An Examination of the Naming Requirement of Title III in Light of United States v. Donovan - A Case for Suppression

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Comment

AN EXAMINATION OF THE NAMING REQUIREMENT OF
TITLE III IN LIGHT OF
UNITED STATES v. DONOVAN—A CASE FOR SUPPRESSION.

"We act differently if we believe we are being observed. If we can
never be sure whether or not we are being watched and listened
to, all our actions will be altered and our very character will
change."

Hubert H. Humphrey*

I. INTRODUCTION

Title III of the Omnibus Crime Control and Safe Streets Act of 1968
(Title III)\(^1\) prohibits the interception of wire or oral communications unless
implemented under court order.\(^2\) Drafted in the wake of the Supreme
Court's decisions in Berger v. New York\(^3\) and Katz v. United States,\(^4\) which
established the prerequisites for a constitutional electronic surveillance statute,\(^5\) the purposes of Title III are to protect "the privacy of wire and oral
communications" and to delineate "on a uniform basis the circumstances and
conditions under which the interception of wire and oral communications
may be authorized."\(^6\)

Despite this enunciated congressional purpose, it appears that recent
Supreme Court decisions are slowly eroding the procedural safeguards of

\* Humphrey, *Foreword to E. LONG, THE INTRUDERS* at viii (1967).

1. 18 U.S.C. §§ 2510-2520 (1976). For an excellent, in depth examination of Title III, see
process under Title III, see, e.g., Pulaski, *Authorizing Wiretap Applications under Title III:
Another Dissent to Giordano and Chavez*, 123 U. PA. L. REV. 750 (1975); Note, 24 *DE PAUL

CONG. & AD. NEWS* 2112, 2113.

3. 388 U.S. 41 (1967). In *Berger*, the Supreme Court struck down a New York electronic
surveillance statute as overbroad and thus violative of the fourth and fourteenth amendments.
Id. at 44. For a discussion of *Berger*, see notes 15-21 and accompanying text infra.

4. 389 U.S. 347 (1967). The Supreme Court in *Katz* discussed the "trespass" doctrine of
Olmstead v. United States, 277 U.S. 438 (1928), and held that the fourth amendment protects
oral statements from unreasonable seizure although there has been no physical intrusion into a
speaker's constitutionally protected area, 389 U.S. at 350-53.

5. See notes 15-21 and accompanying text infra.

when drafting Title III, had long been aware of the potential abuses of electronic surveillance.
United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41, 45-53 (1967); Wong Sun
(dissenting opinions of Holmes and Brandeis, J. J.). It is interesting to note that eavesdropping,
the predecessor of modern electronic surveillance, was condemned at common law as a nuis-
ance. 4 W. BLACKSTONE *COMMENTARIES* 169.
Title III. In United States v. Donovan, the Supreme Court held that a violation of the naming requirement of Title III does not require suppression of the evidence gathered through the use of electronic surveillance. The Court implied, however, that such evidence may be suppressed if the defendant could prove that he was prejudiced by the failure to name him in the interception application or to send him inventory notice, or that the government intentionally violated Title III.

This comment will examine the effect of the Supreme Court's decision in Donovan on the Title III requirements relating to the identification of the person whose communications are to be, or have been, intercepted. It will then propose two alternatives to Donovan: first, that a violation of the naming requirement should mandate suppression; and second, accepting the Court's holding in Donovan, that if a violation occurs, the burden of proof should shift to the government to prove a lack of prejudice to the defendant or that the violation was in fact unintentional.

II. BACKGROUND

A. The Statute

In Berger v. New York, the Supreme Court struck down a New York electronic surveillance statute as overbroad and thus violative of the fourth and fourteenth amendments. The statute, while requiring the naming of the person or persons whose communications were to be intercepted, did

9. 18 U.S.C. § 2518(1)(b)(iv)(1976). The naming of persons comes into play at two points under Title III. First, the application requesting authorization for electronic surveillance must specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Id. See notes 23 & 24 and accompanying text infra. Second, the identification of persons overheard during the intercept plays an integral part in the statutory requirement of postinterception inventory notice. See 18 U.S.C. § 2518(8)(d) (1976); notes 26-29 and accompanying text infra.
10. 429 U.S. at 432-34.
* The masculine form is used throughout this comment for convenience; the feminine form would be equally applicable.
11. Id. at 436 n.23, 439 n.26. See text accompanying note 60 infra.
12. See note 9 supra; notes 22-24 and accompanying text infra.
13. See notes 67-120 and accompanying text infra.
14. See notes 121-38 and accompanying text infra.
16. 1942 N.Y. LAWS ch. 924, as amended (codified at N.Y. CRIM. PROC. LAW § 813-a (1958) (repealed 1965)).
17. 388 U.S. at 44. For the pertinent text of the fourth amendment, see note 20 infra. The fourth amendment is applicable to the states by operation of the fourteenth amendment. See Mapp v. Ohio, 367 U.S. 643, 655 (1961).
18. 388 U.S. at 59.
not compel the applicant to specify the nature of the conversations to be overheard.19 The Court, relying upon the fourth amendment’s requirement of particularity in describing “the persons or things to be seized,” 20 held that by failing to require a particularized description of the communication to be intercepted, the statute granted the officer executing the order an overbroad scope of discretion.21

Congress, in drafting Title III, endeavored to meet the constitutional requirement of particularization expressed in Berger.22 For example, section 2518 of Title III requires, inter alia, that each application for the judicial approval of an interception of wire or oral communications identify “the person, if known, committing the offense and whose communications are to be intercepted.”23 The inclusion of this information in the application was intended to foster judicial review and to prevent the abusive use of electronic surveillance.24 These policies are further reflected in the fact that the

19. Id. Title III satisfies this requirement through the particularization required by § 2518(1)(b), 18 U.S.C. § 2518(1)(b) (1976), and by requiring minimization of the interception of communications outside the scope of the authorization. 18 U.S.C. § 2518(5) (1976). See notes 22-26 and accompanying text infra.

