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THE STATUTORY REQUIREMENTS FOR WIRETAP APPLICATIONS MADE CLEAR— *UNITED STATES v. GIORDANO*

In *United States v. Giordano*,[1] the government, prosecuting for narcotic violations, procured most of its evidence through the use of wiretaps. The United States Attorney General's Executive Assistant had reviewed the government's wiretap applications and subsequently appointed an Assistant Attorney General to authorize the installation.[2] The defense claimed that the wiretap evidence was inadmissible because its procurement violated section 2516(1) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigations, or a Federal agency having responsibility for the investigation of the offense as to which application is made, when such interception may provide or has provided evidence of— . . . . [The statute then lists the various offenses.][3]

The defense alleged that the Attorney General erred in the delegation of his authority to the Executive Assistant because the authorization procedure was not specifically sanctioned by section 2516(1). The govern-

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1. 94 S. Ct. 1820 (1974).

2. A person authorizing a wiretap application reviews it and sanctions the actions of wiretapping a certain telephone, home, etc. This is distinguishable from the person who reviews the application and delegates the authority of authorization to a subordinate by writing a *designation memorandum.*

The Executive Assistant to the Attorney General and the Assistant Attorney General are two separate and distinct positions.

3. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1970) [hereinafter referred to as Title III] outlines the authorization procedures, the penalties and crimes involved with electronic surveillance, and the immunity of witnesses. The defense claimed that since the government violated § 2516(1) the evidence should be suppressed according to § 2515 which states:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, . . . if the disclosure of that information would be in violation of this chapter.

ment, however, contended that the Attorney General did not delegate his authority, but remained responsible for the wiretap application, because the Executive Assistant acted only as his *alter ego*. The appellate court[4] affirmed the district court's[5] decision stating that the *alter ego* argument contravened the congressional intent behind section 2516(1), which provides for the placement of wiretap application authorization in an identifiable person.[6] The Supreme Court affirmed, concluding that "Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him . . . ."[7]

Giordano and its companion case, *United States v. Chavez*,[8] resolved two groups of conflicting decisions involving approximately one hundred cases decided by lower federal courts.[9] The conflict concerned the standards used to determine who may authorize a wiretap application before it is submitted to a court for final approval. The authorization process wherein the authorizing person is specifically identified is apparently intended as a safeguard against the abusive use of wiretaps.[10]

The authorization conflict arose over the validity of the two basic procedures used by the Department of Justice for the authorization of wiretap applications. The first procedure is the *Giordano*-type: a person with the statutory authority granted in section 2516(1) (*i.e.*, the Attorney General) neither reviews nor sees the application form, but the Executive

4. 469 F.2d 522 (4th Cir. 1972).

5. United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972).

6. The congressional intent behind Title III can be better viewed by looking at the various statutes. Besides looking at § 2516(1), one should see if the identity of the authorizing official can be ascertained from the submitted application or the subsequently issued court order as required by 18 U.S.C. § 2518 (1970) which states:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application . . . .
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify— . . .
>
> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application.

7. 94 S. Ct. at 1823.

8. 94 S. Ct. 1849 (1974).

9. For a listing of these cases *see* United States v. Robinson, 472 F.2d 973, 975 n.1 (5th Cir. 1973).

10. Judicial review is an additional safeguard.

Assistant signs a designation memorandum for him. Under a second procedure, the Attorney General reviews the application and signs the designation memorandum giving the Assistant Attorney General the authority to authorize the tap, but a third person, a Deputy Assistant Attorney General, signs the letter of authorization for the Assisant Attorney General.[11]

The two arguments raised by the government in *Giordano*-type situations are "*alter ego*" and "delegation."[12] The government raised the same two arguments in cases where the authorization procedure was similar to *Chavez*, which empowered the Deputy Assistant Attorney General to sign for the Assistant Attorney General. In addition, the government raised a third and successful contention, that the act of signing by the Deputy Assistant Attorney General was ministerial and unimportant in light of the fact that the Attorney General personally reviewed the application.[13]

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11. Since neither the Attorney General nor the Assistant Attorney General reviewed the application in *Giordano*, the decisions at the Supreme Court and appellate court levels were based upon an analysis of the first procedure, while the district court analyzed the second procedure.

