorney's fees, and reasonable costs availa-

The primary purpose underlying the sealing requirement is to guarantee the integrity of taped conversations made under a Title III wiretap order by precluding any governmental tampering or alteration with those tapes.[30] The proponents of Title III presumed that the requisite judicial seal sufficiently would safeguard the purpose of the sealing requirement.[31] Two aspects of the statutory language, however, create problems of interpretation for the courts. First, section 2518(8)(a) fails to describe specifically the requirement of sealing the tapes and documents "[i]mmediately upon the expiration of the period of the order, or extension thereof. . . ."[32] Second, the statutory language provides no guidelines for a "satisfactory explanation"[33] sufficient to overcome a failure to procure a seal immediately upon expiration of the wiretap order.[34] This Note examines the disa-

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ble to aggrieved persons as a result of Title III violations).

29. *Id.* § 2511(1) (prohibited electronic surveillance punishable by a fine not to exceed $10,000, imprisonment for not more than five years, or both). *See* United States v. Duncan, 598 F.2d 839, 846-47 (4th Cir.), *cert. denied*, 444 U.S. 871 (1979) (bank president fined and imprisoned for conducting illegal electronic surveillance of Internal Revenue Service agents during their audit of the bank and the president-defendant).

30. United States v. Ricco, 421 F. Supp. 401, 405 (S.D.N.Y. 1976), *aff'd*, 566 F.2d 433 (2d Cir. 1977). The sealing requirement also serves two other purposes: (1) to ensure that the contents of the tapes remain confidential and (2) to help establish tbe chain of custody. United States v. Cantor, 470 F.2d 890, 893 (3d Cir. 1972); United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D. Pa.), *aff'd*, 485 F.2d 682 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); People v. Nicoletti, 34 N.Y.2d 249, 253, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 858 (1974).

31. *See* LEGISLATIVE HISTORY, *supra* note 5, at 2193-94.

32. 18 U.S.C. § 2518(8)(a) (1976); *see supra* note 16. The court in People v. Carter, 81 Misc. 2d 345, 348-49, 365 N.Y.S.2d 964, 968 (Nassau County Ct. 1975), construed the statutory mandate requiring "immediate" sealing to mean "without unnecessary or unreasonable delay" as opposed to no delay whatsoever. *See* United States v. Vazquez, 605 F.2d 1269 (2d Cir. 1979) (sealing usually possible within one or two days after the completion of the interception; consequently, any delay exceeding two days requires explanation); People v. Blanda, 80 Misc. 2d 79, 83, 362 N.Y.S.2d 735, 743 (Sup. Ct. 1974) (statutory term "immediately" denoted delivery of the recordings to the court "promptly, witbin a reasonable time, or with reasonable diligence"); *infra* notes 111 & 118.

33. 18 U.S.C. § 2518(8)(a) (1976); *see supra* note 16; *infra* note 120.

34. See People v. Nicoletti, 34 N.Y.2d 249, 313 N.E.2d 336, 356 N.Y.S.2d 855 (1974), in whicb the government never presented the tapes to a judge for sealing, but a police detective stored the tapes in his home. Monitoring agents and the district attorney made duplicate recordings and transcripts of the originally taped conversation. Once informed of the storage arrangement for the tapes, the judge suppressed the contents of the taped conversations notwithstanding government arguments that government agents substantially had followed New York's sealing statute, that transcription of the tapes was necessary, and that no sufficiently secure storage facilities were available. The court ruled that the government seriously had abridged the statute and stated:

> Measured against the potential for abuse, the explanations offered in this case are patently insufficient. While the parties charged with custody of the tape recordings were cognizant of the sealing requirement, they did not present them to the issuing Justice for sealing as was their duty. That the issuing Justice was advised of the custody arrangements will not

greement among the federal courts of appeals regarding these two aspects of Title III's language, especially as these aspects affect the courts' determination of (1) whether violation of the sealing requirement is serious enough to require suppression of the tapes and (2) the appropriateness of suppressing improperly sealed tapes even without evidence of alteration.[35] Part II demonstrates the courts' confusion regarding the "immediately" and "satisfactory explanation" requirements of section 2518(8)(a). This demonstration further illustrates the differing approaches among the circuits concerning the analytical procedure best suited to effect suppression of improperly sealed evidence under the statute. Part III focuses on the five methods of analysis used by the courts in considering violations of the sealing requirement and possible suppression of the tapes. Part IV evaluates the various analyses and concludes that a satisfactory explanation and uncontroverted evidence that the government fulfilled the purpose underlying the sealing requirement should prevent the exclusion of wiretapping evidence, even though the government has not met the sealing requirement. Last, this Note advocates that courts assign to the government the burden of proving that it has not compromised the integrity of the tapes.

II. Statutory Scheme and the Sealing Requirement

A. *Electronic Surveillance and the Supreme Court*

1. Abandonment of the Trespass Doctrine

In 1928 the Supreme Court in *Olmstead v. United States*[36] first considered the constitutional implications of electronic surveillance. The *Olmstead* Court declared that fourth amendment[37] restraints are

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suffice. While he may have tactily approved them, the fact remains that the recordings were not sealed. . . . [D]uplicate recordings could and should have been made and the originals preserved under seal.

Id. at 253 (footnote omitted).

35. *Compare* United States v. Vazquez, 605 F.2d 1269, 1274-75 (2d Cir. 1979) (suppression would have ensued notwithstanding the absence of a showing of tampering with the tapes when the government failed to offer an adequate explanation for a seven- and thirteen-day delay in sealing) *with* United States v. Diadone, 558 F.2d 775, 780 (5th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978) (despite a 14-day delay in sealing, court did not order suppression since defendants failed to demonstrate any disturbance or alteration of the tapes and failed to show that they sustained any prejudice from the delay) *and* United States v. Lawson, 545 F.2d 557, 564 (7th Cir. 1975) (notwithstanding a 57-day delay in sealing, court refused to order suppression because defendants failed to challenge the integrity of the tapes).

36. 277 U.S. 438 (1928).

37. The fourth amendment states:

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

inapplicable to government wiretapping operations[38] because such surveillance does not entail physical trespass or seizure of tangible evidence.[39] In his historic dissent Justice Brandeis rebuked the majority for their rigid interpretation of the fourth amendment in the context of electronic surveillance.[40] The Supreme Court's later decisions, however, gradually abandoned rigid notions of "search and seizure" and ultimately rejected *Olmstead*'s holding that fourth amendment protections apply only to physical trespasses.

In *Silverman v. United States*[41] the Court excluded conversational evidence derived from a "spike mike,"[42] which the government

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issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

38. 277 U.S. at 455-57, 463-66. Defendant bootleggers argued that the government's use of defendant's incriminating conversations, intercepted during a five-month warrantless wiretap of eigbt telepbones, represented an unreasonable search and seizure under the fourth amendment. *Id.* at 455-57.

39. *Id.* at 464-66. In Goldman v. United States, 316 U.S. 129 (1942), the government placed a listening device (detectaphone) on the outside of a party wall. The Supreme Court followed the *Olmstead* precedent and upheld the use of electronic surveillance evidence because no physical trespass resulted from placing a detectaphone on the outide of a wall. *Id.* at 134-36; *see* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE §§ 1.02-1.02[2] (1977); C. FISHMAN, WIRETAPPING AND EAVESDROPPING 6-9 (1978). *See also* Goldsmith, *The Codification of Electronic Surveillance: Executing Constitutional Doctrine and Legislative Design*, 74 J. CRIM. L. & CRIMINOLOGY, 1, ___ (1983) (forthcoming) ("There is something anomalous about a constitutional doctrine tbat offers substantial protection to tangible items but does nothing to secure the privacy of thoughts disclosed in confidence.").

40. Olmstead v. United States, 277 U.S. at 472. In his dissent Justice Brandeis stated:

> Since then [1819], this Court has repeatedly sustained the exercise of power hy Congress, under various clauses of that instrument [the Constitution], over ohjects of which the Fathers could not have dreamed. . . . We have likewise held that general limitations on tbe powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.". . . Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this court said in Weems v. United States . . . "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, he necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. . . ."

Id. at 472-73 (citations omitted).

41. 365 U.S. 505 (1961).

42. A "spike mike" is a microphone with a foot-long spike, earphones, a power pack, and an amplifier. *Id.* at 506. In *Silverman* the Washington, D.C., police suspected a row house as the headquarters for a gambling operation. The police gained access to an adjacent vacant row house, from which the officers inserted the spike into a crevice until it touched a heating duct of the adjacent house occupied by petitioners. Consequently, the officers could bear petitioners' conversations through the telephone attachments to the inserted spike mike. *Id.* at 506-07.

inserted into an adjacent party wall. The Supreme Court held that the implantation of the microphone was a physical trespass that violated the fourth amendment because the government had not obtained a warrant.[43] The Court emphasized, however, that its holding did not depend on the technicalities of local trespass law.[44] In *Lopez v. United States*[45] the Supreme Court held that an Internal Revenue Service agent's recording of a conversation between himself and a suspect did not violate the fourth amendment.[46] Defendant, who had attempted to bribe the IRS agent, argued that the Court should not admit the agent's testimony concerning incriminating conversations with defendant because of his undercover participation in the bribery scheme.[47] The Court rejected defendant's argument that he possessed a "right [under the Constitution] to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment."[48]

Although *Lopez* concerned mere consensual electronic surveillance,[49] Justice Brennan's dissent[50] was a forerunner of a broader application of the fourth amendment to electronic surveillance cases.[51] Justice Brennan argued that subsequent Supreme Court decisions had undermined *Olmstead*'s reasoning and that the continued adherence to *Olmstead* created an "intolerable anomaly that while conventional searches and seizures are regulated by the Fourth and Fourteenth Amendments," wiretapping is not.[52] Justice Brennan asserted that the Court repeatedly had recognized that "the Fourth and Fifth Amendments interact to create a comprehensive right of privacy"[53] and he maintained that the Court should not have allowed this stance to be "outflanked by the technological advances of the very recent past."[54] Justice Brennan recognized that the "seemingly