20. 388 U.S. at 56, quoting U.S. CONST. amend. IV. The fourth amendment provides, in pertinent part, that a warrant must “particularly describ[e] the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. See J. CARR, supra note 1 at 33-40.

21. 388 U.S. at 59. The Court compared this lack of particularization to the “truly offensive character” of general warrants. Id. at 55. General warrants arose during the revolutionary era, when England’s “customs officials were given blanket authority to conduct general searches for goods imported into the Colonies in violation of the tax laws of the Crown.” Id.

The Court noted that general warrants were “a motivating factor behind the Declaration of Independence.” Id. The majority stated that the fourth amendment repudiated general warrants, since it made “general searches . . . impossible and prevent[ed] the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” Id., quoting Marron v. United States, 275 U.S. 192, 196 (1927).


23. 18 U.S.C. § 2518(1)(b)(iv) (1976). The application must also include a statement of the facts and circumstances establishing probable cause to believe that a particular offense has been, is being, or is about to be committed, id. § 2518(1)(b)(i); a description of the location where the interception is to be conducted, id. § 2518(1)(b)(ii); a description of the type of communication sought to be intercepted, id. § 2518(1)(b)(iii); a statement of why other investigative procedures are not feasible or have not been successful, id. § 2518(1)(c); and the period of time for which the interception is to be maintained, id. § 2518(1)(d). The application must also disclose all previous applications for interception authorization made to any judge that involve any person named in the current application. Id. § 2518(1)(e).

The application may be made to a federal judge by the Attorney General of the United States, id. § 2526(1), or to a state court judge when the principle prosecuting attorney of the state or a political subdivision thereof is authorized by state statute to seek wiretap authorization. Id. § 2518(2). Judicial approval of the application is conditioned upon satisfactory compliance with the requirements of § 2518. See id. §§ 2518(1)-(3).

24. See S. Rep. No. 1097, 90th Cong., 2d Sess. 97, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2185. Under § 2518(3) of Title III, the judge has discretion to determine whether the authorization should be granted. See 18 U.S.C. § 2518(3) (1976). The requirement that the application include all information relating to prior electronic surveillance is designed to aid the judge in the intelligent exercise of this discretion and to protect an individual from “fishing expeditions” by government agents. See, e.g., United States v. Bernstein, 509 F.2d 996, 1000-01 (4th Cir. 1975), vacated and remanded, 430 U.S. 902, rev’d, 556 F.2d 244 (4th Cir. 1977); United States v. Bellosi, 501 F.2d 833, 836-40 (D.C. Cir. 1974); Hain v. State, 30
judicial authorization of the interception, if granted, must specify the target of the interception.25

In addition to focusing the interception upon specific individuals and minimizing the interception of unrelated communications,26 the naming requirement also "triggers" the mandatory notification procedure of section 2518(8)(d),27 which provides that inventory notice be sent to those persons named in the judicial authorization.28 The section further provides that notification may be required to identifiable persons who, although not named in the judicial authorization, had their conversations intercepted.29 This inventory notice requirement was designed to remove the public’s fear of "secret" surveillance,30 and provides a basis for civil liability for allegedly unlawful interception.31

In addition to these civil remedies, Title III provides for suppression of evidence obtained by electronic surveillance if: "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval."32


28. 18 U.S.C. § 2518(8)(d) (1976). The inventory notice must include the fact that an application was entered, the date of the application, whether authorization was granted or denied, the period of the interception, and whether any communications were intercepted during the term of the order. Id. The notice must be served within ninety days, although the judge may extend this period upon a showing of good cause. Id. The judge also has discretionary authority, upon motion, to disclose portions of the actual transcript to persons whose conversations have been intercepted. Id.

29. 18 U.S.C. § 2518(9)(d) (1976). The serving of this notice is within the judge’s discretion, the criterion being whether it is in the interest of justice.” Id. If an individual has actual notice of an interception, this may satisfy the notification requirements of Title III. See United States v. Alfonso, 552 F.2d 605, 614 (5th Cir.), cert. denied, 434 U.S. 857 (1977); United States v. Johnson, 539 F.2d 181, 194 (D.C. Cir. 1976), cert. denied, 432 U.S. 907 (1977).

30. ABA Project on Minimum Standards for Criminal Justice—Standards Relating to Electronic Surveillance § 5.15 (1968) [hereinafter cited as ABA Standards].


32. 18 U.S.C. § 2518(10)(a) (1976). These statutory grounds for suppression are to be read in the alternative. 429 U.S. at 433 n.22.

