ELECTRONIC SURVEILLANCE, TITLE III, AND THE REQUIREMENT OF NECESSITY

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Title III of the Omnibus Crime Control and Safe Streets Act of 1968[1] was enacted to remedy what was considered an intolerable state of the law in the area of electronic surveillance.[2] Title III specifically set out to accomplish the dual purpose of protecting the privacy of wire and oral communications[3] and of delineating on a national basis the circumstances and conditions under which the interception[4] of wire and oral communications may be authorized.[5] The passage of Title III marked an important milestone in the controversy[6] over the constitu-

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* Member, second year class.

1. 18 U.S.C. §§ 2510-2520 (1968) [hereinafter referred to as Title III].

2. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 67 (1968) [hereinafter cited as SENATE REPORT]. This report is also set out in full in 2 U.S. CODE CONG. & AD. NEWS 2112 (1968). "Electronic surveillance" as used in this note will refer to both wiretapping and electronic eavesdropping (commonly referred to as "bugging") without the consent of any party to the communication. Title III applies to both wiretapping and "bugging." 18 U.S.C. § 2510(1) & (2) (1970).

3. "[O]ral communication means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2) (1968). For circumstances justifying such expectation, *see* Katz v. United States, 389 U.S. 347 (1967). "Wire communication" is any communication made through communication facilities making the transmission by wire, cable, or similar connection between point of origin and of reception, and furnished by a common carrier of interstate or foreign communications. 18 U.S.C. § 2510(1) (1968).

4. "Interception" is defined as the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4) (1968).

5. SENATE REPORT, *supra* note 2, at 66.

6. *See*, Gelbard v. United States, 408 U.S. 41, 62 (1972) (Douglas, J., concurring); Cox v. United States, 406 U.S. 934 (1972) (Douglas, J., dissenting from denial of certiorari); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Osborn v. United States, 385 U.S. 323, 353-54 (1966) (Douglas, J., dissenting); Hoffa v. United States, 385 U.S. 293, 317 (1966) (Warren, C.J., dissenting); Lopez v. United States, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring in the result); *Id.* at 463-71 (Brennan, J., dissenting); On Lee v. United States, 343 U.S. 747, 758 (1952) (Frankfurter, J., dissenting); *id.* at 765 (Douglas, J., dissenting); Olmstead v. United States, 277 U.S. 438, 465-66 (1928); *id.* at 471-78 (Brandeis, J., dissenting); S. DASH, R. SCHWARTZ, & R. KNOWLTON, THE EAVESDROPPERS (1959); E.

tionality[7] and propriety of permissive electronic surveillance: it was the first time Congress had ever authorized the use of electronic surveillance under any circumstances.

One key limiting provision of Title III, intended to prevent unwarranted invasions of personal privacy, mandates that the application for an interception order contain:

> [A] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.[8]

A judge[9] may authorize an order permitting electronic surveillance only if it is found that:

> [N]ormal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.[10]

These two related requirements, which will be referred to as the "necessity requirement," are not further mentioned elsewhere within Title III, nor does Title III provide guidelines for the interpretation of

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LAPIDUS, EAVESDROPPING ON TRIAL (1974); Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAW. 657 (1968); Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969); Symposium, *The Wiretapping-Eavesdropping Problem: Reflections on The Eavesdroppers*, 44 MINN. L. REV. 811 (1960) (presenting five different viewpoints—the legislator, prosecutor, defense counsel, private investigator, and law professor).