12. The majority of cases in this first category have held that these two arguments are invalid and thus the substitution of people violated the prescribed procedures of Title III and called for the suppression of the derived evidence: United States v. King, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 94 S. Ct. 2628 (1974); United States v. Roberts, 477 F.2d 57 (7th Cir. 1973), *cert. denied*, 94 S. Ct. 2604, 2622 (1974); United States v. Robinson, 468 F.2d 189, *aff'd on rehearing (en banc)*, 472 F.2d 973 (5th Cir. 1972); United States v. Fox, 349 F. Supp. 1258 (S.D. Ill. 1972); United States v. Vasquez, 348 F. Supp. 532 (C.D. Cal. 1972); United States v. Narducci, 341 F. Supp. 1107 (E.D. Pa. 1972); United States v. LaGorga, 340 F. Supp. 1397 (W.D. Pa. 1972); United States v. Aquino, 338 F. Supp. 1080 (E.D. Mich. 1972); United States v. Baldassari, 338 F. Supp. 904 (M.D. Pa. 1972); United States v. Cihal, 336 F. Supp. 261 (W.D. Pa. 1972).

As a result of the *Giordano* decision, two cases have been remanded on appeal to the Supreme Court. United States v. Becker, 461 F.2d 230 (2d Cir. 1972), *vacated*, 94 S. Ct. 2597 (1974); United States v. Pisacano, 459 F.2d 259 (2d Cir. 1972), *vacated*, 94 S. Ct. 2597 (1974). *See also* United States v. Mainello, 345 F. Supp. 863 (E.D.N.Y. 1972).

13. The Attorney General personally reviewed the wiretap application, but there was a controversy as to whether he actually authorized the wiretap application or merely delegated the authority to his Assistant Attorney General to authorize it. To illustrate this situation, one should look at the wiretap application forms used to see if there was a designation or an actual authorization.

The *designation memorandum* sent to Will Wilson by Attorney General Mitchell in part said:

> Pursuant to the powers conferred in me by Section 2516 of Title 18, United States Code, you are hereby specifically designated to exercise those powers for the purpose of authorizing [specific name] to make the above-described application.

This memo was signed "JNM" at the top by John Mitchell.

The Will Wilson *letter of authorization* stated:

> Accordingly, you are hereby authorized, under the power specially delegated to me in this proceeding by the Attorney General of the United States, the

This Note will dissect and analyze the reasoning behind the *alter ego* and delegation arguments presented in the *Giordano* decisions.

Title III was the result of a long recognized need for an effective device to combat organized crime, particularly gambling and narcotics.[14] Wiretapping and other types of electronic surveillance were known to be effective, but Congress realized the existence of many inherent dangers in the use of electronic surveillance.[15] The constitutional issues of the right to privacy and the "big brother" image of 1984 were hopelessly intertwined with the issue of electronic surveillance. As a result, in 1934,

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Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18 United States Code, to make application to a judge of competent jurisdiction. . . .

/s/ Will Wilson
Assistant Attorney General.

In the various cases, Will Wilson did not sign the letters, instead his Deputy Assistant Attorneys General Henry Peterson or Harold Shapiro or an unknown person signed Mr. Wilson's name.

Even though the letters on their face clearly show a designation, most courts seem to say that the Attorney General actually authorized the wiretap application, thereby making the authorization proper. United States v. Ceraso, 467 F.2d 647 (3d Cir.), *rev'g sub nom.* United States v. Casale, 341 F. Supp. 374 (M.D. Pa. 1972); United States v. Consiglio, 342 F. Supp. 556 (D. Conn. 1972); United States v. Doolittle, 341 F. Supp. 163 (M.D. Ga. 1972); United States v. LaGorga, 340 F. Supp. 1397 (W.D. Pa. 1972); United States v. D'Amato, 340 F. Supp. 1020 (E.D. Pa. 1972); United States v. Iannelli, 339 F. Supp. 171 (W.D. Pa. 1972). *See also* United States v. Chavez, 94 S. Ct. 1849 (1974), where the Supreme Court agreed with the majority circuits and upheld the wiretap procedure even though the wiretaps did not comply with § 2518(1)(a),(4)(d). The court of appeals in *Chavez* held that the signature of Will Wilson signed by his deputy deceived the court which issued the wiretap order as to the identity of the authorizing official. The Supreme Court in reversing the court of appeals stated that if the issuing court knew that the authorizing official was actually Attorney General Mitchell instead of Will Wilson, the wiretap would still have been issued. *See* United States v. Consiglio, *supra* at 560 n.7, which said that this misidentification was not a "material fraud upon the Court" and admitted the procured evidence.