Any "aggrieved person" may move to suppress the contents of an interception. 18 U.S.C. § 2518(10)(a) (1976). An "aggrieved person" is one who was a party to an interception or against whom an interception was directed. Id. § 2510(11).
B. The Case Law

One of the pivotal questions which arose in the interpretation of Title III's provisions was the issue of who must be named in the application for judicial authorization. In United States v. Kahn, Mrs. Kahn, the wife of the individual named in an interception application, was indicted on the basis of evidence obtained through the telephone wiretap. In support of her motion to suppress the fruits of the wiretap, Mrs. Kahn asserted that she was a person "known" within the meaning of Title III, and that the interception of her communications was therefore unlawful due to the failure to name her in the application and authorization. The Supreme Court reversed the granting of Mrs. Kahn's motion to suppress, and rejected the argument that the statutory language "if known" includes any person whom "careful investigation by the government would disclose were probably using [the target] telephones in conversations for illegal activities." The Court held that a person must be named in the application and authorization only if the government possesses information that would tend to establish probable cause to believe that that person was committing the offense and was using the target telephone.

Both prior and subsequent to Kahn, lower court decisions that considered this naming issue had held that if probable cause similar to that found in Kahn existed, a person must be named in the application and authoriza-

34. The application and authorization named Mr. Kahn and "others as yet unknown." Id. at 144-45.
36. See 415 U.S. at 149; note 9 supra; text accompanying note 23 supra.
37. 415 U.S. at 148-49. Mrs. Kahn also moved to suppress the intercepted communications on the ground of "marital privilege." Id. Section 2517(4) of Title III states: "[N]o otherwise privileged wire or oral communication intercepted . . . shall lose its privileged character." 18 U.S.C. § 2517(4) (1976).
38. 415 U.S. at 151. The district court granted the motion to suppress on both the grounds of "marital privilege" and the failure to name Mrs. Kahn as a "known" person within the meaning of § 2518. Id. at 148-49. The Seventh Circuit affirmed, but only on the latter ground. Id. at 149.
39. Id. at 149, quoting United States v. Kahn, 471 F.2d 191, 196 (7th Cir. 1972). The Court, examining the language of Title III, concluded that if Congress had meant for "discoverable" persons to be named in the application, it would have explicitly drafted such a requirement into § 2518. 415 U.S. at 151-53. The Court further stated that "[a] requirement that the Government fully investigate the possibility that any likely user of a telephone is engaging in criminal activities before applying for an interception order would greatly subvert the effectiveness of the law enforcement mechanism that Congress constructed." Id. at 153.
40. 415 U.S. at 155 (emphasis added). Reasoning by extension, the Court concluded that if an interception is valid as to a named person, there is no "additional requirement that the Government investigate all persons who may be using the subject telephone in order to determine their possible complicity." Id. at 153-54 n.12. The Court also determined that evidence obtained from this interception can be used against such an "unknown" individual. Id. at 155-57. Accord, United States v. Johnson, 539 F.2d 181, 186-88 (D.C. Cir. 1976), cert. denied, 432 U.S. 907 (1977); United States v. Sklaroff, 323 F. Supp. 296, 324-25 (S.D. Fla. 1971), aff'd, 506 F.2d 837 (5th Cir. 1975).
41. See note 40 and accompanying text supra.
tion, and that a failure to do so may require suppression at trial of evidence gathered from an interception of that individual’s conversations.42

Shortly after Kahn, however, the Supreme Court decided United States v. Chavez 43 and United States v. Giordano, 44 which involved the faulty identification of the federal officials who authorized the wiretap applications.45 In both cases, the Court emphasized that Congress intended to require suppression only where there is a “failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.”46 Although there might be a failure to adhere to Title III’s provisions, the Court concluded that the suppression of evidence will not be required unless the violated requirement plays a “central” or “substantive” role in Title III’s regulatory scheme.47


44. 416 U.S. 505 (1974).

45. 416 U.S. at 565-67; 416 U.S. at 508-10. Title III requires that the Attorney General or any Assistant Attorney General specially designated by the Attorney General authorize a wiretap application by federal authorities as a prerequisite to judicial consideration of the application. 18 U.S.C. § 2516(1) (1976). This authorization is required to provide “lines of responsibility” leading to an identifiable person should abuses occur and to centralize “in a publicly responsible official subject to the political process the formulation of law enforcement policy” pertaining to electronic surveillance. S. Rep. No. 1097, 90th Cong., 2d Sess. 96-97, reprinted in [1968] U.S. CODE CONC. & AD. NEWS 2112, 2153.

In Chavez, the interception applications recited authorization by the Assistant Attorney General, whereas in actuality, one application had been approved by the Attorney General and the second had been approved by the Attorney General’s Executive Assistant. 416 U.S. at 565-67. In Giordano, the application stated authorization by a designated Assistant Attorney General, whereas the authorization was actually obtained from the Executive Assistant to the Assistant General. 416 U.S. at 508-10.