7. The Supreme Court has never decided the issue of the constitutionality of Title III, though the most recent cases involving Title III to be before the Court implicitly accept its constitutionality. *See* United States v. Chavez, 416 U.S. 562 (1974); United States v. Giordano, 416 U.S. 505 (1974). All of the federal courts of appeals that have considered the issue have found Title III constitutional. *E.g.*, United States v. Ramsey, 503 F.2d 524 (7th Cir. 1974); United States v. Martinez, 498 F.2d 464 (6th Cir.), *cert. denied*, 95 S. Ct. 639 (1974); United States v. James, 494 F.2d 1007 (D.C. Cir. 1974); United States v. Tortorello, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. Bobo, 477 F.2d 974 (4th Cir. 1973), *cert. denied sub nom.* Gray v. United States, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 73-231); United States v. Whitaker, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973); United States v. Cafero, 473 F.2d 489 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974); United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972). All of the federal district courts that have considered the issue of the constitutionality of Title III have found it constitutional, with one exception. United States v. Whitaker, 343 F. Supp. 358 (E.D. Pa. 1972), *rev'd*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973).

8. 18 U.S.C. § 2518(1)(c) (1968).

9. The application must be approved by a United States district court judge or United States court of appeals judge, not a United States magistrate. 18 U.S.C. § 2510(9) (1968). In the case of state applications the state statute must specify what types of judges may issue interception orders.

10. *Id.* § 2518(3)(c) (1968).

the requirement, how it is to be implemented, or what considerations or criteria should be evaluated in the making of the judicial determination of necessity.[11] The Senate Report accompanying Title III[12] also fails to elucidate the congressional intent in regard to the showing of necessity.[13]

This lack of explanation of the necessity requirement has permitted courts to interpret its meaning with few restrictions and has led to the virtual "reading out" of the requirement from Title III.[14] Research has revealed no case holding that the showing of necessity required by Title III has not been met in an application for an interception order. Boilerplate allegations of necessity are frequently accepted as sufficient showings.[15] Judicial opinions dealing with the necessity issue usually have treated the requirement and the factual situation in which the application arises in a cursory manner, simply finding that the requirement has been met.[16]

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11. Title III only requires that the *application* for the interception order contain a "full and complete statement" about the need for the use of electronic surveillance. *Id.* § 2518(1)(c) (1968). Title III does not require the judge approving an application to include in his order the reasons for, the criteria of, or the information evaluated in determining whether or not the necessity requirement has been met. In fact the judge need not even include a simple finding of necessity in the authorization order. *See* note 102 *infra*. *But see* United States v. Curreri, 363 F. Supp. 430, 435 (D. Md. 1973). This interpretation results from the fact that 18 U.S.C. § 2518(4) (1970), specifying what must be contained in the interception order, fails to make any reference to the necessity requirement. Therefore, the actual criteria by which the necessity requirement is interpreted remain unarticulated.

12. SENATE REPORT, *supra* note 2 [hereinafter referred to in text as Senate Report].

13. *Id.* at 101. The report's explanation of the necessity requirement is extraordinarily sparse, especially in light of the fact that "[b]ecause of the complexity in the area of wiretapping and electronic surveillance, [the Senate Judiciary Committee] believes that a *comprehensive and in-depth analysis* of title III would be appropriate in order to make explicit congressional intent in this area." *Id.* at 88 (emphasis added).

14. *But cf.* United States v. Kahn, 471 F.2d 191, 197 (7th Cir. 1972), *rev'd on other grounds*, 415 U.S. 143 (1974).

15. *See* text accompanying notes 132-48 *infra*.

16. *E.g.*, United States v. Robertson, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 74-974); United States v. Brick, 502 F.2d 219, 224 (8th Cir. 1974); United States v. James, 494 F.2d 1007, 1015-16 (D.C. Cir. 1974); United States v. Bynum, 485 F.2d 490, 499-500 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); United States v. Bobo, 477 F.2d 974, 982-83 (4th Cir. 1973), *cert denied sub nom.* Gray v. United States, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 73-231); United States v. Buschmann, 386 F. Supp. 822, 827 (E.D. Wis. 1975); United States v. Halmo, 386 F. Supp. 593, 595-96 (E.D. Wis. 1975); United States v. Carubia, 377 F. Supp. 1099, 1108 (E.D.N.Y. 1974); United States v. Herrmann, 371 F. Supp. 343, 347 (E.D. Wis. 1974); United States v. Staino, 358 F. Supp. 852, 856-57 (E.D. Pa. 1973); United States v. DeCesaro, 349 F. Supp. 546, 551 (E.D. Wis. 1972), *rev'd on other grounds*, 502 F.2d 604 (7th Cir. 1974); United States v. Sklaroff, 323 F. Supp. 296, 307-08 (S.D. Fla. 1971), *aff'd on other grounds*, 506 F.2d 837 (5th Cir. 1975).