14. *See* FINAL REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, S. REP. NO. 725, 82d Cong., 1st Sess. 5 (1951); 114 CONG. REC. 14,767 (May 23, 1968).

15. *See* 1968 U.S. CODE CONGRESSIONAL & ADMIN. NEWS 2112, 2224; S. REP. NO. 1304, 76th Cong., 3d Sess. 383 (1940). For more general discussions pertaining to the dangers of electronic surveillance *see* Berger v. United States, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967); Wong Sun v. United States, 371 U.S. 471 (1963); Olmstead v. United States, 277 U.S. 438 (1928) (dissenting opinions of Justices Holmes and Brandeis). *See also* Note, *Constitutional Law—Electronic Surveillance and the Fourth Amendment: Warrant Required for Wiretapping of Domestic Subversives*, 22 DEPAUL L. REV. 430 (1972); Note, *Electronic Surveillance and the Supreme Court: A Move Back?*, 21 DEPAUL L. REV 806 (1972); Comment, *Electronic Surveillance: The New Standards*, 35 BROOKLYN L. REV. 49 (1968).

Congress made all electronic surveillance illegal.[16] It was not until 1968, that Title III was passed, enabling law enforcement officials to use electronic eavesdropping devices under restricted circumstances and circumscribed procedures.[17]

Giordano explicitly investigated the congressional intent behind Title III.[18] The district court's decision in *United States v. Focarile*[19] had previously concluded that Congress wanted the responsibility for each wiretap and eavesdrop authorization to rest in an identifiable person. The proposed forerunners of sections 2516 and 2518 of Title III can be traced back to 1961 with the introduction of Senate Bill 1495[20] which stated, *inter alia*, that the Attorney General or *any* officer of the Department of Justice or *any* United States attorney authorized by the Attorney General may in turn authorize an electronic surveillance.

Henry Miller, the Assistant Attorney General in charge of the Criminal Division of the Justice Department in 1961, recommended that the power of authorization be confined in the Attorney General or any specially designated Assistant Attorney General in order to "give greater assurance of a responsible executive determination."[21] The Department of Justice adopted Mr. Miller's recommendation and issued a letter to the Senate urging the introduction of an amendment which restricted the number of persons authorized to issue wiretap applications.[22] In 1967, Professor G. Robert Blakey, consultant to the President's Commission of Law Enforcement and Administration of Justice, published a proposed bill containing a requirement compelling the identification of the authorizing officer in each wiretap application.[23] Later that year a bill was introduced which required not only the identity of the authorizing officer to be set forth in the application, but also that the name be listed in the court

16. The Federal Communications Act of 1934 § 605, 47 U.S.C. § 605 (1970).

17. 18 U.S.C. §§ 2516(1), 2518 set forth the procedure for authorization of wiretap applications; 18 U.S.C. §§ 2516(1)(a)-(g) limits the crimes for which surveillance may be employed; 18 U.S.C. §§ 2511(1), 2515, 2520 set forth the penalties and consequences for violations of the set forth rules; and, 18 U.S.C. § 2512 makes it illegal for a private person to intercept any wire or oral communications.

18. *See also* United States v. Chavez, 94 S. Ct. 1849 (1974), *rev'g*, 478 F.2d 512 (9th Cir. 1973); United States v. Ceraso, 467 F.2d 647, 652 (3d Cir. 1972); United States v. Iannelli, 339 F. Supp. 171, 175 (W.D. Pa. 1972).

19. 340 F. Supp. 1033 (D. Md. 1972).

20. *See Hearing on S. 1086, S. 1221, S. 1495, S. 1822 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961), at 5.

21. *Id.* at 356.

22. *Id.* at 372.

23. 1967 TASK FORCE REPORT: ORGANIZED CRIME, app. C, at 80, 109.

order.[24] Further, Congress required a report of the wiretap application and order to be filed with the Administrative Courts and Congress.[25] The finished statute contained three basic requirements: (1) the wiretap authorization must be made by the Attorney General or a specially designated Assistant Attorney General;[26] (2) the identity of the authorizing person must be listed in both the application and the court order;[27] (3) the identity must be contained in a report to the Administrative Courts and Congress.[28]

Congress recognized the necessity for fixing responsibility in an identifiable person and embodied the language of the 1961 Justice Department recommendation in section 2516(1). A further example of congressional intent is illustrated as follows:

> Paragraph (1) [of section 2516] provides that the Attorney General, or any Assistant Attorney General of the Department of Justice specifically designated by him, may authorize an application for an order authorizing the interception of wire or oral communications. This provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. This provision in itself should go a long way in guaranteeing that no abuses will happen.[29]

This determination of congressional intent in enacting electronic surveillance legislation is the predominant issue in many wiretap cases.