43. *Id.* at 506-07, 511-12.
44. *Id.* at 511.
45. 373 U.S. 427, 440 (1963).
46. *Id.* at 437-40. Defendant taxpayer Lopez had attempted to bribe an Internal Revenue Service agent, who reported the attempt and thereafter received instructions " 'to pretend to play along with the scheme.' " *Id.* at 430. He therefore carried a pocket wire recorder during later meetings with defendant to confirm the prior bribery attempt. *Id.* at 429-30.
47. *Id.* at 437.
48. *Id.* at 439.
49. *See supra* note 2 and accompanying text.
50. *See* Lopez v. United States, 373 U.S. at 446.
51. *See* Goldsmith, *supra* note 39, at ___.
52. 373 U.S. at 471.
53. *Id.* at 456.
54. *Id.* at 471.

anomalous" treatment of wiretapping grew from a "pervasive fear that if electronic surveillance were deemed to be within the reach of the Fourth Amendment, a useful technique of law enforcement would be wholly destroyed, because an electronic 'search' could never be reasonable within the meaning of the Amendment."[55] Attempting to speak to these fears, the Justice wrote:

> [I]t is premature to conclude that no warrant for an electronic search can possibly be devised. The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment," could be made a precondition of lawful eletronic surveillance. And there have been numerous suggestions of ways in which electronic searches could be made to comply with the other requirements of the Fourth Amendment.
>
> This is not to say that a warrant that will pass muster can actually be devised. It is not the business of this Court to pass upon hypothetical questions, and the question of the constitutionality of warrants for electronic surveillance is at this stage purely hypothetical. But it is important that the question is still an open one. Until the Court holds inadmissible the fruits of an electronic search made, as in the instant case, with no attempt whatever to comply with the requirements of the Fourth Amendment, there will be no incentive to seek an imaginative solution whereby the rights of individual liberty and the needs of law enforcement are fairly accommodated.[56]

In *Osborn v. United States*[57] the Court showed a sensitivity to Justice Brennan's concerns and suggestions expressed in his *Lopez* dissent. In *Osborn* the FBI procured a search warrant before permitting an informant to record his conversation with defendant. Although *Lopez* did not require a search warrant for consensual surveillance, the Court reasoned that Justice Brennan's concerns expressed in his *Lopez* dissent were dispositive since the FBI in fact had obtained a warrant.[58] Accordingly, the germane issue no longer was "the permissibility of 'indiscriminate use of [electronic] devices in law enforcement' "[59] but rather, "the permissibility of using such a device [electronic recorder] under the most precise and discriminate circumstances, circumstances which fully met the 'requirement of particularity' which the dissenting opinion in *Lopez* found necessary."[60] The Court held that the search warrant complied with the fourth amendment because it delineated sufficiently "precise and discriminate"

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55. *Id.* at 463.

56. *Id.* at 464-65 (citations and footnote omitted).

57. 385 U.S. 323 (1966).

58. *Id.* at 327; *see* Goldsmith, *supra* note 39, at ___; Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455, 457-60 (1969).

59. Osborn v. United States, 385 U.S. at 329.

60. *Id.*; *see, e.g.*, Schwartz, *supra* note 58, at 463-66; Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 172-73 (1969).

procedures to govern the tape recording operation.[61] The *Osborn* decision alerted Congress that the Court would accept appropriately drafted electronic surveillance legislation.[62]

2. *Berger* and *Katz*

One year after *Osborn* the Supreme Court "reconstitutionalized"[63] the law of electronic surveillance with *Berger v. New York*[64] and *Katz v. United States*,[65] which ultimately induced Congress to adopt Title III. Defendant in *Berger* participated in a far-reaching conspiracy to corrupt the New York State Liquor Authority. To gather information against defendant by hidden microphones, the district attorney obtained an eavesdropping warrant under a New York statute that authorized court-sanctioned electronic surveillance.[66] The *Berger* Court declared the New York statute unconstitutional under the fourth amendment because the statute had no curbs to prevent wiretaps from becoming general, overly obtrusive searches.[67] The Court expressly held unconstitutional five aspects of the surveillance statute.[68] First, the statute authorized the issuance of eavesdropping warrants based upon information insufficient for probable cause. Second, the statute did not require the warrant to describe the conversations in detail. Third, the warrant's maximum statutory life of two months was an excessive grant of authority because the statute required merely a single showing of probable cause.[69] Fourth, the statute did not require the wiretap to end when the government accomplished the purpose of its search: attaining the targeted communication. Last, the statute did not require the author-

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61. Osborn v. United States, 385 U.S. at 330-31.

62. *See* United States v. Scott, 436 U.S. 128, 139 (1972); *Controlling Crime through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 957 (1967) (testimony of Professor G. Robert Blakey); J. CARR, *supra* note 39, § 1.02[2] (1977); Goldsmith, *supra* note 39, at ___.

63. Goldsmith, *supra* note 39, at ___.

64. 388 U.S. 41 (1967).

65. 389 U.S. 347 (1967).

66. Berger v. New York, 388 U.S. at 43-45. For a description of the electronic surveillance operations in *Berger*, see ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE 58-70 (Approved Draft 1971) [hereinafter cited as ABA STANDARDS].

67. 388 U.S. at 54-60. The Court agreed with defendant's argument that the New York eavesdropping statute permitted "a system of surveillance which involves trespassory intrusions into private, constitutionally protected premises, [and] authorizes 'general searches' for 'mere evidence.'" *Id.* at 43-44.

68. *See id.* at 58-60.

69. The Court analogized the elongated surveillance period to a series of searches and seizures authorized only upon a single showing of probable cause. *Id.* at 59.

ities to give notice to the individual subject to the surveillance, nor did it require a showing of exigent circumstances to render notice unnecessary.[70]

Although declaring that the fourth amendment's " 'basic purpose . . . is to safeguard the privacy and security of individuals against arbitrary intrusions by government officials' " and that these safeguards apply to intangible as well as tangible items,[71] the *Berger* Court did not expressly reject the *Olmstead* doctrine, which limited fourth amendment protection to physical trespasses.[72] During the following term in *Katz v. United States*,[73] the Court stated that the *Olmstead* doctrine no longer was controlling and formally extended fourth amendment restrictions to nontrespassory wiretapping.[74] The authorities in *Berger* actually had trespassed to install hidden microphones;[75] in *Katz*, however, the government placed electronic listening devices on the outside of a public telephone booth from which defendant engaged in several incriminating conversations.[76] The Court determined that defendant possessed a reasonable expectation of privacy[77] in his conversations;[78] consequently, interception of defendant's conversations was a search and seizure under the fourth amendment.[79] Although the government agents had conducted the surveillance with restraint as they would under a warrant, the Court found that the government violated defendant's fourth amendment interests because the agents' restraint was self-imposed and not com-

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70. *Id.* at 58-60; *see infra* note 82 and accompanying text.

71. 388 U.S. at 50-53 (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).

72. *See supra* notes 36-40 and accompanying text. Justice Douglas wrote, "I join the opinion of the Court because at long last it overrules *sub silentio Olmstead v. United States* . . . ." 388 U.S. at 64 (Douglas, J., concurring). The failure expressly to overrule *Olmstead* was particularly egregious since the government accomplished the surveillance in *Berger* through the installation of hidden microphones, which necessarily entails a trespass, and not through the nontrespassory wiretapping used in *Olmstead*. Consequently after *Berger*, the question remained unresolved whether the fourth amendment is available to invalidate a nontrespassory wiretap.

In Dalia v. United States, 441 U.S. 238 (1979), the Court rejected the proposition that the government must obtain separate authorization to enter a building covertly to install the listening device. Instead, the Court held that an authorization to install a listening device concomitantly authorizes the covert entry. *Id.* at 246-48.

73. 389 U.S. 347 (1967).

74. The Court stated, "We conclude that the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." *Id.* at 353.

75. *See* Berger v. New York, 388 U.S. at 45.

76. Katz v. United States, 389 U.S. at 348.

77. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 143 (1978).

78. Katz v. United States, 389 U.S. at 353.

79. *Id.*

pelled by a warrant from a neutral, scrutinizing magistrate.[80]

The *Katz* opinion affirmed the validity of statutes authorizing police wiretaps, provided the statute imposes fourth amendment safeguards.[81] Therefore, following *Berger* and *Katz* a statute must require law enforcement officials to fulfill the following requirements before obtaining a surveillance warrant: (1) probable cause must exist to believe that the suspect has committed or is committing a particular offense; (2) the government must describe particularly the targeted communications; (3) the eavesdropping must be of limited duration; (4) a separate showing of probable cause is necessary to grant extensions; (5) the surveillance must end once the government obtains the evidence it seeks; and (6) the government must give notice unless it demonstrates exigent circumstances.[82] The *Katz* decision goaded Congress to enact electronic surveillance legislation that would comply with the fourth amendment.

B. The Suppression Sanction

Responding to *Berger* and *Katz*, Congress adopted Title III not only to satisfy fourth amendment strictures but also to establish certain nonconstitutional limitations both to address the "unique attributes of electronic surveillance" and to regulate the "mode of execution of an electronic search."[83] Therefore, to discourage governmental overreaching in the conduct of the electronic surveillance,[84] Congress believed that a restrictive statute with rigorous controls[85] was neces-

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80. *Id.* at 356.

81. *See id.* at 364 (Black, J., dissenting).