The United States Supreme Court has yet to deal directly with the necessity requirement of Title III.[17] The uncertainties surrounding this requirement warrant a thorough analysis of the requirement, its basis, and its implementation by the courts.

I. Title III Provisions

Title III is an attempt by Congress to provide law enforcement agencies with a judicially supervised procedure for the authorization of the limited use of electronic surveillance. It prohibits any person from willfully intercepting or disclosing the contents of any wire or oral communication[18] unless the person is a party to the communication or has

17. Two petitions for certiorari have directly raised the necessity requirement issue. United States v. Bynum, *vacated on other grounds*, 417 U.S. 903 (1974); Fein v. United States, *cert. denied*, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975).

Mr. Justice Powell, in a dissent in *United States v. Giordano*, 416 U.S. 505 (1974), joined by Chief Justice Burger and Justices Blackmun and Rehnquist, does discuss the necessity issue in passing, finding that the affidavits in support of the application "established the inadequacy of alternative investigative means and demonstrated that without a wiretap . . . narcotics agents would be unable to discover his source of supply or method of distribution." *Id.* at 560. But there is no discussion of the requirement beyond the bare assertion that it had been met. Since compliance with the necessity requirement was not an issue before the Court, it is difficult to assess the weight to be attached to the finding.

The Supreme Court has dealt with some Title III issues. In *Alderman v. United States*, 394 U.S. 165 (1969), the Court held that a person has standing to challenge the legality of interceptions only if an actual participant in the intercepted conversations or if such interceptions occurred on the person's premises. *Id.* at 179-80. Once the illegality of the interceptions is established, all intercepted conversations must be turned over to the defendant so that fruit of the poisonous tree issues may be adequately resolved. *Id.* at 182. The Court held in *United States v. United States District Court*, 407 U.S. 297 (1972), that the national security exception to Title III does not apply to electronic surveillance in domestic security matters involving domestic dissidents, where an appropriate prior warrant procedure is required. *Id.* at 301-08. In *Gelbard v. United States*, 408 U.S. 41 (1972), the Court upheld a grand jury witness' right to refuse to answer questions based on illegally seized conversations of the witness since 18 U.S.C. § 2515 (1968) expressly so provides. *But cf.* United States v. Calandra, 414 U.S. 338 (1974). In *United States v. Kahn*, 415 U.S. 143 (1974), the Court held that Title III requires the naming of a person in the interception application and order only if there is probable cause to believe the person is committing the offense for which the interception order is sought. In *United States v. Giordano*, 416 U.S. 505 (1974), the Court held an interception unlawful under Title III when the application order was approved by the attorney general's executive assistant, not the attorney general or a specially designated assistant attorney general, as required by Title III. In *United States v. Chavez*, 416 U.S. 562 (1974), it was held that an interception order complied with Title III if the attorney general had actually approved the interception application even though a specially designated assistant attorney general was identified as the one approving the application.

In these cases the necessity requirement received no more than passing attention. *See* United States v. Kahn, 415 U.S. 143, 153-54 n.12 (1974); United States v. Giordano, 416 U.S. 505, 515, 527, 531, 561 (1974).