In *Giordano*, the government was investigating the defendants for possible illegal activities in the sale of narcotics. The agents assigned to the case[30] thought that valuable evidence could be procured through electronic surveillance, particularly through the use of "pen registers" and telephone wiretaps.[31] On October 16, 1970, the agents requested Attorney

24. *See Senate Hearings on S. 300, S. 552, S. 580, S. 674, S. 675, S. 678, S. 798, S. 824, S. 916, S. 917, S. 992, S. 1007, S. 1094, S. 1194, S. 1333, S. 2050 Before the Subcomm. on Criminal Laws and Procedures of the Comm. of the Judiciary*, 90th Cong., 1st Sess. 77 (1967); 18 U.S.C. § 2518 (1970).

25. 18 U.S.C. § 2519 (1970).

26. *Id.* § 2516(1).

27. *Id.* § 2518(1)(a), (4)(d).

28. *Id.* § 2519.

29. 1968 U.S. CODE CONGRESSIONAL & ADMIN. NEWS, S. REP. NO. 1097, at 2112, 2185.

30. The Bureau of Narcotics and Dangerous Drugs.

31. A "pen register" is a device which registers telephone numbers called from a certain phone but does not intercept the conversations or even tell if the call was completed. *See* United States v. Focarile, 340 F. Supp. 1033, 1036-38 n.1 (D. Md. 1972); United States v. Caplan, 255 F. Supp. 805, 807 (E.D. Mich. 1966). Since

General John N. Mitchell to authorize the wiretaps. Pursuant to established Department of Justice procedures, the Executive Assistant to the Attorney General, Sol Lindenbaum, reviewed the request because Mr. Mitchell was out of town. The Executive Assistant then wrote a memorandum to Assistant Attorney General Will Wilson specially designating him to authorize the wiretap application under section 2516(1). On the belief that the Attorney General would have personally taken the same action, Mr. Lindenbaum signed Mitchell's initials, instead of his own, to the designation memorandum.[32]

The application was reviewed by an attorney and the Chief and Deputy Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Justice Department and then forwarded to Deputy Assistant Attorney General Shapiro.[33] In addition, an unknown party signed Assistant Attorney General Will Wilson's name on the letter of authorization.[34]

Subsequently, a court order was issued to permit the use of electronic surveillance in compliance with the application that bore the initials of Attorney General Mitchell and Will Wilson's signature. Mr. Mitchell and Mr. Wilson had no personal knowledge of the application for this wiretap.

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the arguments for the "pen register" are the same as for the telephone wiretaps, only the wiretaps will be discussed.

32. There was also an application for the extension of time on the wiretap which was personally approved by Attorney General Mitchell. Even though the extension was properly authorized, its derived evidence would also be suppressed because of the "fruit of the poisonous tree" doctrine. *See* United States v. Roberts, 477 F.2d 57 (7th Cir. 1973) (two defendants were investigated for gambling violations as a result of information received on previous improperly authorized wiretaps concerning different defendants). *See also* Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). However, if there remained sufficient independent probable cause to issue the second wiretaps after the first wiretaps had been suppressed, the evidence gained through the second wiretap need not be suppressed. In other words, it is possible to have evidence independent of the tainted evidence which can furnish probable cause for the second wiretap. *See* United States v. Iannelli, 339 F. Supp. 171, 179 (W.D. Pa. 1972).

33. 340 F. Supp. at 1052.

34. *Id.* In many of the other cases it was known who signed Will Wilson's name to the authorization letters. It was either Deputy Assistant Attorney General Harold Shapiro or Deputy Assistant Attorney General Henry Peterson acting under the authority given to them by Will Wilson. *See* United States v. Roberts, 477 F.2d 57 (7th Cir. 1973) (Petersen signed an affidavit, *see* government's brief at 4); United States v. Ceraso, 467 F.2d 647 (3d Cir. 1972) (Shapiro); United States v. Cox, 462 F.2d 1293, 1298 (8th Cir. 1972) (Peterson). In fact the Deputy Assistant Attorneys General signed most of the Title III applications and Will Wilson signed hardly any, even though they all bear his name. Someone suggested during the Giordano investigation of the unacknowledged letters that Will Wilson himself signed the Giordano application and everyone present laughed. 469 F.2d at 524 n.3.