47. 416 U.S. at 579-80; 416 U.S. at 527-28. Applying this standard, the Giordano Court concluded that the proper preapplication authorization required by § 2516(1) was so essential to the regulatory scheme of Title III that suppression of the intercepted evidence was warranted for the violation of this provision. Id. In contrast, the Chavez Court, in a five to four decision, found that since the preapplication authorization, although wrongly identifying the authorizing federal official, still satisfied the requirements of § 2516(1), the defect was not a fatal one requiring suppression of the intercepted evidence. 416 U.S. at 579-80.
United States v. Donovan\textsuperscript{48} was the Supreme Court's most recent encounter with the role of the naming requirement of section 2518.\textsuperscript{49} In Donovan, three defendants in a criminal prosecution for gambling sought to suppress wiretap evidence on the ground that they were "known" within the meaning of section 2518, yet had not been named in the interception application and authorization.\textsuperscript{50} Finding that Kahn provided relevant precedent,\textsuperscript{51} the Donovan Court stated that since the government had probable cause to believe that these petitioners were engaged in criminal activity and would be overheard on the target telephone, it should have named them in the application.\textsuperscript{52} The Court nevertheless concluded that this violation of the naming requirement did not warrant suppression of the evidence.\textsuperscript{53} The majority focused upon whether the identification of all those likely to be overheard played a "substantive role" in the judicial authorization process.\textsuperscript{54} The Court reasoned that since other individuals were properly named in the application, and the addition of the petitioners would not have precluded judicial authorization of the wiretap,\textsuperscript{55} the evidence was not "un-
lawfully intercepted” within the meaning of Title III so as to require suppression.56

The Court found support for its conclusion in Chavez57 and Giordano,58 and noted that “nothing in the legislative history suggests that Congress intended this broad identification requirement to play ‘a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance.’”59 The Court did imply, however, that if a defendant could establish that he was prejudiced by the failure to name him or to send him inventory notice, or that the government intentionally failed to fulfill these requirements of Title III, the evidence may be suppressed.60

The dissent in Donovan argued that the majority took “too narrow a view of the provision at issue, ignoring its place in the system Congress has created to restrain wiretapping.”61 According to the dissent, the issue was not whether the naming of the petitioners would have affected the decision of the judge who issued the authorization, but rather whether the identification requirement is a “central” and “substantive” provision necessary to effectuate the purpose of Title III.62 Focusing on the naming requirement as

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56. Id. at 436. Under Title III, evidence may be suppressed if it was “unlawfully intercepted.” 18 U.S.C. § 2518(10)(a)(i) (1976). See note 32 and accompanying text supra. The Court rejected any suggestion that the interception authorization was facially insufficient, see 18 U.S.C. § 2518(10)(a)(ii) (1976), or that the interception was not conducted in conformity with the authorization, id. § 2518(10)(a)(iii). 429 U.S. at 432. For the text of these provisions, see text accompanying note 32 supra. For an analysis of whether a failure to name a “known” person should render an interception authorization “facially insufficient,” see notes 115-20 and accompanying text infra.


59. 429 U.S. at 437, quoting United States v. Chavez, 416 U.S. 562, 578 (1974). The Court, after a brief examination of legislative history, also rejected the contention that “postinterception notice was intended to serve as an independent restraint on resort to the wiretap procedure.” 429 U.S. at 439. Thus, the failure to send inventory notice to the two other petitioners did not render the interception of their communications “unlawful,” and suppression of this evidence was not required. Id. See note 50 supra.

60. 429 U.S. at 436 n.23, 439 n.26.

61. Id. at 449 (Marshall, J., dissenting in part). Justice Marshall concurred in the majority’s reaffirmation of Kahn as the standard to be employed in determining who is “known” within the meaning of § 2518. Id. at 445 (Marshall, J., dissenting in part). For a discussion of Kahn, see notes 33-40 and accompanying text supra. Justice Marshall also concurred in the majority’s holding that the government must provide a judge with sufficient information to allow him to intelligently exercise his discretion in passing on an interception application. 429 U.S. at 445 (Marshall, J., dissenting in part). Justice Marshall dissented, however, from the Court’s determination that § 2518 is not a “central” provision of Title III, and from the Court’s denial of suppression of the intercepted evidence. Id. at 445-46 (Marshall, J., dissenting in part). For the majority’s position in Donovan, see notes 48-60 and accompanying text supra.

62. 429 U.S. at 446 (Marshall, J., dissenting in part). Justice Marshall initially reaffirmed Justice Douglas’ position in Chavez that the Court lacks the discretion to designate some provisions of Title III as “central” or “substantive.” Id. at 455 (Marshall, J., dissenting in part). See note 47 supra. However, the dissent noted that the Chavez Court had rejected this argument, and that “nothing is to be gained by renewing it here.” 429 U.S. at 455 (Marshall, J., dissenting in part).
a statutory "trigger" for other provisions of Title III, the dissent would have designated this requirement as a "central" provision, thereby requiring suppression of the intercepted communications for its violation. Courts confronted with the issue of suppression of electronic surveillance evidence acquired as a result of a defective application and authorization under Title III's naming requirement have followed the Supreme Court's decision in Donovan. The lower courts have generally been unable to find the prejudice to a defendant or the intentional failure by the government to follow the statutory requirements of Title III necessary to warrant suppression of wiretap evidence.

III. A CASE FOR SUPPRESSION

A. The Need

The Donovan decision and its progeny illustrate a judicial assessment of the role of the naming requirement of section 2518 with respect to Title III's regulatory scheme. It is submitted that by relegating the naming requirement to an "undoubtedly important," though not "central," role in Title III's statutory framework, the Supreme Court has receded from the strict
requirement of particularization made by Berger \(^69\) and has weakened
the effectiveness of Title III in protecting the public from the possibility of
serious invasions of privacy.