18. 18 U.S.C. § 2511(1) (1968).

prior consent from a party to the conversation.[19] Title III does permit, however, limited use of electronic surveillance by federal law enforcement officials in the investigation of specified federal offenses, as well as conspiracy to commit such offenses.[20] It also permits limited use of electronic surveillance by state law enforcement officials for certain specified offenses, and for any other state offense punishable by imprisonment for more than one year, if the offense is specified in a state statute authorizing the use of electronic surveillance.[21]

Before an application for an interception order may be made to a judge, the attorney general of the United States, or a specially designated assistant attorney general, must approve the application.[22] This procedure was established to insure that a responsible public official determines the need and justifiability of each interception application.[23]

The key provisions of Title III are contained in section 2518.[24] This section specifies the procedures by which applications for interception orders must be made and the process by which they are to be authorized by the judge. These procedures were adopted to accomodate the constitutional requirements for the use of electronic surveillance prescribed by *Berger v. New York*[25] and *Katz v. United States*.[26] Central to the Title III procedure is the requirement that prior to the use of electronic surveillance, law enforcement officials must obtain judicial authorization by a detached and neutral judge. The only exceptions to the need for prior judicial authorization are situations

19. *Id.* § 2511(2)(c)&(d) (1968). This exception derives from the fact that consensual interceptions are not a search and seizure under the Fourth Amendment. United States v. White, 401 U.S. 745 (1971); Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952).

20. 18 U.S.C. § 2516(1) (1970) lists these offenses. It should be noted that the list is very broad in scope, especially in light of the fact that conspiracy to commit such offenses is included in the listed offenses.

21. *Id.* § 2516(2) (1968) lists these offenses. This list of offenses is also very broad considering its inclusion of all felonies specified in any state statute permitting the use of electronic surveillance. This provision actually permits the broader use of electronic surveillance by state law enforcement officials than by federal officials under 18 U.S.C. § 2516(1) (1970).

22. *Id.* § 2516(1) (1970). *See generally* United States v. Chavez, 416 U.S. 562 (1974); United States v. Giordano, 416 U.S. 505 (1974). In the case of state applications the approval must be by a public official specified in the state statute permitting electronic surveillance. 18 U.S.C. § 2516(2) (1968).

23. SENATE REPORT, *supra* note 2, at 96-99.

24. 18 U.S.C. § 2518 (1968).

25. 388 U.S. 41 (1967) (*see* text accompanying notes 44-49 *infra*).

26. 389 U.S. 347 (1967) (*see* text accompanying notes 70-76 *infra*).

which threaten the national security[27] or that involve special emergencies.[28]

Each application for an interception order, after approval by the attorney general, or a specially designated assistant attorney general, must meet certain requirements. It must contain:

1. A statement of the applicant's authority to make the application;[29]
2. The identity of the official making the application and of the official authorizing the making of the application;[30]
3. A full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an interception order should be issued;[31]
4. A statement of the time period for which the interception will be needed;[32] and
5. A full and complete statement of the necessity of using electronic surveillance.[33]

Upon review of the application in light of the above requirements, a judge may issue an *ex parte* interception order only if treble probable cause is found; that is, probable cause to believe that:

1. An individual has committed, is committing, or is about to commit an offense specified in Title III;[34]

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27. *Id.* § 2511(3) (1968). *But see* United States v. United States District Court, 407 U.S. 297 (1972).

28. 18 U.S.C. § 2518(7) (1968). This subsection allows specially designated law enforcement officials to intercept wire or oral communications when they reasonably believe an emergency situation exists involving conspiratorial activities threatening the national security or characteristic of organized crime. This procedure is permitted only if it is essential to make the interception before an interception order may be obtained. But subsequent judicial approval must be obtained to bring the interception within Title III, with such application being made within forty-eight hours after the interception has occurred or begins to occur. Such a procedure is needed since: "[O]ften in criminal investigations a meeting will be set up and the place finally chosen almost simultaneously. Requiring a court order in these situations would be tantamount to failing to authorize the surveillance." SENATE REPORT, *supra* note 2, at 104.

29. 18 U.S.C. § 2518(1) (1968).

30. *Id.* § 2518(1)(a) (1968).