The defendants were brought to trial and the district court[35] suppressed the evidence procured from the wiretaps, finding the defendants not guilty. The government subsequently appealed.

THE *Alter Ego* ARGUMENT

The defendants claimed that since neither the Attorney General nor the Assistant Attorney General authorized the application as required by section 2516(1) the evidence procured was thereby inadmissible.[36] The government contended that the procedure was legitimate because Sol Lindenbaum acted as an *alter ego* of John Mitchell.[37] The government argued that because the Executive Assistant to the Attorney General worked closely with the Attorney General and became familiar with his habits, standards and actions, he could with near certainty know which way the Attorney General would decide any given situation and thus act accordingly. Sol Lindenbaum approved the wiretap *not* because *he thought* it was appropriate, but because, as Mr. Mitchell's *alter ego*, he knew the *Attorney General would think it was appropriate* and approve it. The government concluded that the responsibility was still vested in Attorney General Mitchell. The government argued that since the responsibility still rested with Mitchell, the intent of Congress to have the responsibility in an identifiable person was satisfied under this procedure.

The appellate court concluded that the government's argument failed primarily because the *alter ego* theory obscured the identity of the responsible person. The court did not look at the government's contention that Mr. Mitchell, by ratifying Mr. Lindenbaum's action, fulfilled the requirements of a needed identifiable person.[38] The court took a different approach concerning future activity in this area:

> The premise is that future alter egos will always act within guidelines created by the Attorney General and that future Attorneys General will then always acknowledge responsibility for authorizations penned in their names. Our concern here is not primarily with past action of a former Attorney General, but rather the future consequence of sanctioning an alternative scheme which could be abused hereafter to evade the congressional policy of locating responsibility for wiretap applications with the Attorney General and a limited number of his designated assistants. If we should accept the Government's reasoning, there can be no assurance that in some future case, if the particular wiretap authorization proved politically embarassing, the Attorney General would not then repudiate his "Linden-

35. 340 F. Supp. 1033 (1972).

36. 18 U.S.C. § 2515 (1970).

37. 469 F.2d at 526.

38. *Id.* at 528.

> baum." The Attorney General would always be able to say with the benefit of hindsight that the subordinate had betrayed his confidence, acted beyond the scope of his responsibility, and the actions taken were not those of an agent.[39]

If the Executive Assistant or some other agent alleges that he acted as an *alter ego* of the Attorney General and the Attorney General repudiates the agent's action the identity of the responsible person becomes uncertain. The desire of Congress to have an identifiable person responsible for the wiretap is destroyed.

The court further stated that the *alter ego* theory destroys the purpose of Congress' legislative intent which sought to centralize the wiretapping authority because such a theory permits nearly everyone to act on the Attorney General's behalf.

> It need not stop with Lindenbaum, but could be extended with an equal claim of validity to anyone within or without the Department of Justice. In determining who qualifies as an alter ego, it would permit sidestepping the congressional mandate fixing the level of those who may be designated to authorize applications.[40]

The appellate court found that the *alter ego* theory subverts congressional intent in three other ways.[41] First, Congress wanted the responsible person subject to the scrutinization of the "political process."[42] The Executive Assistant is not subject to this process; he need not be approved by the Senate but rather he is appointed by the Attorney General.[43] Secondly, the government alleged that even if the procedure was not technically correct, the procedure used created a uniform policy with just as many safeguards.[44] The court stated that the procedure does not have the statutory safeguards, and consequently violated the separation of powers theory.[45] The court further stated that Congress intended a certain procedure and it is not up to the Executive Branch to create another, no matter how flawless or superior it may be. Congress clearly stated that no other deviate practice should flourish.[46] In addition, the government pointed out that the proliferation of wiretap applications has made it impossible for the Attorney General to personally review each one; there-

39. *Id.*

40. *Id.*

41. *Id.* at 527-29.

42. *Id.* at 527. *See also* 340 F. Supp. 1033, 1057. "Political process" means subject to approval by the Senate. 28 U.S.C. § 506 (1970).

43. *See* 28 C.F.R. § 0.6 (1973).

44. 469 F.2d at 528.