By failing to designate the naming requirement as a “central” provision
requiring suppression for its violation,\(^70\) the Supreme Court has placed this
regulatory aspect of Title III in the position of the proverbial dog whose bark
is worse than its bite. Whatever deterrent effect mandatory suppression had
on preventing violations of section 2518 may now be lost, thereby increasing
the potential for abuse of electronic surveillance.\(^71\) For example, one pur-
pose of the naming requirement is to ensure adequate judicial supervision of
the interception process.\(^72\) In order to aid the judge in the intelligent exer-
cise of his discretion, the application must contain a record of all previous
applications submitted concerning the person who is the focus of the present
application.\(^73\) This procedure was intended to protect against repeated in-
vasions of a person’s privacy and to guard against the use of electronic sur-
veillance as a “dragnet.”\(^75\) However, if law enforcement officials, having
previously submitted applications for an interception directed at a particular
individual, are fearful that a judge may, in his discretion, deny a current
application which includes that individual as a target of the interception, the
officials can omit that individual’s name from the application, thus frustrating
the judicial regulation of interceptions.\(^75\)

Another area in which Donovan undermines the strict regulatory as-
pects of Title III is the mandatory inventory notice which must be supplied
to all those named in the application and authorization.\(^76\) Although the
judge may require that inventory notice be sent to an unnamed person,\(^77\)
this provision does not ensure full protection from the potential abuses of
electronic surveillance, nor does it contribute to allaying the “secret fears” of
the public concerning electronic surveillance.\(^78\) Rather, it is submitted that
a decrease in the protection of privacy and an enhancement of societal fears
about electronic surveillance follow from Donovan. A law enforcement offi-
cial, wishing to avoid revealing to an individual the fact that his conversa-
tions have been overheard, may omit that person’s name from the applica-

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\(^69\) For a discussion of Berger, see notes 15-21 and accompanying text supra.
\(^70\) See text accompanying notes 53-59 supra.
\(^71\) The use of electronic surveillance techniques is usually carefully planned and, thus,
electronic surveillance “appears uniquely and highly susceptible to the restraining influence of
deterrence.” J. Carr, supra note 1, at 354-55. See also ABA Standards, supra note 30, at §
2.3(d).
\(^72\) See note 24 and accompanying text supra.
\(^74\) See note 24 and accompanying text supra.
\(^75\) It is arguable that such actions by law enforcement officials may be found to be an
“intentional” violation of Title III’s statutory structure, thus providing a ground for suppression.
See text accompanying note 60 supra. It appears doubtful, however, that a defendant could
successfully obtain suppression on this ground. See notes 83-90 & 143 and accompanying text
infra.
\(^77\) See 18 U.S.C. § 2518(8)(d) (1976); note 29 and accompanying text supra.
\(^78\) See ABA Standards, supra note 30.
tion in the hope that the judge will not require discretionary inventory notice to be sent to that person.\textsuperscript{79}

This possibility could have two serious consequences. First, unaware that an interception has occurred, an individual would not be able to pursue the civil remedies permitted under Title III for unlawful interceptions.\textsuperscript{80} Second, since it is posited that the individual is “known” at the time of the application—that is, that the applicant has probable cause to believe that the individual is engaged in criminal activity, and is using the target telephone—\textsuperscript{81} he could be hindered in his defense preparation should an indictment be brought against him.\textsuperscript{82} In regard to the public’s “secret fears” of electronic surveillance, it is submitted that any diminution of the degree of impartial and intelligent legislative or judicial control over the use of electronic surveillance, especially where it concerns the very ability of an individual to learn that his conversations have been overheard, can only increase the public’s fear of unwarranted invasions of privacy.

It is arguable that the Donovan decision addresses these potential problems since the Court implicitly left open the possibility that the fruits of an interception may be suppressed for failure to name a “known” person if the defendant can show that he was prejudiced by the omission\textsuperscript{83} or that the omission was intentional.\textsuperscript{84} It is submitted, however, that these possible grounds for suppression are not viable in that they impose an insurmountable evidentiary burden on the defendants. First, the prejudice ground would appear to be unavailable to a defendant in most instances. Assuming compliance\textsuperscript{85} with section 2518(9),\textsuperscript{86} it will be hard for a defendant to present a strong prejudice argument, since he will have had knowledge of the interception for at least ten days prior to trial.\textsuperscript{87} One court has noted: “We doubt that many defendants will be able to make a showing of actual prejudice.”\textsuperscript{88}

\textsuperscript{79} As one writer has observed: “[T]here is considerable opportunity under § 2518(1)(b)(iv) to circumvent the notice provision by a deliberately incomplete investigation.” J. CARR, supra note 1, at 36. See also note 75 supra.

\textsuperscript{80} See 18 U.S.C. § 2520 (1976), note 31 and accompanying text supra.

\textsuperscript{81} For a discussion of this interpretation of § 2518(1)(b)(iv) by the Kahn Court, see notes 33-40 and accompanying text supra.

\textsuperscript{82} Title III provides that a defendant must be given a copy of the court order and application within ten days prior to trial if evidence derived from the interception is to be introduced at that trial. 18 U.S.C. § 2518(9) (1976). This would appear to allow a defendant some time in which to prepare a defense with the knowledge that an interception has occurred, thus negating a possible prejudice argument. However, at least one court has noted that § 2518(9) is not meant to be used to negate the possible prejudicial effect of a failure to provide a defendant inventory notice, but “is intended to provide the defendant whose telephone has been subject to wiretap an opportunity to test the validity of the wiretapping authorization” prior to trial. United States v. Eastman, 465 F.2d 1057, 1063 n.13 (3d Cir. 1972).

\textsuperscript{83} 429 U.S. at 439 n.26.