82. *Id.* at 354. The Court conceded that advance notice is not necessary in electronic surveillance cases, because the success of the surveillance depends on the suspect's ignorance. Thus, the government need not give notice if it would "provoke the escape of the suspect or the destruction of critical evidence." *Id.* at 355 n.16; *see* Berger v. New York, 388 U.S. at 60.

83. *See* NATIONAL WIRETAPPING COMM'N REP., *supra* note 12, at 22.

84. Section 2515 also applies to state proceedings under the supremacy and necessary and proper clauses of the Constitution. *See* U.S. CONST. art. VI, cl. 2 & art. I, § 8, cl. 18. Congress believed such a suppression rule "necessary and proper" to fulfill the objective of Title III in protecting individual privacy. LEGISLATIVE HISTORY, *supra* note 5, at 2185. Several states' regulation of the "mode of execution of an electronic search" vary from federal regulations. This lack of consistency reflects either different statutory requirements or ad hoc responses to perceived omissions in Title III. Before admitting trial evidence from electronic surveillance, states at least must require compliance with Title III's preinterception requirements (governmental compliance is a precondition to procure judicial authorization to install a wiretap), executional requirements, and postinterception requirements. NATIONAL WIRETAPPING COMM'N REP., *supra* note 12, at 22.

85. Title III provides for electronic eavesdropping under a carefully detailed warrant and strict court supervision. The warrant procedure includes requirements for justification and reporting of results that exceed the tasks required by traditional search warrant. *See* LEGISLATIVE

sary to control the quantum of government electronic surveillance.[86] The legislative history indicated that Congress expected courts stringently to enforce and strictly to construe the statute to secure individuals' fourth amendment privacy interests in wire and oral communications.[87]

To guarantee rigid adherence by law enforcement officials to Title III, Congress looked to the conventional exclusionary rule, a common-law remedy requiring suppression at trial of evidence obtained from an unreasonable search and seizure in violation of the fourth amendment.[88] The Court had developed this rule as a prophylactic measure to deter fourth amendment violations by minimizing government incentive to conduct an unreasonable search and seizure.[89] Congress therefore established a statutory exclusionary rule for Title III in section 2515.[90] This section 2515 exclusionary rule precludes disclosure of an intercepted communication or its use in evidence if the disclosure violates Title III.[91] Because many Title III provisions are not of a constitutional dimension as defined by the Supreme Court in *Berger* and *Katz,* the impact of section 2515 thus exceeds that of the

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HISTORY, *supra* note 5, at 2189-95.

86. *Id.* at 2153-56.

87. *Id.* at 2177; *see* PRESIDENT'S COMMISSION, *supra* note 12, at 18.

88. In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court imposed the exclusionary rule on the federal courts and in Mapp v. Ohio, 367 U.S. 643 (1961), the Court held that state courts also must apply the exclusionary rule.

89. *See* W. LAFAVE, SEARCH AND SEIZURE § 1.1(f) (1978).

90. Section 2515 imposes an evidentiary sanction to compel compliance with other prohibitions of Title III. The section provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may he 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 this chapter.

18 U.S.C. § 2515 (1976). Section 2517(3) contains the major exception that permits testimonial disclosure of surveillance evidence by any person receiving the communication *by any means authorized* by Title III—any information concerning a wire or oral communication, or evidence derived therefrom, intercepted in accordance with Title III. Section 2515 is a stautory exclusionary rule unique in United States criminal procedure. The deterrent purpose of § 2515 is the same as that of the common-law exclusionary rule for fourth amendment violations, regardless of its statutory form for transgressions of Title III provisions that exceed constitutional requirements.

91. LEGISLATIVE HISTORY, *supra* note 5, at 2184-85. The Supreme Court has determined that not all Title III provisions play a "substantive role" in Title III's regulatory scheme. Accordingly, the Court has held that suppression is necessary only when the Title III provision in question "substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." United States v. Giordano, 416 U.S. 505, 527 (1974). *See* United States v. Donovan, 429 U.S. 413 (1977); United States v. Chavez, 416 U.S. 562 (1974).

conventional fourth amendment exclusionary rule.

Section 2518(10)(a) of Title III[92] provides that any aggrieved person[93] may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom. The grounds for this motion to suppress are (1) the government unlawfully intercepted the communication; (2) the order of authorization or approval for the interception was insufficient on its face; or (3) the method, manner, or procedure used in intercepting the conversations violated the wiretap order.[94] Section 2518(10)(a) in effect is the "remedy for the right" under section 2515 to obtain suppression of illegally intercepted communications.[95] The defendant may invoke the section 2515 suppression sanction only if he can demonstrate a violation enumerated in section 2518(10)(a).[96]

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92. Section 2518(10)(a) provides that:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

18 U.S.C. § 2518(10)(a) (Supp. 1981). Although § 2518(9) requires the government not less than 10 days before a trial, hearing, or other proceeding to furnish notice to each party that it intercepted their communications, the legislative history shows that Congress explicitly recognized the propriety of limiting access to intercepted communications or evidence derived therefrom. Thus, courts should not transform the motion to suppress under § 2518(10)(a) into a wholesale right for the defendant to conduct unmonitored, unrestricted discovery.

93. 18 U.S.C. § 2510(11) (1976) defines an aggrieved person as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

94. The first category of § 2518(10)(a) engulfs the second and third categories, which are cumulative and nondistinct from the all-inclusive terms of the first category. *See* LEGISLATIVE HISTORY, *supra* note 5, at 2195-97; NATIONAL WIRETAPPING COMM'N REP., *supra* note 12, at 99; J. CARR, *supra* note 39, § 6.02[3], at 344. Section 2518(10)(a) reflects existing law. It applies to wiretap evidence obtained directly or indirectly in violation of Title III. *See* Nardone v. United States, 302 U.S. 379 (1937).

95. LEGISLATIVE HISTORY, *supra* note 5, at 2195.

96. United States v. Diana, 605 F.2d 1307, 1311 (4th Cir. 1979), *cert. denied*, 444 U.S.

Although section 2518(10)(a) provides the defendant with a procedural means to raise section 2515 rights to preclude the prosecution from introducing unlawfully *intercepted* evidence,[97] section 2515 does not exclude wiretap evidence because of government deviations from a *postinterception requirement.*[98] None of the three subsections of section 2518(10)(a) make reference to or incorporate any postinterception provisions of Title III;[99] the sealing requirement[100] is the postinterception provision most notably absent from the section.[101] Each subsection of section 2518(10)(a) refers to either the preinterception stage or the executional stage of the surveillance. Section 2518(10)(a), therefore, fails to provide a basis for suppression of evidence tainted by postinterception violations of Title III.[102] Thus, section 2518(10)(a) does not support the position of some circuits that the three grounds for suppression listed in section 2518(10)(a) include a violation of the sealing requirement.[103] Conse-

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1102 (1980) (Section 2515 imposes sanctions to compel compliance with prohibitions of Title III and complements § 2518(10)(a), which delineates the grounds for suppression of wiretap evidence and those who may make the motion).

97. *Id.*

98. J. CARR, *supra* note 39, § 6.02[3], at 345.

99. *See id.*

100. *See supra* notes 16-29 and accompanying text.

101. Regarding the relationship between the subsections of § 2518(10)(a), Professor Carr states:

> Senate Report 1097 does not indicate whether the second and third subcategories of § 2518(10)(a) are distinct from the first, or are supplemental or redundant. By its all-inclusive terms, the first subsection would appear to state the grounds for a motion to suppress adequately, without reference to either of the other two categories.

J. CARR, *supra* note 39, § 6.02[3], at 344. In United States v. Giordano, 416 U.S. 505 (1974), the Supreme Court stated: "The words 'unlawfully intercepted' [referring to § 2518(10)(a)(i)] are themselves not limited to constitutional violations . . . ." *Id.* at 527. In fact, courts have held that "unlawfully intercepted" applies to nonconstitutional, statutory violations. *See* United States v. Ford, 553 F.2d 146, 172 (1977). The Court thus gave broad meaning to the first subsection and viewed the second and tbird subsections as supplemental provisions that would allow "suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)." United States v. Giordano, 416 U.S. at 527. *See* NATIONAL WIRETAPPING COMM'N REP., *supra* note 12, at 129-30.

Giordano's attempt to salvage the independent relevance of subsections (ii) and (iii) of § 2518(10)(a) has no support in the legislative history. The most reasonable interpretation regards subsections (ii) and (iii) as surplusage. *See* J. CARR, *supra* note 39, § 6.02[3], at 344; Note, *Judicial Sealing of Tape Recordings under Title III—A Need for Clarification,* 15 AM. CRIM. L. REV. 89, 91 n.168, 93 (1977).

102. J. CARR, *supra* note 39, § 6.02[3], at 345-46; *see* United States v. Diana, 605 F.2d 1307, 1312 (4th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980); United States v. Gigante, 538 F.2d 502 (2d Cir. 1976); United States v. Florea, 541 F.2d 568 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977); United States v. Caruso, 415 F. Supp. 847 (S.D.N.Y. 1976), *aff'd without opinion,* 553 F.2d 94 (2d Cir. 1977).

103. *See, e.g.,* United States v. Caggiano, 667 F.2d 1176 (5th Cir. 1982); United States v.

quently, a defendant should not be able to invoke the section 2515 suppression provision for a sealing requirement violation.

Section 2518(8)(a), however, contains its own independent exclusionary provision directed specifically to failures to fulfill the sealing mandate. The section delineates particular prerequisites for admissiblity and independently from section 2518(10)(a) excludes the evidence from trial for governmental noncompliance with its provisions:

> The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.[104]

Therefore, no need exists to consider whether a sealing violation also renders the tapes inadmissible under section 2518(10)(a).[105] Congress explicitly established alternative prerequisites for the use of wiretap evidence in a judicial proceeding: the presence of a judicial seal or a satisfactory explanation for its absence.[106]

III. JUDICIAL INTERPRETATION

At the end of the continuous period of interception the sealing

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Angelini, 565 F.2d 469 (7th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); United States v. Lawson, 545 F.2d 557 (7th Cir. 1975); *see* J. CARR, *supra* note 39, § 6.02[3], at 345.