45. *Id.*

46. S. REP. No. 1097, 90th Cong., 2d Sess. 2185 (1968).

fore, the Executive Assistant should be allowed to act as his *alter ego*. The appellate court found that the government's contention violated the common rule of statutory construction, that the enumeration of certain people implies an exclusion of all others.[47] Section 2516(1) states that the Attorney General or a specially designated Assistant Attorney General may authorize the application. In accordance with this provision, the appellate court held that an Assistant Attorney General may act as the Attorney General's *alter ego*; however, by this congressional scheme of enumeration, the Executive Assistant cannot.

THE DELEGATION ARGUMENT

The government did not relinquish on this last point of statutory construction, but insisted that the Executive Assistant was not only a qualified *alter ego*, but that the Attorney General could *delegate* his authority to the Executive Assistant. The government contended that 28 U.S.C. § 510 allows the Attorney General to delegate to any other officer any of his functions including those of section 2516(1).[48]

Affirming the court of appeals, the Supreme Court based its decision on a delegation theory, instead of addressing itself to the *alter ego* theory. It held that section 2516(1) limited the delegation power authorized by section 510. The Court further illustrated this by searching into the legislative history of Title III.

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47. 469 F.2d at 529; Casualty Co. v. United States, 314 U.S. 527, 533 (1942); Ginsburg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932).

48. 28 U.S.C. § 510 (1970) states:

> The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

It may be noted that the *alter ego* and the delegation arguments are two mutually exclusive alternate arguments. Under the *alter ego* argument, the Attorney General stays fully responsible for any actions done under his name; while under the delegation argument, he is allowed to delegate both his authority and his responsibility. *See* United States v. King, 478 F.2d 494, 504 (9th Cir. 1973), *cert. denied*, 94 S. Ct. 2628 (1974).

The government claimed the delegation process is a necessity because of the great number of applications. But in United States v. Robinson, 468 F.2d 189, 194 (5th Cir. 1972), the court refused to bend and said that Congress must pass legislation to relieve the Attorney General of his overload. In United States v. Narducci, 341 F. Supp. 1107, 1115 (E.D. Pa. 1972), the court recognized (1) that Congress can pass legislation to relieve the Attorney General and (2) that the Attorney General can delegate his authority to an Assistant Attorney General. Both ways relieve the overload and do not violate any statutes.

Other cases such as *United States v. Robinson*[49] and *United States v. Pisacano*[50] have clearly pointed out the opposing viewpoints of the delegation argument. *Robinson* is a case with virtually the same facts as *Giordano*, the chief factual distinction being that the identity of the person who signed Will Wilson's name to the authorization letter was known. Consequently, the appellate court reversed the trial court's conviction and suppressed the derived evidence. The court concluded that section 2516 (1) was a limitation on section 510 since section 510 existed before section 2516(1).[51] The court reasoned that the supplemental words "or any specially designated Assistant Attorney General" would have been surplusage if delegation was allowed.

On the other hand, the appellate court in *Pisacano* upheld the validity of such wiretaps on the basis of the delegation argument. In *Pisacano*, the defendants pleaded guilty to gambling violations[52] before realizing that the evidence obtained which caused them to plead guilty might have been tainted because of the wiretap procedure used. The procedure was the same as that used in *Robinson*. However, the court of appeals upheld the guilty pleas on the grounds that the wiretap was properly authorized. Without specifically referring to 28 U.S.C. § 510, the court stated that if Congress did not mean to delegate authority, it would have expressly said so in the statute.[53] To prove this point, the court cited section 101 of the Civil Rights Act of 1968[54] passed during the same term as the Omnibus Crime Control and Safe Streets Act of 1968. Section 101 of the Civil Rights Act states that the Attorney General or the Deputy Attorney General may act only in accordance with this section and the "function of certification may not be delegated." By implication, the court reasoned that 18 U.S.C, § 2516(1) may authorize delegation of power because explicit words limiting the delegation are missing in the statute. The Supreme

49. 468 F.2d 189 (1972), *aff'd on rehearing (en banc)*, 472 F.2d 973 (5th Cir. 1973).

50. 459 F.2d 259 (2d Cir. 1972), *vacated*, 94 S. Ct. 2597 (1974).

51. 468 F.2d at 192.

52. 18 U.S.C. § 1084, transmission of wagering information by wire communication in interstate commerce; and 18 U.S.C. § 1952, transportation in the aid of racketeering.

53. 459 F.2d at 263.