\textsuperscript{84} Id. at 436 n.23.

\textsuperscript{85} If a defendant has not received inventory notice pursuant to § 2518(8)(d), and the requirements of § 2518(9) have not been satisfied, then the evidence derived from the interception will automatically be excluded from trial. See 18 U.S.C. § 2518(9) (1976).

\textsuperscript{86} 18 U.S.C. § 2518(9) (1976). For a discussion of § 2518(9), see note 82 supra.


\textsuperscript{88} United States v. Harrigan, 557 F.2d 879, 884 (1st Cir. 1977).
In attempting to compel suppression on the ground that the law enforcement officials intentionally omitted his name from the application, a defendant will be placed in the onerous position of having to prove the subjective motivation of the applicant. Circumstantial evidence with which a defendant might seek to establish an intentional omission will invariably be in the possession of those opposing suppression, a situation in which possibilities for obstruction and deception exist. It is thus submitted that a defendant will rarely be able to suppress evidence for failure to name him in the application on the grounds of prejudice or an intentional omission.

Moreover, in its discussion of the question of intentional omissions, the Donovan Court stated: “There is no suggestion in this case that the Government agents knowingly failed to identify respondents . . . for the purpose of keeping relevant information from the District Court . . . . If such a showing had been made, we would have a different case.” It would appear to follow from this language that in order to compel suppression on the ground that an intentional omission has occurred, a defendant must not only prove that the Kahn requirements existed and that the applicant was aware of this fact, thereby rendering a failure to name the defendant in the application implicitly intentional, but also must prove that a specific purpose was to be fulfilled by the omission. The defendant’s burden of proof in seeking suppression is thus increased to an even greater magnitude.

B. The Rationale

In light of the potential abuses outlined above, a reexamination of the Donovan Court’s analysis is warranted. It is submitted, contrary to the position of the Donovan majority, that the naming requirement of section 2518 is central to the implementation of Title III’s regulatory framework.

Specifically, the Donovan majority’s focus seems misplaced. In Chavez and Giordano, the Court held that a violation of a Title III provision does not require suppression of evidence obtained as a result thereof unless that provision played a “central, or even functional, role in guarding against unwarranted use of electronic surveillance.” These holdings thus advanced the primary policy underlying Title III. The majority in Donovan, however, narrowly focused its analysis on the determination of whether Title III’s naming requirement played a substantive role in the “judicial authorization of [an] intercept order.” Is it is submitted that by narrowing the issue

89. Given the general statutory scheme of Title III—that the government initiates the interception process—the government will be in possession of first hand knowledge of the circumstances leading up to an application for interception. See notes 23 & 45 and accompanying text supra.
90. See note 66 and accompanying text supra.
91. 429 U.S. at 436 n.23 (emphasis added).
92. For a discussion of the Court’s analysis in Donovan, see notes 48-60 and accompanying text supra.
93. 416 U.S. at 578. See 416 U.S. at 527. For a discussion of Chavez and Giordano, see notes 43-47 and accompanying text supra.
94. See note 6 and accompanying text supra.
95. 429 U.S. at 435. See text accompanying notes 53-55 supra.
in this respect, the majority failed to consider the overall purpose of Title III and the precedent established by Chavez and Giordano. 96

The dissent in Donovan recognized this deficiency, 97 and, in contrast to the majority, framed the issue as being whether the naming requirement "directly and substantially implement[s] the congressional intention to limit the use of interception procedures," 98 and not whether the requirement affects a judge’s decision with respect to the issuance of a particular warrant. 99 Following the precedent of Chavez and Giordano, it is submitted that the dissent’s analysis is correct, 100 and in light of the central position that the naming requirement occupies in Title III’s statutory scheme, evidence intercepted in violation of this provision should be suppressed. 101

Further support for the dissent’s position can be found when one considers that Title III was drafted with the Berger decision 102 in congressional hands. 103 In Berger, the statute at issue required the naming of the person or persons whose communications were to be intercepted. 104 While this requirement withstood the Supreme Court’s scrutiny, the statute was invalidated for its failure to require that the nature of the conversations to be overheard be specified. 105 A close reading of Berger would seem to suggest that if the statute in question had failed to require the naming of persons to be overheard, rather than failing to specify the nature of the communications to be intercepted, the Court would not have altered its decision. 106 It is therefore suggested that a failure to name all “known” persons 107 in an interception application should be a constitutional violation mandating suppression. As a constitutional requirement, the naming provision must by necessity play a “central” and “substantive” role in Title III. Indeed, if the initial authorization requirement provided in section 2516, 108 which is not

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96. The Donovan Court did apply the “central and substantive” test as enunciated in Chavez and Giordano. See notes 57-59 and accompanying text supra. It is submitted, however, that the Court’s findings with respect to the naming requirement in relation to the statutory scheme of Title III were conclusory, and that the Court placed greater emphasis on the narrow issue of whether the violation of the naming requirement would have precluded judicial authorization of this particular interception. See notes 53-56 and accompanying text supra.


100. For a discussion of the dissenting opinion in Donovan, see notes 61-64 and accompanying text supra.

101. See 429 U.S. at 449-(Marshall, J., dissenting in part); notes 63 & 64 and accompanying text supra.

102. For a discussion of Berger, see notes 15-21 and accompanying text supra.


104. 388 U.S. at 59.