The Third Circuit in United States v. Falcone, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975), held that § 2518(10)(a) does not encompass transgressions of the sealing requirement because a defendant may invoke § 2518(10)(a) only to suppress wiretap evidence when the violation of the statute concerns a provision whose purpose and design was to limit the use of intercept procedures. The *Falcone* court determined that a violation of § 2518(8)(a) does not render intercepted communications unlawful under § 2518(10)(a)(i) because the purpose of sealing is not to limit the use of intercept procedures, but rather to ensure the maintenance of the integrity of the tapes after interception. 505 F.2d at 483-84; *see* United States v. Giordano, 416 U.S. 505 (1974). The legislative history demonstrates that Congress designed § 2518(8)(a) to ensure the keeping of accurate records concerning the intercepted communications. Congress believed such a provision to be of paramount importance to guarantee the protection of the tapes from editing and alteration. Congress also advocated the development of appropriate procedures by the government to safeguard the identity, physical integrity, and the contents of the recordings to ensure their admissibility in evidence. The sealing requirement of § 2518(8)(a) implements, to some extent, these concerns and desires of Congress. This reasoning led the *Falcone* court to hold that the sealing requirement itself did not authorize suppression, but rather that § 2518(8)(a) relied on the suppression motion of § 2518(10)(a) to enforce the requirement. The Third Circuit's *Falcone* analysis effectively forecloses the defendant from pursuing any remedy for governmental violation of the sealing requirement. This result obviously is contrary to congressional intent.

104. 18 U.S.C. § 2518(8)(a) (1976).

105. *See generally* United States v. Gigante, 538 F.2d 502 (2d Cir. 1976).

106. United States v. McGrath, 622 F.2d 36, 42-43 (2d Cir. 1980); United States v. Vazquez, 605 F.2d 1269, 1278 (2d Cir. 1979); United States v. Gigante, 538 F.2d 502, 506-07 (2d Cir. 1977).

requirement becomes effective.[107] The sealing of all recordings made pursuant to a Title III order is a post-authorization requirement designed to guarantee the preservation of the tapes' integrity. The courts of appeals agree that the failure immediately to obtain a seal constitutes a preliminary violation of section 2518(8)(a) of Title III.[108] The presence of an intact seal attached *immediately*[109] after the expiration of the wiretap order or termination of the surveillance is a prerequisite for the use or disclosure of the contents of the intercepted communication, or evidence derived therefrom, under section 2517(3).[110] The immediacy requirement of section 2518(8)(a) accomplishes the underlying purpose of the sealing requirement by foreclosing potential tampering with the tapes[111] because it theoretically precludes the passage of any substantial amount of time between the lapse of the wiretap and the delivery of the tapes to the judge for

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107. *See supra* notes 17-20 and accompanying text.

108. NATIONAL WIRETAPPING COMM'N REP., *supra* note 12, at 99. The Commission found that every court that had considered an alleged sealing violation had construed the absence of a seal, or a failure to seal promptly, as a prima facie violation of § 2518(8)(a).

109. *See supra* note 32 and accompanying text.

110. Section 2517(3) prohibits disclosure of wiretap evidence in any judicial proceeding unless the government complies with every Title III requirement. 18 U.S.C. § 2517(3) (1976). *See supra* note 23.

111. LEGISLATIVE HISTORY, *supra* note 5, at 2193-94; *see* United States v. Vazquez, 605 F.2d 1269, 1278 (2d Cir. 1979) (holding that sealing ought to occur within one or two days, and accordingly any delay beyond two days requires an explanation). No concensus exists regarding what constitutes a satisfactory explanation under the statute for a sealing that is less than immediate. *Id.* Many courts, however, are quite lenient and have refused to suppress evidence when the sealing delays exceeded two days. *See, e.g.*, United States v. Angelini, 565 F.2d 469 (7th Cir. 1977) (sealing delays of 9, 26, and 38 days), *cert. denied*, 435 U.S. 923 (1978); United States v. Diadone, 558 F.2d 775 (5th Cir. 1977) (two-week sealing delay), *cert. denied*, 434 U.S. 1064 (1978); United States v. Sklaroff, 506 F.2d 837 (5th Cir.) (14-day sealing delay), *cert. denied*, 423 U.S. 874 (1975); United States v. Lawson, 545 F.2d 557 (7th Cir. 1975) (57-day delay); United States v. Falcone, 505 F.2d 478 (3d Cir. 1974) (45-day sealing delay), *cert. denied*, 420 U.S. 955 (1975); United States v. Poeta, 455 F.2d 117 (2d Cir.) (13-day sealing delay), *cert. denied*, 406 U.S. 948 (1972); United States v. Caruso, 415 F. Supp. 847 (S.D.N.Y. 1976) (24- and 42-day delays), *aff'd without opinion*, 553 F.2d 94 (2d Cir. 1977). In some instances the courts overlook sealing delays without a satisfactory explanation proffered by the government. *See infra* note 167 and accompanying text.

Some courts construed the statutory mandate of "immediately" to mean "without unnecessary or unreasonable delay." *See, e.g.*, People v. Carter, 81 Misc. 2d 345, 348-49, 365 N.Y.S.2d 964, 968 (Nassau County Ct. 1975). Still other courts found the term "immediately" to denote delivery of the recordings to the court "promptly, within a reasonable time, or with reasonable diligence" after completion of the surveillance. *See, e.g.*, People v. Blanda, 80 Misc. 2d 79, 83, 362 N.Y.S.2d 735, 741 (Sup. Ct. 1974). Moreover, other courts selected a bright-line evaluation and found sealing to be possible within one or two days after completion of the interception. Consequently, any delay exceeding two days will result in a nonimmediate sealing that requires an explanation. *See infra* note 120.

sealing.[112] Furthermore, the statute on its face appears to compel suppression of the tapes for a governmental failure to fulfill this immediacy requirement, or for a complete failure ever to obtain a seal for the tapes at all. Without an immediate sealing, tapes are admissible only upon the offering of a "satisfactory explanation" for the absence of a timely seal.[113] This strict reading of section 2518(8)(a) indicates that unless the government provides such an explanation that satisfies the court, the court must exclude the tainted evidence.

By including a satisfactory explanation exception in section 2518(8)(a), the drafters of Title III enabled the government to circumvent the obligations and purpose of the sealing requirement. The admission of the tapes under this exception notwithstanding the lack of an immediate sealing thwarts the purpose of the sealing requirement,[114] because the satisfactory explanation does not address the integrity of the tapes. The explanation itself does not assure that the tapes are reliable, accurate renditions of the recorded conversations.

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112. Minor variances from the exact requirements of the statute will not result in suppression in many cases. *See* United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972). Upon completion of the wiretap in *Poeta*, the judge who issued the order was on vacation. The applicable New York statute requires sealing the tapes under the direction of the "issuing justice." N.Y. CRIM. PRO. LAW § 700.50(2) (McKinney 1971). The police waited 13 days and then presented the tapes to another judge for sealing. The Second Circuit concluded:

> Section 2518(8)(a) provides that in the absence of a seal the tapes might be used in evidence if "a satisfactory explanation for the absence" is made. *A fortiori*, where, as here, the tapes are sealed, a satisfactory explanation for the delay will allow their use in evidence. We are satisfied that the delay of the police in delivering the tapes for sealing was entirely excusable . . . .

United States v. Poeta, 455 F.2d at 122. *See supra* notes 17-19.

113. *See* United States v. Gigante, 538 F.2d 502 (2d Cir. 1976); United States v. Lilla, 534 F. Supp. 1247, 1271-72 (N.D.N.Y. 1982); United States v. Aloi, 449 F. Supp. 698, 727 (E.D.N.Y. 1977); United States v. Ricco, 421 F. Supp. 401, 410-11 (S.D.N.Y. 1976), *aff'd*, 566 F.2d 433 (2d Cir. 1977), *cert. denied*, 436 U.S. 926 (1978); United States v. Caruso, 415 F. Supp. 847, 851 (S.D.N.Y. 1976), *aff'd without opinion*, 553 F.2d 94 (2d Cir. 1977); *cf.* United States v. McGrath, 622 F.2d 36 (2d Cir. 1980) (consideration of tape integrity is relevant in finding a satisfactory explanation).

114. The function of the postinterception procedural requirements is to preserve the integrity of the intercepted communication and to prevent any tampering or editing of the tapes or other unlawful use. *See* United States v. Diana, 605 F.2d 1307, 1314 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); McMillan v. United States, 558 F.2d 877, 878 (8th Cir. 1977); United States v. Abraham, 541 F.2d 624, 627-28 (6th Cir. 1976); United States v. Gigante, 538 F.2d 502, 506-07, (2d Cir. 1976); United States v. Sklaroff, 506 F.2d 837, 840 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975); United States v. Lilla, 534 F. Supp. 1247, 1271-72 (N.D.N.Y. 1982); United States v. DePalma, 461 F. Supp. 800, 825-26 (S.D.N.Y. 1978); United States v. Aloi, 449 F. Supp. 698, 727 (E.D.N.Y. 1977); United States v. Ricco, 421 F. Supp. 401, 406-07 (S.D.N.Y. 1976), *aff'd*, 566 F.2d 433 (2d Cir. 1977), *cert. denied*, 436 U.S. 926 (1978); United States v. Caruso, 415 F. Supp. 847, 851 (S.D.N.Y. 1976), *aff'd without opinion*, 553 F.2d 94 (2d Cir. 1977).