54. Civil Rights Act of 1968 § 101, 18 U.S.C. § 245(a)(1) (1970) states:
No prosecution of any offense described in this section shall be undertaken by the United States except upon certification in writing of the Attorney General or the Deputy Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which *function of certification may not be delegated.* [Emphasis added.]

Court twisted the *Pisacano* argument around and used section 101 as an example that Congress did not intend to have section 510 controlling and thus allowed the Attorney General to freely delegate his duties. The Supreme Court by giving section 2516(1) a fair reading concluded it must be a limit on section 510.[55]

To further bolster the position held in *Pisacano*, the government in *Robinson*[56] supported its delegation argument by citing *December 1968 Grand Jury v. United States*[57] which held section 510 to have broadened 18 U.S.C. § 2514.[58] Under section 2514 a United States attorney can apply for an order requiring a witness to testify "upon the approval of the Attorney General." The government contended that if section 510 can be applied to section 2514, it can also be applied to section 2516(1).

The *Robinson* court distinguished the two statutes on a conceptually weak basis. It found that two different "gravities" were involved; that section 2514 does not approach the constitutional significance of section 2516(1).[59] *Robinson* held that Congress was dealing with two separate problems and concluded that while section 2514 could allow delegation, section 2516(1) could not go beyond the terms of the statute.

The government's analogy between sections 2514 and 2516(1) can be held invalid by analyzing the concept of statutory construction. *United States v. Aquino*,[60] using the same statutory construction argument as the appellate court did in *Giordano*, applied this concept to the delegation argument. *Aquino*, a case suppressing wiretap evidence against alleged gambling violators, stated that section 2516(1) has supplemental words which act as an outer limit to the delegation power, while section 2514 does not have any words which preclude the inclusion of any people not specifically mentioned.[61]

The rule of statutory construction, in addition to distinguishing the two sections 2514 and 2516(1) seems to cause the confusion in the first place. Does 2516(1) by statutory construction act as a limit upon 510 or does 510 broaden 2516(1)? The majority of the courts, including the Su-

55. 94 S. Ct. at 1826.

56. 468 F.2d at 193.

57. 420 F.2d 1201 (7th Cir.), *cert. denied*, 397 U.S. 1021 (1970).

58. Section 2514 provides that "such United States Attorney, upon approval of the Attorney General, shall make application to that court that the witness shall be instructed to testify or produce evidence. . . ." The statute grants immunity to the witness on such procured evidence.

59. 468 F.2d at 193.

60. 338 F. Supp. 1080 (E.D. Mich. 1972).

61. *Id.* at 1083.

preme Court, in reviewing the legislative history of Title III have concluded the former is the correct answer. The *Pisacano* appellate court looked for an explicit indication of intent by Congress to deny further delegation. The legislative history of Title III and its predecessors does not clearly reveal any statement that would resolve this doubt. The late Senator Thomas Dodd, who introduced one of the earlier proposed bills, made one statement about confining the delegation power:

> As for the authority S.1495 would lodge directly in the Attorney General, I point out that he must act personally, and cannot act through a delegee; and that he must act under promulgated rules and regulations, which will be open to scrutiny by the Congress and by the public.[62]

However, a question arises as to whether Senator Dodd was referring to the corresponding section of 2516(1), since his bill was differently worded and seven years had elapsed until the passage of Title III.

Nevertheless, if one looks at the intent of Congress to have a readily identifiable person subject to the political process, it must be seen that the Executive Assistant is not a qualified person. The government maintained that delegation to the Executive Assistant provided for a readily identifiable person and centralized authority. The first case to confront this argument, *United States v. Narducci*,[63] where the court suppressed the wiretap evidence used against the defendants charged with conspiracy and gambling violations, claimed it proved too much. That is, section 510 would allow delegation to anyone in the department which therefore destroys any centralization of authority and is clearly inconsistent with Congressional intent.[64]

CONCLUDING REMARKS

The Supreme Court in *Giordano* stated that

> it appears wholly at odds with the scheme and history of the Act to construe § 2516 to permit the Attorney General to delegate his authority at will, whether it be to his Executive Assistant or to any officer in the Department other than an Assistant Attorney General.[65]

The appellate court found that the court which issued the wiretap order and the investigating agents were deceived by improper authorizations. Other cases, while upholding the wiretap authorization, criticized the gov-

62. *Hearings on S. 1086, S. 1221, S. 1495, S. 1822 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 87th Cong., 1st Sess. 450 (1961).