105. Id. See note 21 and accompanying text supra.

106. See 388 U.S. at 55-59. The Berger Court referred to the fourth amendment requirement that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." 388 U.S. at 56, quoting U.S. CONST. amend. IV.

107. For a discussion of who is a "known" person within the meaning of § 2518, see notes 33-40 and accompanying text supra.

constitutionally mandated,109 was designated as a "central" provision in Giordano110 and Chavez,111 it is submitted that the congressionally recognized constitutional requirement of particularization,112 as effectuated by the naming requirement of section 2518,113 should be no less a "central" and "substantive" provision.114

The majority in Donovan also summarily rejected the contention that section 2518(10)(a)(ii)115 required the suppression of the intercepted evidence.116 Section 2518(10)(a)(ii) provides a ground for suppression if "the order of authorization or approval under which [the communication] was intercepted is insufficient on its face."117 It is submitted that the Donovan

109. The Berger Court stated that fourth amendment requires that a "neutral and detached authority be interposed between the police and the public." 388 U.S. at 54. This requirement is satisfied by causing an interception order to issue only upon judicial determination. Id. See 18 U.S.C. § 2518 (1976). Interception authorization by the Attorney General of the United States or his designate, or by the principal prosecuting attorney of a state or a political subdivision thereof, is not a constitutional mandate, although it is required under Title III. See 18 U.S.C. § 2516 (1976).


112. See notes 20-25 and accompanying text supra.

113. Section 2518, which includes the naming requirement, was drafted by Congress with the aim of fulfilling the constitutional requirement of particularization. See text accompanying note 22 supra.

114. The Supreme Court in Donovan recognized that Congress intended the naming requirement to fulfill the "constitutional command of particularization." 429 U.S. at 426-27, quoting S. Rep. No. 1097, 90th Cong., 2d Sess. 101, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2190. The Court, however, relegated the constitutional issue to a short footnote. 429 U.S. at 427 n.15. The Court stated that "[i]t is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named." Id. (emphasis added). It is submitted that there is a clear distinction between those "likely to be overheard engaging in incriminating conversations," and those whom law enforcement officials have probable cause to believe are engaging in criminal activity and are using the target telephones. The constitutional demand is one of probable cause. See Berger v. New York, 388 U.S. 41, 54-55 (1967). Indeed, the Donovan Court cited with approval the Kahn determination that a person should be named in the application and authorization if the Government possesses sufficient evidence to establish probable cause to believe that the person was engaged in criminal activity and was using the target telephone. 429 U.S. at 423-24 & n.11, citing United States v. Kahn, 415 U.S. 143 (1974). See 429 U.S. at 427, note 40 supra. Thus, the above passage, assumed by the Court to settle the constitutional issue involved, merely avoided that issue.

The Court further stated that specification of all those likely to be overheard is unnecessary since the authorization merely "identif[ies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." 429 U.S. at 427 n.15, quoting Berger v. New York, 388 U.S. 41, 59 (1967). The Court, however, does not supply the context from which the quotation is taken. The quotation, in its proper context, does not suggest that the naming of a "known" person is not constitutionally mandated. Rather, it is used in Berger to illustrate that the naming requirement, in and of itself, is not constitutionally sufficient to protect an individual's privacy in a wiretap situation. See 388 U.S. at 59. See also note 106 and accompanying text supra.


116. 429 U.S. at 432.

117. 18 U.S.C. § 2518(10)(a)(ii) (1976). As the Donovan Court noted, § 2518 "provides alternate grounds on which one may seek suppression of wiretap evidence obtained in violation of Title III's statutory provision." 429 U.S. at 433 n.22 (emphasis supplied by the Court). Thus, § 2518(10)(a)(ii), unlike § 2518(10)(a)(i), does not require a finding that the communications were "unlawfully intercepted." Compare 18 U.S.C. § 2518(10)(a)(i) (1976) with id. § 2518(10)(a)(ii). It
majority too hastily concluded that section 2518(10)(a)(ii) was inapplicable since the statutory requirement that an application name a "known" individual has been firmly established by the Supreme Court. By thus failing to name a "known" individual in the initial application, it is submitted that the judicial authorization which flows from that application necessarily will be "insufficient on its face." Following this reasoning, once a defendant establishes that he was "known" but was not named in the application, suppression of the evidence derived from the interception should automatically be granted on the grounds of facial insufficiency without a further showing of prejudice or an intentional omission by the applicant.

IV. SHIFTING THE BURDEN OF PROOF

The possibility of suppression of interception evidence for either an intentional failure to name a "known" person or a showing of prejudice by the defendant raises two interesting issues. First, if, as the Supreme Court has stated, a person must be named in an interception application when probable cause exists under Kahn, and assuming that such probable cause does exist, then the question arises as to what excuses justify a failure to name that person in the initial application. One may assume that a blatant disregard by the applicant of evidence sufficient to establish probable cause may be construed as an intentional omission by the court. As has been previously suggested, however, a defendant will generally be hard pressed to establish that the applicant has intentionally violated Title III's provisions, or that the defendant was prejudiced by the applicant's conduct.