The circuit courts unfortunately have not recognized the inherent contradiction between the satisfactory explanation exception and the purpose of Title III, nor have they realized that they exacerbate this contradiction through lenient interpretation of the exception. Thus, the courts use various, often conflicting methods to resolve delayed sealing problems.

A. The Second Circuit Approach

In 1976 the United States Court of Appeals for the Second Circuit in *United States v. Gigante*[115] meticulously construed section 2518(8)(a) and held that the absence of an immediately applied seal constitutes a violation of section 2518(8)(a) that requires exclusion of the evidence unless the government can provide a satisfactory explanation.[116] In *Gigante* the government failed to seal wiretapping tapes "immediately" after the expiration of the judicial order authorizing the surveillance[117] and thus expressly violated section 2518(8)(a).[118] The court interpreted the provision for a satisfactory explanation as providing an alternative to the sealing requirement. Therefore, under this analysis the government must meet one of two conditions before it may use wiretap evidence: It must have acquired a judicial seal immediately after the termination of the surveillance *or* it satisfactorily must explain the failure to seal immediately.[119] Although the government in *Gigante* conceded that it had no satisfactory explanation

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115. 538 F.2d 502 (2d Cir. 1976).

116. *Id.* at 506-07.

117. *Id.* at 506. The *Gigante* court stated that a satisfactory explanation for a delay in sealing or for an absence of a seal must exist before the tapes are admissible into evidence. The court held that because law enforcement officials delayed the delivery of tapes to the issuing judge, in some cases exceeding one year, and because they could not explain this failure, the court ordered suppression of those tapes and evidence derived therefrom. *Id.* at 507.

118. The language of the statute requires the government to seal the tapes immediately. *See* LEGISLATIVE HISTORY, *supra* note 5, at 2193; *supra* note 16. "Seal provided for by this subsection" requires presentation to the judge "shortly after the surveillance is terminated." *See* J. CARR, *supra* note 39, § 5.12[2], at 281; ABA STANDARDS, *supra* note 66, at 160. In United States v. Vazquèz, 605 F.2d 1269 (2d Cir. 1979), the court presumed that a sealing delay surpassing two days fell outside the scope of the immediacy requirement of § 2518(8)(a) and accordingly required a satisfactory explanation. The court ruled that a sealing delay exceeding two days is less than immediate because "cases illustrate that sealing is often possible within one or two days." *Id.* at 1278.

119. The dissent in United States v. Falcone, 505 F.2d 478, 486 n.5 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975), required a satisfactory explanation not only for total failure to seal the tapes hut also for failure to seal the tapes immediately. The *Gigante* court adopted this reasoning and concluded that any other interpretation would vitiate the statutory purpose of protecting the integrity of the tapes. United States v. Gigante, 538 F.2d 502, 507 (2d Cir. 1976).

for noncompliance with section 2518(8)(a)[120] and thus could not meet either condition, it claimed that the court should not order suppression because defendants failed to present any evidence demonstrating that the tapes themselves had sustained any tampering or alteration.[121] The *Gigante* court rejected this argument because it undercuts the congressional desire that the judiciary supervise the sealing process immediately after surveillance terminates. Because the delay in sealing was extensive and because the government did

120. The courts have approved various "satisfactory" explanations. For example, in United States v. Poeta, 455 F.2d 117 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972), the government failed to present the recorded tapes to the court for sealing immediately upon expiration of the last wiretap order as mandated by § 2518(8)(a). After allowing 13 days to pass, the government submitted the recordings for sealing to a judge who had not issued the wiretap order. The government failed to acquire a seal immediately because it believed that only the judge who issued the warrant could direct sealing and the issuing judge was on vacation when the order expired. The court regarded this explanation as satisfactory and did not suppress the tape-recorded evidence.

In United States v. Vazquez, 605 F.2d 1269 (2d Cir. 1979), the delay in sealing various tapes ranged from seven to thirteen days. The government complained that the massive investigation caused shortages in both personnel and equipment because most of the intercepted conversations were in Spanish and only four Spanish-speaking agents were available to monitor the taping, to make copies of the 260 tape reels, to check the duplicates for audibility, and finally to label each of the 520 tapes. *Id.* at 1279. The government asserted that these hinderances caused the sealing delay. The court accepted the government's explanation as sufficient to permit admission of the tapes into evidence. The court stated, "the government's lack of foresight regarding the actual scope of the investigation does not justify the exclusion of probative evidence lawfully obtained." *Id.* In United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 403 (1978), the court excused a seven-day delay in sealing because preparation for the upcoming trial preoccupied the time of the government attorneys. In United States v. McGrath, 622 F.2d 36 (2d Cir. 1980), the court excused delays of three to eight days since the delay was relatively short and was unavoidable because of the dispersion of tape processing facilities.

Courts have considered various elements when determining whether the government's explanation is "satisfactory" under § 2518(8)(a). These elements include the length of the delay, *see* United States v. Vazquez, 605 F.2d 1269 (2d Cir. 1979); United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), evidence of tampering, *see* United States v. Vazquez, 605 F.2d 1269 (2d Cir. 1979); United States v. Poeta, 455 F.2d 117 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972), time required for duplicating, labelling, checking, and preparing the tapes for sealing, *see* United States v. Ricco, 566 F.2d 433 (2d Cir. 1977), *cert. denied*, 436 U.S. 926 (1978), and whether the defendants were prejudiced by the delay, *see* United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), *cert. denied*, 436 U.S. 403 (1978). In United States v. Aloi, 449 F. Supp. 698 (S.D.N.Y. 1977), the government delayed sealing tapes from five to seven days because the issuing judge was unavailable, the district attorney briefly was ill, and the office staff required time to check and catalogue the tapes. The court found these explanations satisfactory under § 2518(8)(a).

121. Several courts have refused to suppress tapes for sealing delays absent a challenge by the defendant regarding the authenticity of the tapes used against him or an allegation of tape alteration. *See, e.g.*, United States v. Falcone, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); Cerbo v. Fauver, 469 F. Supp. 1004 (D.N.J. 1979), *aff'd*, 616 F.2d 714 (3d Cir.), *cert. denied*, 449 U.S. 858 (1980); United States v. DePalma, 461 F. Supp. 800, 828-29 (S.D.N.Y. 1978) (no suppression because defendants could not establish any breach compromising the security of the remaining tapes).

not satisfactorily explain the delay, the *Gigante* court suppressed the surveillance evidence. Hence, *Gigante* and its Second Circuit progeny adopted the position that the absence of an immediately applied seal—or a satisfactory explanation for its absence—requires suppression without inquiry into whether the government fulfilled the purpose underlying the sealing requirement despite the delay.[122] Accordingly, *Gigante* established the premise that the absence of an allegation of tape tampering by the defendant will not constitute a satisfactory explanation for a sealing delay.

Four years after *Gigante* the Second Circuit in *United States v. McGrath*[123] retreated from this rigid position and asserted that a lack of any evidence of tape tampering or alteration *may* transform an otherwise inadequate explanation into a satisfatory explanation. In *McGrath* the appellants moved to suppress three wiretap tapes since the government failed to proffer a satisfactory explanation under section 2518(8)(a) for delays of three to eight days in sealing the tapes. The court held that a satisfactory explanation was absolutely essential to overcome a sealing requirement violation. Contrary to the previous ruling in *Gigante*, the *McGrath* court also held that if the defendant does not produce evidence of prejudice from the sealing delay, of tape tampering, or of governmental bad faith, then a court properly may find that the government's explanation is satisfactory.[124] The court held that the sealing delays in *McGrath* did not contravene section 2518(8)(a) because:

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122. The *Gigante* court's interpretation is stricter than those of the Third, Fifth, and Seventh Circuits. The rigid gloss *Gigante* placed on the sealing requirement effectively elevates the immediate sealing requirement to a more protected status than any of the other procedural requirements of Title III. *See* Angelini v. United States, 565 F.2d 469 (7th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). The court in United States v. Diana, 605 F.2d 1307 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980), did not consider *Gigante*'s holding a significant restriction of the admission of evidence under § 2518(8)(a), except that perhaps a lack of evidence of tampering will be insufficient to allow the admission of wiretap evidence after a violation of § 2518(8)(a). *Id.* at 1313-14.

Rejecting *Gigante*, the Fifth Circuit has held that a lack of any evidence of tampering *completely* overcomes a § 2518(8)(a) violation. *See* United States v. Diadone, 558 F.2d 775, 780 (5th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978). The Third and Seventh Circuits have held that a lack of any evidence of tampering *may* overcome the violation. *See* United States v. Angelini, 565 F.2d 469, 473 (7th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); United States v. Falcone, 505 F.2d 478, 483-84 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

123. 622 F.2d 36 (2d Cir. 1980).

124. *Id.* at 42-43. The Second Circuit viewed as two separate issues (1) its satisfaction with the explanation for delay and (2) the sufficiency of evidence of the tapes' integrity. The court held that evidence supporting the integrity of the tapes significantly will affect the court's satisfaction with the government's explanation and thus lessen its willingness to suppress the wiretap evidence. *See id.*

> [h]ere, however, given that the delay was relatively short and included one weekend, and that no evidence of prejudice or foul play was presented, we accept as satisfactory the Government's explanation that it was "reasonably necessary" to transport the tapes from Binghamton to Albany for duplication and processing, and thence to Auburn for sealing.[125]

B. The Approach of the Third and Eighth Circuits

The United States Court of Appeals for the Third Circuit in *United States v. Falcone*[126] and the United States Court of Appeals for the Eighth Circuit in *McMillan v. United States*[127] declared that they will not suppress taped evidence because of a sealing delay unless the *defendant* can prove that tape tampering or alteration has compromised the integrity of the tapes.[128] These circuits characterize a violation of the sealing requirement as a mere technicality that alone is insufficient to justify suppression.