63. United States v. Narducci, 341 F. Supp. 1107, 1115 (E.D. Pa. 1972).

64. *Contra*, United States v. Iannelli, 339 F. Supp. 171 (W.D. Pa. 1972).

65. 94 S. Ct. at 1830.

ernment's failure to adhere to the provisions of Title III.[66] Some courts, particularly the ninth circuit, have strongly criticized the government's tactics and suppressed the evidence of the wiretap if the authorization did not *strictly* adhere to Title III's provisions.[67] While the Supreme Court did not take the strict viewpoint handed down by the ninth circuit, it refused to allow the procedures to deviate substantially from those proscribed.

The courts' efforts to keep wiretaps under strict control should not be surprising. Many years ago the court was called on to prevent and correct any deviations from the prescribed methods. Congressmen supported the passage of Title III with the understanding that there would be "strict court supervision."[68] In his earlier bill, Senator Dodd placed the responsibility in the lap of the courts in an effort to insure that any standards applicable to them shall be maintained.[69] The courts took the responsibil-

66. *See* United States v. Chavez, 94 S. Ct. 1849 (1974); United States v. Becker, 461 F.2d 230 (2d Cir. 1972).

67. United States v. King, 478 F.2d 494, 503-04 (9th Cir. 1973). The government in order to keep the evidence from being suppressed contended the spirit, if not the letter, of the law was followed. The government claimed it had in good faith set up a procedure which exceeded the requirements of Title III. Since it was in good faith, there was no need to apply the drastic remedy of suppression because of a simple technical mistake. *Giordano* and *King* rejected this argument, because they rejected the premise that the mistake was technical.

United States v. King, *supra* at 504, further rejected the contention that the government acted in good faith because the letters of authorization and memoranda were drawn exactly as the statute prescribed. The applications were deliberately made to mislead the court.

The government also contested the suppression of evidence by contesting the constitutionally debated and judicially made exclusionary rule or "fruit of the poisonous tree doctrine." But in *Giordano* and in United States v. Narducci, 341 F. Supp. 1107, 1115 (E.D. Pa. 1972), the courts pointed out that the government's arguments were misplaced. The rule here is not a constitutional question at all, but a separate statutory matter which the courts are obligated to follow. Section 2515 specifically states the suppression is necessary if disclosure is "in violation of this chapter."

This wording (*see* note 3 *supra*) dispels another of the government's various contentions based on § 2518(10)(a) which states:

> Any aggrieved person in any trial . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted.

The government contended the technical violation is not "unlawful," and that, therefore, the defendant could not move to suppress the evidence. United States v. Narducci, *supra* at 1116, quickly dispelled this by looking just at the wording of § 2515 and gave "unlawful" a broader definition.

68. *See, e.g.*, 1968 U.S. CODE CONGRESSIONAL & ADMIN. NEWS, Individual Views of Sen. Eastland, 2270.

69. *Hearings on S. 1086, S. 1221, S. 1495, S. 1822 Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 87th Cong., 1st Sess. 450 (1961):

> My reply is that the legislative branch of Government must, in the nature of our system, leave it to the appellate courts to correct the judicial errors of

ity and explained why. Judge Becker in *Narducci* succinctly elaborated:

> [T]he necessity for strict compliance with the statute in a wiretap situation stems just as much from the precedent setting example of condoning laxity in years to come, with serious consequences to personal liberties, as from concern over the rights of the accused in a given case.[70]

The government cleverly argued its case, not for the promotion of societal order or for respect of the law, but for the expediency of the moment.[71] In his famous dissent in *Olmstead v. United States*,[72] Justice Brandeis warned:

> Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law. . . .[73]

The Supreme Court in affirming the appellate court which had suppressed wiretap evidence seemed to adopt this view and attempted to put a stop to the grosser of the two deviant practices used in authorizing wiretap applications by the Department of Justice.[74]

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the lower courts and to ensure that the standards which legislation prescribes for court action actually govern the courts.

70. United States v. Narducci, 341 F. Supp. 1107, 1115 (E.D. Pa. 1972).

71. United States v. King, 478 F.2d 494, 506 (9th Cir. 1973).

72. 277 U.S. 438 (1928).

73. *Id.* at 485.

74. The second practice involved in *Chavez* has since been conformed to the provisions of Title III by redrafting the form letters which now point to the Attorney General as the authorizing official instead of the Assistant Attorney General.