31. *Id.* § 2518(1)(b) (1968). This statement must include "(i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place from where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, and (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted." *Id.*

32. *Id.* § 2518(1)(d) (1968). The maximum length of time permitted per interception order is thirty days, though an unlimited number of extensions may be obtained. *Id.* § 2518(5) (1968).

33. *Id.* § 2518(1)(c) (1968).

34. *Id.* § 2518(3)(a) (1968).

2. Particular communications concerning the offense will be obtained through the interception;[35] and
3. The facilities or place from which the interception is to be made are being used, or are about to be used in connection with the commission of a specified offense.[36]

In addition, the judge must determine whether the necessity requirement has been met.[37]

A judge may not enter an interception order for any period of time than is longer than necessary to achieve the objective of the authorization, and in no event longer than thirty days.[38] Finally, every interception must be conducted so as to minimize the interception of communications not otherwise subject to interception.[39]

II. Necessity as a Constitutional Requirement

The foundation for the inclusion of the necessity requirement within the Title III statutory scheme is not clear. This uncertainty is due to the lack of any meaningful discussion of the necessity requirement in the congressional hearings on electronic surveillance resulting in Title III[40] or the Senate Report accompanying Title III,[41] and the confusion over the meaning of one of the constitutional limitations on the use of electronic surveillance articulated in *Berger v. New York*. The Senate Report, the most complete explanation of Title III, reveals only that the necessity requirement is patterned after traditional search warrant practice and the English procedure for the authorization of the use of electronic surveillance.[42] This implies that the requirement is grounded only upon a statutory and not a constitutional foundation.[43]

35. *Id.* § 2518(3)(b) (1968).
36. *Id.* § 2518(3)(d) (1968).
37. *Id.* § 2518(3)(c) (1968).
38. *Id.* § 2518(5) (1968).
39. *Id.* § 2518(5) (1968). *See generally* Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 STAN. L. REV. 1411 (1974).
40. *Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967) [hereinafter cited as *Hearings*].
41. SENATE REPORT, *supra* note 2.
42. *Id.* at 101.
43. The Senate Report makes no mention of the necessity requirement as a constitutional requirement. This should be contrasted with the report's explicit reference to other Title III provisions as constitutional requirements. *Id.* at 101.

Indeed, the individual views of Sentators Dirksen, Hruska, Scott, and Thurmond set forth in the Senate Report clearly show that they thought the necessity requirement was purely a statutory and not a constitutional requirement: "[I]f all of the other standards set out in the Title can be met, we fail to see why the use of [electronic surveillance] techniques should be further restricted. We note particularly the requirement that other investigative procedures have been tried or reasonably appear to be unlikely to succeed if tried or to be too dangerous. *Can we seriously suggest . . . that all constitutional*

But the Supreme Court's decision in *Berger* indicates the necessity requirement does have a constitutional foundation.

A. Berger v. New York

In *Berger v. New York*,[44] the Court found New York's permissive electronic surveillance statute violative of the Fourth and Fourteenth Amendments.[45] The statute permitted the entry of an *ex parte* interception order upon oath or affirmation stating probable cause to believe that evidence of a crime may be obtained, a particular description of the person or persons to be overheard, and the purpose of the interception. The maximum permissible duration of an interception order was sixty days, though this period could be extended if the judge found that such an extension would be "in the public interest."[46]

Berger, the defendant, had been convicted of conspiracy to bribe members of the state liquor authority. The case arose when complaints were made to a district attorney that state liquor authority agents were demanding bribes in connection with the issuance of new liquor licenses. Failure to make such payments would lead to reprisals in the form of raids and seizures made at the reticent applicant's place of business. An *ex parte* interception order was issued on the basis of evidence of a bribe solicitation obtained by a liquor license applicant equipped with a recording device.[47] From evidence derived from this interception another *ex parte* interception order was obtained. Through this second order the evidence against Berger was produced.