United States v. Falcone[129] concerned two court-authorized wiretaps of defendant's conversations.[130] In each instance the government delayed forty-five days in sealing the tapes.[131] The government explained that the need to make a composite tape and a transcript of the tapes caused the delay.[132] Construing the satisfactory explanation exception of section 2518(8)(a) as an alternative to the sealing requirement,[133] the court found that a failure to seal the tapes immediately is not a violation that necessarily requires suppression as a matter of law.[134] The court ruled that because the integrity of the tapes is the "crucial factor,"[135] the absence of an immediately applied seal is an insufficient reason to suppress the evidence if the defendant cannot impeach the intregity of the tapes.[136] The Third Circuit reiterated this interpretation of section 2518(8)(a) in *Cerbo v. Fauver*,[137] in

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125. *Id.* at 43.

126. 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

127. 558 F.2d 877 (8th Cir. 1977).

128. For a discussion of the means by which a defendant can show governmental tape tampering, see *infra* note 180.

129. 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

130. 505 F.2d at 480 n.6.

131. *Id.* at 485 (Rosenn, J., dissenting).

132. *Id.* at 486 (Rosenn, J., dissenting).

133. The *Falcone* court did not mention the satisfactory explanation provision and gave as an example that police confusion had constituted a satisfactory explanation in another case. The court, however, did not hold that the government gave a satisfactory explanation in this case. *Id.* at 484.

134. *Id.*

135. *Id.*

136. *Id.*

137. 616 F.2d 714 (3d Cir.), *cert. denied*, 449 U.S. 858 (1980).

which petitioner never challenged the authenticity of the tapes nor alleged any tampering with those tapes. The Third Circuit affirmed the district court's refusal to order suppression for the sealing delay and emphasized that absent a claim of tampering, a sealing delay per se will not constitute grounds for suppression notwithstanding the length of the sealing delay.[138] Moreover, the Third Circuit specifically denounced the Second Circuit's *Gigante* holding as contrary to its own holding in *Falcone*.[139]

In *McMillan v. United States*[140] the Eighth Circuit emphasized that the purpose of the sealing provision is to ensure preservation of the integrity of the tapes after the interception.[141] Because defendant failed to allege that governmental impropriety impaired the accuracy of the tapes during the sealing delay, the court implied that suppression would be an inappropriate sanction in this instance since the violation would be inconsequential and technical.[142] Unless the defendant challenges the tapes' integrity, the courts of the Eighth Circuit will presume their accuracy.[143]

Under the approach of the Third and Eighth Circuits, a court will order suppression of surveillance tapes only if the defendant demonstrates that the government somehow compromised the integrity of the tapes during the sealing delay. Conversely, the Second Circuit requires that the government satisfactorily explain its failure to seal the tapes immediately; otherwise, the court will order suppression. Absence of evidence that the government compromised the integrity of the tapes will further a finding under the Second Circuit's approach that the government proffered a satisfactory explanation.

C. *The Approach of the Fourth Circuit*

In *United States v. Diana*[144] the United States Court of Appeals for the Fourth Circuit analyzed whether inquiry into governmental tampering with or editing of the tapes is either appropriate or dispositive in determining whether the government provided a satisfactory explanation for the sealing delay.[145] The court acknowledged that

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138. *Id.* at 716.
139. *Id.; see supra* notes 120-22 and accompanying text.
140. 558 F.2d 877 (8th Cir. 1977).
141. *Id.* at 878.
142. *Id.* at 879.
143. *Id.*
144. 605 F.2d 1307 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980). Thirty-nine days lapsed before law enforcement officials sealed the tapes. *Id.* at 1311.
145. *Id.*

Congress intended sealing to preclude governmental interference with the tapes and thus to ensure accurate representations of the recorded conversations.[146] The court questioned whether a finding that the government satisfied the purpose of section 2518(8)(a) also should determine that the government's explanation is satisfactory.[147] The court, however, stated that "this fact would have at least some bearing on whether the explanation was satisfactory."[148] In holding that inquiry into whether the government tampered with the tapes was "appropriate in determining"[149] whether the explanation was satisfactory, the Fourth Circuit parallelled the approach of the Third and Eighth Circuits.[150] Concluding that the Second Circuit in *United States v. Gigante* excluded the taped evidence solely because of extensive sealing delays of eight to twelve months,[151] the *Diana* court held that an extensive delay will preclude the government's use of the satisfactory explanation exception to overcome a section 2518(8)(a) violation. The *Diana* court found, however, that the government's explanation for the sealing delay was satisfactory on its face and that the court did not need to consider the unchallenged integrity of the tapes to infer a satisfactory explanation.[152]

Thus, like the Second Circuit in *United States v. McGrath,*[153] the Fourth Circuit requires the government to produce a satisfactory explanation to prevent suppression for a sealing requirement violation. Under the Fourth Circuit approach, however, a finding that the government fulfilled the purpose of the sealing requirement during the sealing delay renders the government's explanation satisfactory. In application, the Fourth Circuit approach is similar to that of the Third and Eighth Circuits because all hold that a determination of preserved tape integrity during the sealing delay will render inconsequential the violation of the sealing provision. The Fourth Circuit approach is distinguishable from these other approaches because the Fourth Circuit will not allow the government to use the satisfactory explanation exception to avoid suppression if the delay in sealing is

146. *Id.*
147. *Id.* at 1312-14.
148. *Id.* at 1313.
149. *Id.* at 1314.
150. *Id.*
151. *Id.* at 1313-14.
152. *Id.* at 1314. The court held that the government fulfilled the purpose of the sealing requirement, and that the explanation proffered by the government for the delay in sealing was reasonable "based in part on considerations other than the fact that the integrity of the tapes is not challenged." *Id.* at 1316.
153. 622 F.2d 36 (2d Cir. 1980); *see supra* notes 123-25 and accompanying text.

of great length. Thus, although the length of the sealing delay is important under Fourth Circuit analysis, under the approach of the Third and Eighth Circuits a sealing delay with no evidence of tape tampering will not require suppression, irrespective of the length of the delay.

D. The Approach of the Fifth Circuit

The United States Court of Appeals for the Fifth Circuit in *United States v. Diadone*[154] held that a failure to seal or a delay in sealing the tapes immediately upon completion of the surveillance will necessitate suppression of the tapes *if* the defendant demonstrates that the delay prejudiced him or that the delay compromised the integrity of the tapes.[155] If the defendant cannot demonstrate prejudice or compromised integrity of the tapes, the court will disregard the violation of the sealing requirement and will refuse to suppress the evidence.[156]

Like the Third and Eighth Circuits, the Fifth Circuit rejects the Second Circuit requirement that the government satisfactorily must explain a failure to seal surveillance tapes before the tapes are admissible at trial. Furthermore, unlike the Fourth Circuit, the Fifth Circuit considers the length of the sealing delay irrelevant in determin-

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154. 558 F.2d 775 (5th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

155. *See infra* note 180.

156. In the Fifth Circuit all aspects of the sealing requirement are secondary to the fulfillment of the congressional purpose behind § 2518(8)(a). In United States v. Sklaroff, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975), the government waited 14 days after the expiration of the wiretap order to deliver the recordings to the judge for sealing. The government explained that the recordings remained in the FBI evidence room for seven days and the search warrant required an additional seven days to prepare. The court concluded that the government substantially complied with § 2518(8)(a) because defendant did not show that the integrity of the interception was questionable or that the delay prejudiced him. *Id.* at 840. In United States v. Cohen, 530 F.2d 43 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976), the authorizing judge received the tapes of the wiretapped conversations five weeks after termination of the wiretap. Because the parties stipulated to facts showing the chain of custody and a lack of alteration to the tapes, the court found no violation of the sealing requirement. *Id.* at 45-46. In United States v. Diadone, 558 F.2d 775, 780 (5th Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978), defendants failed to show that the government disturbed the integrity of the interception in any way. The tapes were not suppressed even though the government breached its duty to surrender the tapes to the court immediately upon completion of the interception. In United States v. Caggiano, 667 F.2d 1176 (5th Cir. 1982), the court declined to suppress wiretapping evidence although the government technically violated § 2518(8)(b), which is the procedural aspect of the sealing requirement. *See supra* note 22 and accompanying text. The court found that the purpose of § 2518(8)(b), like that of § 2518(8)(a), is to preserve the confidentiality of the wiretap applications and orders. Defendants did not allege that the procedures the government used breached any confidence. The court suggested that suppression perhaps is appropriate when the government deliberately circumvents tbe sealing requirement. *Id.* at 1179.

ing admissibility. The Fifth Circuit instead mandates the suppression of surveillance tapes for a sealing delay only if the defendant demonstrates prejudice or doubtful tape integrity. This added opportunity for the defendant to obtain suppression of the tapes upon a showing of prejudice distinguishes the approach of the Third and Eighth Circuits from that of the Fifth Circuit.

E. The Approach of the Seventh Circuit

The United States Court of Appeals for the Seventh Circuit has based its approach largely upon the Ninth Circuit's holding in *United States v. Chun.*[157] The Ninth Circuit had adopted a test to determine when governmental violations of particular Title III provisions mandate suppression of electronic surveillance evidence. The conditions for admission are: First, the particular procedure must be a central or functional safeguard of the Title III scheme to prevent abuses, *and* second, the government has satisfied the purpose of the procedure notwithstanding the delay, *or* the government did not deliberately ignore the statutory requirement and thereby gain a tactical advantage.[158] In 1975 the Seventh Circuit in *United States v. Lawson*[159] applied the *Chun* test specifically to a violation of section 2518(8)(a) and held that the absence of an immediate seal will not violate section 2518(8)(a) and will not require suppression if: (1) despite the error, the law enforcement authorities accomplished the purpose for which Congress designed the sealing requirement, and (2) the violation of the sealing provision was not purposeful and in no sense conveyed to the government a tactical advantage.[160] The *Lawson* court concluded that section 2518(8)(a) is a central or functional safeguard of the Title III scheme to prevent abuses because it is a "statutory requirement . . . that directly and substantially implement[ed] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."[161] Consequently, any viola-

157. 503 F.2d 533 (9th Cir. 1975). *Chun* did not concern a sealing requirement violation hut rather a failure to give defendants a formal inventory notice under 18 U.S.C. § 2518(8)(d) (1976).