Assuming, therefore, that the Donovan Court's analysis was sound and that mandatory suppression of evidence for a failure to name a "known" person in an interception application is neither required nor even desirable, it is submitted that "[a]t the very least, the burden should be on the government to show valid cause, as opposed to negligence, for noncompliance and that no prejudice in fact occurred."
The rationale for shifting the burden upon a motion to suppress would be similar to that employed by the Supreme Court in *Wong Sun v. United States*. In *Wong Sun*, the Court held that verbal statements obtained during an unlawful warrantless arrest must be suppressed as "fruits" of that arrest. In regard to other evidence acquired on the basis of the suppressed verbal statements, the Supreme Court concluded that suppression would be required unless the obtainment of the evidence had been so attenuated from the primary illegality as to purge the taint of that illegality. In support of its conclusion, the Court cited *Nardone v. United States*, which had placed the burden upon the Government to prove attenuation.

It is settled law that an interception application must name all "known" persons if the probable cause test of *Kahn* is satisfied. Hence, a failure to name a "known" person is a prima facie violation of section 2518. It is submitted that although the *Donovan* Court held that a violation of the naming requirement of section 2518 does not render an interception so unlawful as to require suppression of the evidence under Title III, such a statutory violation taints the entire interception process as to the unnamed individual. The evidence derived from such a tainted interception then becomes the "fruits" of the Government's statutorily violative conduct. Applying an analysis paralleling that employed by the Court in *Wong Sun* and *Nardone*, once the defendant has shown a violation of the naming requirement of section 2518, the burden of proof should be upon the Government to show attenuation. Attenuation in this instance could be interpreted as compelling the Government to establish that good cause existed for the violation and that the defendant was not prejudiced by the Government's actions. In this way, the deterrent element of Title III will be preserved and the policies underlying the statutory requirements will be advanced.

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126. *Id.* at 485.
127. *Id.* at 487-88.
128. *Id.* at 487.
129. 308 U.S. 338 (1939).
130. *Id.* at 341-42. The Government failed in *Wong Sun* to carry its burden of proof and the evidence in question was suppressed. 371 U.S. at 488.
131. See notes 51 & 52 and accompanying text *supra*.
132. See text accompanying note 23 *supra*.
133. 429 U.S. at 435-37. See notes 51-60 and accompanying text *supra*.
134. This taint would arise from the government's failure to obtain judicial authorization for interception of the "known," yet unnamed, individual's communications, as required by Title III. See notes 22-25 and accompanying text *supra*. See also notes 51 & 52 and accompanying text *supra*.
135. See text accompanying note 126 *supra*. The interception evidence would also be tainted if the interception itself is viewed as "unlawful." See notes 92-120 and accompanying text *supra*.
136. See notes 60 & 124-30 and accompanying text *supra*.
137. See note 124 and accompanying text *supra*.
138. See note 71 and accompanying text *supra*.
139. See notes 6, 24-25 & 30 and accompanying text *supra*.
V. Conclusion

This comment has suggested that the Supreme Court, in a line of recent decisions culminating with Donovan, has consistently and effectively relaxed the regulatory impact of Title III. After Donovan, section 2518 of Title III requires that an interception application name all "known" persons, but if the application is lawful as to a named individual, a failure to name additional "known" persons in the application will not require suppression of their intercepted communications unless that failure was intentional or the defendant was prejudiced by the omission. The naming requirement of section 2518 is therefore left with little, if any, deterrent elements to support its enforcement. The Court's interpretation of the naming requirement will undoubtedly affect other provisions of Title III: directly, as in the area of inventory notice, and indirectly, as has already occurred with respect to Title III's requirement that an interception application disclose all previous applications submitted concerning an individual named in the current application.

It has been suggested in this comment that the Donovan Court, by confining itself to a narrow scope of inquiry, erred in concluding that a violation of the naming requirement of section 2518 does not mandate suppression of interception evidence. It has been further suggested that if the Donovan decision is correct and mandatory suppression of evidence is neither required nor desired for a violation of section 2518, then the government should have the burden of proving that its violation was unintentional and did not prejudice the defendant. In this manner, the deterrence element implicit in Title III will be preserved rather than weakened.

The Supreme Court, perhaps recognizing the potential harm inherent in Donovan, suggested that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." This hope for "strict adherence," however, does not adequately ensure that electronic surveillance will be intelligently utilized with the restraint necessary to meaning-

140. See notes 33-66 and accompanying text supra.
141. See notes 67-91 and accompanying text supra.
142. 429 U.S. at 428, 435-36. See notes 52-60 and accompanying text supra.
143. See notes 76-82 and accompanying text supra.
144. See United States v. Abramson, 553 F.2d 1164 (8th Cir.), cert. denied, 430 U.S. 911 (1977). In Abramson, the application failed to fully disclose that previous wiretaps were executed upon a "known," yet unnamed, individual, a violation of 18 U.S.C. § 2518(1)(e) (1976). 553 F.2d at 1169. The court, applying the rationale of Donovan, found that § 2518(1)(e) was not "central or functional in guard-ing against unwarranted use of wiretapping or electronic surveil-lance" and denied the defendant's motion to suppress the intercepted evidence. Id. at 1170.
145. See notes 92-120 and accompanying text supra.
147. See note 37 and accompanying text supra.
fully protect the privacy of individuals. As the dissent in Donovan poignantly observed: "[H]ope is a poor substitute for certainty that the Government will make every effort to fulfill its responsibilities under Title III. We can obtain that certainty only by according full recognition to the role of the naming and notice requirements in the statutory scheme created by Congress." 149 Although "hope is a poor substitute for certainty," one can only hope that the Court, or Congress, will see fit to return the bite to the barking dog.

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149. 429 U.S. 450-51 (Marshall, J., dissenting in part).