158. *Id.* at 542. The *Chun* court did not determine whether violations of § 2518(8)(a) fall under its test. The court merely concluded that if the government fails the test, then the government's conduct violates the statute and the court will suppress the wiretap evidence under § 2518(10)(a)(i). *Id.* at 538-42.

159. 545 F.2d 557 (7th Cir. 1975).

160. The *Lawson* court held that § 2518(8)(a) is a central or functional safeguard in the Title III scheme to prevent ahuses. *See id.* at 564.

161. *Id.* at 562 (quoting United States v. Giordano, 416 U.S. 505 (1974)).

tions of section 2518(8)(a) fall within the scope of section 2518(10)(a)(i)[162] and require suppression under the *Chun* test if the government did not fulfill the purpose of section 2518(8)(a) or if the government purposely ignored the sealing requirement and gained a tactical advantage over the defendant.

Two years later the Seventh Circuit in *United States v. Angelini*[163] tempered its constructon of the sealing requirement and interpreted section 2518(8)(a) more consistently with the statutory language. The court read section 2518(8)(a) entirely in conjunction with section 2518(10)(a) and contemplated a two-step analysis in considering delayed sealing problems. In an approach identical to the Second Circuit's, the Seventh Circuit ruled that if the government does not seal the tapes immediately, the court must decide whether the government has offered a satisfactory explanation. If the government cannot provide a satisfactory explanation, then the court will apply the *Chun* test, which the government must meet to avoid suppression of the wiretap evidence.[164] The *Angelini* analysis expands the *Lawson* approach because it adopts a two-step method: Is the explanation satisfactory? If it is satisfactory, then the evidence is admissible. If it is unsatisfactory, the court will apply section 2518(10)(a) and the *Chun* test. In determining whether to suppress surveillance evidence because of a sealing requirement violation, this Seventh Circuit approach disregards the length of the sealing delay or the extent of prejudice to the defendant from the sealing delay.[165]

IV. Analysis

Neither the *Gigante* nor the *McGrath* approaches of the Second Circuit effectuate the ostensible purpose of the sealing requirement: to provide an external safeguard against manipulation of recorded evidence.[166] Title III's sealing requirement does not itself foreclose extensive governmental alteration and editing of wiretapping tapes because if the government delays for too long to procure an "immediate" seal, the satisfactory explanation loophole assures ad-

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162. *See* United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

163. 565 F.2d 469 (7th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978).

164. *Id.*

165. In *Angelini* the government delayed in sealing three tapes for 9, 26, and 38 days. 565 F.2d at 470. The court admitted the tapes into evidence because it found that the government's explanation was satisfactory and because the government's conduct did not undermine the objectives of the Title III sealing requirement. *Id.* at 473.

166. *Id.*; *see supra* notes 115-25 and accompanying text.

missibility of the evidence. Of course, the court may not find the excuse satisfactory, but in practice the Second Circuit will transform almost any *believable* excuse for the delay into a satisfactory explanation.[167] Unfortunately, nothing precludes government officials who are determined to convict a defendant from tampering with the tapes during the interim between completion of the surveillance and acquisition of an affixed seal. Moreover, in deciding whether to suppress taped evidence the Second Circuit does not expressly consider the length of time the government possessed the unsealed tapes after termination of the wiretap, or whether this delay places the integrity of the tapes in doubt. The Second Circuit has not yet confronted a case in which the government provides a satisfactory explanation for the delay but the defendant challenges the integrity of the tapes.[168] In *Gigante,* for example, the government did not seal the wiretap tapes for more than one year after expiration of the authorizing order. The *Gigante* court specifically conditioned suppression on the government's failure to explain the delay satisfactorily—the court did not consider the length of the delay. By overlooking the duration of delay, the Second Circuit is heedless of overzealous prosecutors who may alter the tapes to convert exculpatory statements into inculpatory ones or to augment the incriminating nature of the entire tape and then proffer a manufactured explanation the courts would deem satisfactory.[169] Because the Second Circuit has strictly interpreted

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167. *See, e.g.,* United States v. Scafidi, 564 F.2d 633, 641 (2d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978); *supra* note 120.

The satisfactory explanation exception of § 2518(8)(a) resembles a good faith exception for sealing requirement violations. The legislative history does not explain the reason Congress included a provision excusing literal compliance with the sealing requirement. One court has defined a satisfactory explanation as "one in which the Government shows that it acted with dispatch and all reasonable diligence to meet the sealing requirement, respectful of the letter and spirit of Title III and mindful of the construction it has been given in the Courts." United States v. Angelini, 565 F.2d 469, 472 (7th Cir. 1977), *cert. denied,* 435 U.S. 923 (1978); *see* J. CARR, *supra* note 39, at 84-85.

168. In all sealing cases to-date no defendant has questioned the integrity of the tapes when the government has proffered an explanation for a sealing delay.

169. *See, e.g.,* United States v. Mouton, 617 F.2d 1379, 1385 (9th Cir.) (defendant alleged that prosecutor tampered with tapes of defendant's telephone conversations), *cert. denied,* 449 U.S. 860 (1980); United States v. Grismore, 546 F.2d 844 (10th Cir. 1976) (defendant alleged prosecutorial tampering with trial exhibit, but court ruled that defendant did not overcome the presumption that the government did not tamper with the evidence); United States v. Fletcher, 487 F.2d 22, 23 (5th Cir. 1973) ("[T]he material was not always firmly sealed, and at least fifteen persons had access to the evidence room where it was kept. These objections go to the weight, not the admissibility of the evidence . . . ."), *cert. denied,* 416 U.S. 958 (1974); Williams v. United States, 381 F.2d 20, 21 (9th Cir. 1967) ("The [trial] court did not exclude the possibility of tampering, but properly left the question with the jury as bearing on reasonable doubt of guilt."); Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960) ("Factors to be

the language of the sealing requirement[170] and has not welcomed allegations of governmental tape tampering, a challenge to the tapes' integrity likely will not significantly affect the court's determination regarding suppression.

The Third and Eighth Circuits conspicuously disregard the satisfactory explanation exception of section 2518(8)(a) and instead carve out their own exception that enables the government to circumvent the suppression sanction. If the defendant has no meritorious challenge to tape integrity, these circuits refuse to suppress evidence because of a sealing delay. *Falcone* and *McMillan* effectively illustrate that the defendant must bear the burden to demonstrate that the government altered or edited the tapes or that the tapes otherwise convey an inaccurate account of the conversations. To lay this burden on the defendant is unreasonable;[171] most defendants do not pos-

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considered [in deciding admissibility of evidence] include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.").

170. *See, e.g.*, United States v. McGrath, 622 F.2d 36 (2d Cir. 1980); United States v. Gigante, 538 F.2d 502 (2d Cir. 1976).

171. *See* J. CARR, *supra* note 39, § 5.12[4], at 283. The defendant may allege, for example, intentional tampering or alteration, accidental erasure, damage, confusion, or loss of tapes that alters the overall interpretation of the conversations. *See id.* at 282. The government prepares duplicate tapes for continued investigative and trial purposes. In many jurisdictions government agents record duplicates simultaneously with the originals, but in others agents make duplicates shortly after they remove the original tape from the recorder. NATIONAL WIRETAPPING COMM'N REP., *supra* note 12, at 88. Section 2517 specifically lists the situations in which the government may use or disclose the contents of a tape. *See* 18 U.S.C. § 2517 (1976); United States v. Dorfman, 690 F.2d 1230, 1233 (7th Cir. 1982); *In re* Applications of Kansas City Star, 666 F.2d 1168, 1175 (8th Cir. 1981). Section 2517(2) provides:

> Any investigative or law enforcement officer who, by any means authorized by the chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

18 U.S.C. § 2517(2) (1976). On its face, § 2517(2) permits the government to use the contents of intercepted communications to make duplicate recordings of the original tapes after sealing, because the courts surely would regard such *use* as "appropriate to the proper performance of his [the government agent's] official duties." Hence, the need to make duplicate tapes after sealing may augment the already suhstantial opportunity for governmental tape alteration. In United States v. Dorfman, 690 F.2d 1230 (7th Cir. 1982), the court held that no specific subsection of § 2517 permits a judge to open sealed surveillance evidence to the press simply hecause the contents are newsworthy. *Id.* at 1231-33. The court stated that § 2517 limits the use or disclosure of such evidence outside trial proceedings to investigative and law enforcement officers. Under § 2518(8)(b), however, the government may obtain disclosure of applications and orders after sealing "upon a showing of good cause before a judge of competent jurisdiction." For example, in United States v. Florea, 541 F.2d 568, 575 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977), the court authorized the Department of Justice to unseal, copy, and return signature papers from the wire interception authorizations. *See also* LEGISLATIVE HISTORY, *supra* note 9, at 2194. Although attempts to develop tamperproof and editproof tapes and recording devices are continuous, the Wiretap Commission unconvincingly stated that "[p]erhaps

sess the necessary resources to detect sophisticated alterations of tapes.[172] The officers making the recordings should bear the burdens of compliance and justification because they should be able to comply with the delivery requirements of the sealing provision.

The Fourth Circuit also imposes upon the defendant the burden of demonstrating prejudice because of questionable tape integrity. The Fourth Circuit declined to address the propriety of the position of the Third and Eighth Circuits and avoided the issue by stating:

> [S]ince we find, however, a satisfactory explanation[173] in this case based in part on considerations other than the fact that the integrity of the tapes is not challenged, we need not decide if we would allow the evidence to be admitted solely on the basis of the fact that no tampering has been shown.[174]

Unlike the Third and Eighth Circuits, however, the Fourth Circuit in *Diana* determined that the length of the sealing delay, especially if it is extensive, substantially affects the availability to the government of the satisfactory explanation exception to avoid exclusion of wiretap evidence.[175] Primarily, the Fourth Circuit emphasizes that the government must fulfill Congress' purpose in requiring sealing to enable the court conscientiously to deem the explanation satisfactory. Furthermore, the Fourth Circuit will admit the unsealed taped evidence even if the explanation itself is inadequate or not forthcoming at all.

> We repeat that we feel the district court's finding of a satisfactory explanation was not in error. The integrity of the tapes is not questioned, and we take into account the extra precautions taken with respect to them. Therefore, the purpose of the sealing requirement has been fulfilled, and, as discussed earlier, this fact is important in deciding whether a satisfactory explanation has been provided.[176]

Under the Fifth Circuit's approach, the defendant's suppression mo-

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the best protection against alteration is the absence of a motive to edit court-ordered surveillance, as it is based on probable cause and is closely supervised by superior officers, the prosecutor, and the judge." NATIONAL WIRETAPPING COMM'N REP., *supra* note 12, at 89.

172. J. CARR, *supra* note 39, § 5.12[4], at 282; *see infra* note 180.

173. The government argued that malfunctioning equipment necessitated the sealing delay because duplicates could not provide the needed information for preparation of the indictment, warrants, and transcripts. United States v. Diana, 605 F.2d 1307, 1314-15 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980).

174. 605 F.2d at 1314.

175. The court did not necessarily find that this decision conflicted with *Gigante*. The *Diana* court distinguished *Gigante* because in *Gigante* the delay was inordinately long, irregularities existed in the tape storage process, and the government could not proffer a satisfactory explanation for its "haphazard procedures" to ensure the integrity of the tapes. The government in *Diana*, however, employed many protections to ensure the integrity of the tapes. *Id.* at 1313-16.

176. *Id.* at 1316.

tion will prevail notwithstanding a satisfactory explanation for delay if the defendant can demonstrate that the integrity of the tapes is doubtful or if the delay has prejudiced him.[177] This additional opportunity to demonstrate prejudice distinguishes the Fifth Circuit approach from that of the Third and Eighth Circuits.[178] The Fifth Circuit has not indicated whether failure by the government to comply with the sealing requirement ever will sufficiently prejudice the defendant to justify suppression of the wiretap evidence.[179] Although the Fifth Circuit never has specified the nature of prejudice to the defendant under section 2518(8)(a), the defendant apparently can demonstrate prejudice through sustainable claims of tape tampering or editing by the government.[180] Prejudice, however, should not in-

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177. *See supra* notes 155-56 and accompanying text.

178. *See supra* notes 126-43 and accompanying text.

179. In every case the Fifth Circuit perfunctorily has addressed the prejudice issue raised by the defendant. For example, the court in *United States v. Sklaroff* stated:

> There was a delay of fourteen days. There was no showing of prejudice to the defendants in the delay. The purpose of this provision of the statute is to safeguard the recordings from editing or alteration. There was no showing that the integrity of the interceptions was in any way violated. The government accounted for the delay . . . . There was substantial compliance with the requirements on the part of the government and the authorizing judge.

United States v. Sklaroff, 506 F.2d 837, 840-41 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975).

180. Admittedly, when law enforcement officials seize incriminating conversations, they have almost no motive to tamper with the tapes. The possibility of tampering arises, however, when the government believes the seized evidence is not sufficiently incriminating. The drafters designed § 2518(8)(a) to decrease the likelihood of tape alteration. NATIONAL WIRETAPPING COMM'N REP., *supra* note 12, at 131. If the government tampers with the recordings between the making of the recording and termination or between termination and return of the tapes to the court, the defendant perhaps cannot demonstrate this manipulation. Experts agree that a sophisticated editing process is impossible to detect or only is detectable at a prohibitive expense. *Id.* at 89; *see* People v. Sher, 38 N.Y.2d 600, 345 N.E.2d 314, 381 N.Y.S.2d 843 (1976); Weiss & Hecker, *The Authentication of Magnetic Tapes: Current Problems and Possible Solutions*, in NATIONAL WIRETAPPING COMM'N REP., *supra* note 12, at 216, 237. Indeed, no defendant to-date has proved an allegation of tape tampering. *See* NATIONAL WIRETAPPING COMM'N REP., *supra* note 12, at 131. Thus, when the defendant makes some showing that the tapes are not accurate, the court can enhance the reliability of the surveillance evidence by requiring the prosecution to prove the negative proposition that tampering and alteration have not occurred. In United States v. Wooten, No. 82-1336, slip op. (D.C. Cir. Dec. 21, 1982), the court stated:

> Such alterations moreover, are likely to go undetected because a highly skilled forensic examiner who is an expert in the fields of tape recording, signal analysis, and speech communication, using the best available analysis equipment, can take weeks and even months to establish with reasonable certainty the fact that a tape has been falsified. The advantage, in terms of effort, time, and cost is clearly with the forger.

Id. (footnote omitted).

For an outrageous perspective on law enforcement bad faith, see A. DERSHOWITZ, THE BEST DEFENSE (1982), whose theme is "Nobody really wants justice." *Id.* at xxii. Professor Dershowitz writes: "[The United States Attorney's office for the Southern District of New York] serves as a model of integrity. . . . [I]t is essential to disclose the sad reality behind its facade of

clude dubious tape integrity because the prejudice challenge then would be equivalent to the challenge based on a lack of tape integrity. Consequently, the Fifth Circuit's interpretation of prejudice renders the integrity condition surplusage, and although theoretically more favorable to the defendant than the Third and Eighth Circuit approach, the Fifth Circuit approach essentially is the same. Thus, the same problems arise regarding the defendant's sustaining his burden with insufficient resources. To provide the defendant with two real alternative challenges and to return the burden of proving the reliability of the tapes to the government, the Fifth Circuit should deem all delays prejudicial unless the government dispels the inference that the tapes' integrity is questionable.

The expansive approach of the Seventh Circuit under the *Angelini* line of cases presents the government two independent theories by which it can avoid suppression. The first is the statutory satisfactory explanation exception; the second is the *Chun* test which requires that the defendant prove either (1) that the government disturbed the integrity of the tapes, and (2) that the government intentionally postponed sealing or gained a tactical advantage from the delay. This disposition of sealing violations does not accomplish the articulated legislative purpose of section 2518(8)(a) because it does not eliminate the opportunity or incentive for tape tampering or other governmental bad faith. To ensure admissibility of the tapes, law enforcement officials need only offer a satisfactory explanation for the delay or comply with the *Chun* test.

A satisfactory explanation for a delay in sealing of course does not preclude possible alteration of the tapes during the delay. Requiring proof that the government disturbed the integrity of the tapes during the sealing delay as a condition precedent to suppression effects the congressional purpose of ensuring that only those tapes containing accurate representations of intercepted conversations are admissible at trial. As with the other circuits' approaches, however, the burden rests on the defendant to demonstrate questionable tape integrity, which he probably never can prove because his limited resources would not detect subtle changes made by sophisticated techniques.

An alternative basis for suppression under *Chun* is a showing that the government purposefully postponed sealing the tapes "immediately" and from this delay acquired some tactical advantage. This alternative, however, similarly prejudices the defendant because

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incorruptibility." *Id.* at 383.

of his limited resources. The defendant simply cannot obtain information regarding prosecutorial strategy and cannot ascertain whether the government's delay was intentional. To solve the defendant's predicament, the court should presume that the government *altered* the tapes during an *intentional* postponement of sealing. The court should require the government—not the defendant—to rebut this presumption as a precondition to admission of the tapes. Without this shift of burden, the exceptions for sealing requirement violations would not effect the congressional purpose underlying the sealing requirement of guaranteeing the integrity of the evidence.

The various circuits, however, are not entirely responsible for approaches that stray from the enunciated legislative purpose of section 2518(8)(a), for Congress itself enacted a loophole that contradicts the purported legislative purpose of the statute. The satisfactory explanation exception undermines the deterrent purpose of the statute because the exception itself does not depend on or encourage government measures to ensure preservation of the tapes' integrity during the sealing delay.

V. Conclusion

The rationale offered by Congress for requiring immediate sealing of wiretapping tapes by the court upon the completion of the interception period is to preserve the integrity of the tapes by preventing any tape tampering, alteration, editing, or other governmental bad faith. Congress, however, also added an exception to the sealing requirement that permits disclosure of the tapes' contents in a judicial proceeding if the government has contravened the sealing requirement yet has offered a satisfactory explanation for either a failure to seal or a delay in sealing. No circuit court treats sealing requirement violations in a manner that effects the congressional purpose underlying the sealing requirement. Congress desired to provide an external safeguard against tampering with or manipulating recorded evidence. To preserve this safeguard and the integrity of intercepted communications, courts should interpret section 2518(8)(a) strictly and require a satisfactory explanation for any sealing delay beyond one or two days. Moreover, for purposes of invoking the exception, the court only should deem an explanation satisfactory if the cause for the delay during the initial days of the surveillance is unforeseeable and beyond the government's control. The courts, furthermore, should place an affirmative obligation on the government to show by a preponderance of the evidence that the government preserved the integrity of the tapes during the delay. Because the gov-

ernment initially instituted the electronic surveillance, the court should shift the burden of proof to the government. If the government satisfies these conditions to explain the sealing delay, then the court should not suppress the tapes for mere technical violation of the sealing requirement. Alternatively, the court should suppress the evidence if the government does not satisfy the necessary preconditions explaining the sealing delay.

THOMAS CLONEY BANKS