The Court, in analyzing the statute by ordinary search warrant standards, found the statute unconstitutional for failure:

1. To be particular in describing the place to be searched and the person or thing to be seized;
2. To be particular in describing the crime that has been, is being, or is about to be committed;
3. To be particular in describing the type of conversation sought to be seized;
4. To limit execution of the order to prevent search of unauthorized areas and to prevent further searching once the object of the search is found;

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methods of law unforcement [sic] should not be used to attack our mounting crime problem?" *Id.* at 238 (emphasis added).

44. 388 U.S. 41 (1967).

45. *Id.* at 44.

46. *Id.* at 43.

47. The fact that there was a citizen willing to be used to obtain evidence of the bribery conspiracy within the state liquor agency raises a question as to whether it was necessary to resort to the use of electronic surveillance. The Court never discussed this problem but only referred to a stipulation by the parties that without the electronic surveillance there would have been insufficient evidence upon which to prosecute Berger.

5. To require a showing of probable cause at shorter intervals to prevent what was the equivalent of a series of intrusions, searches, and seizures upon a single showing of probable cause;
6. To require prompt execution of the order;
7. To require new probable cause to justify the extension of the interception order;
8. To require a return on the order, and;
9. *To require a showing of exigent circumstances to justify the failure to give the subject of the interception notice prior to the execution of the warrant.*[48]

The Court emphasized this "exigent circumstances" requirement by stating:

> [T]he statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized.[49]

B. "Exigent Circumstances"

But a problem with the *Berger* requirement of a showing of exigent circumstances or special facts before execution of an interception order without notice to the subject is that none of the opinions of the justices describes or explains what is meant by the terms "exigent circumstances" or "special facts." One thing is certain though—the showing of exigent circumstances to excuse the lack of presearch notice is a constitutional requirement, for the *Berger* holding is based on the Fourth and Fourteenth Amendments. Though the meaning of exigent circumstances as used in the *Berger* opinion has not been made clear, the most persuasive explanation is that it is a reference to what subsequently was codified in Title III as the necessity requirement. Therefore the necessity requirement itself, as a codification of the *Berger* requirement of exigent circumstances, is a constitutional requirement. Since *Berger,* three formulations of the definition of exigent circumstances have been propounded.

1. *Destruction of Evidence or Escape of the Suspect*

One formulation of exigent circumstances is found in *Katz v. United States,*[50] decided six months after *Berger.* In *Katz,* in a

48. Berger v. New York, 388 U.S. 41, 58-60 (1967).
49. *Id.* at 60.
50. 389 U.S. 347 (1967).

somewhat cryptic footnote,[51] the Court attempted to explain the meaning of exigent circumstances. After citing with approval the procedure used by law enforcement officers in *Osborn v. United States,*[52] the Court reaffirmed the *Berger* approval of *Osborn,* where "no greater invasion of privacy was permitted than was necessary under the circumstances."[53] The Court then referred to language in *Berger* that stated that the protections afforded the defendant in *Osborn* were "similar . . . to those . . . of conventional warrants," but not identical.[54]

> A conventional warrant ordinarily serves to notify the suspect of an intended search. But if Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. In omitting any requirement of advance notice, the federal court that authorized electronic surveillance in *Osborn* simply recognized, as has this Court, that *officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence.*
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> Thus the fact that the petitioner in *Osborn* was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in *Berger* from reaching the conclusion that the use of the recording device sanctioned in *Osborn* was entirely lawful.[55]

This explanation implies that the Court defines exigent circumstances as those situations where notice, if given, would lead to the destruction of evidence or would allow a suspect to escape. But this interpretation of exigent circumstances is inapposite to situations where electronic surveillance is to be used. There would usually be no danger of a suspect escaping, for electronic surveillance is used primarily to obtain the incriminating evidence against the subject, not

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51. *Id.* at 355 n.16.

52. 385 U.S. 323 (1966). In *Osborn,* the Court approved a consensual interception where one party to the conversation had used a recorder to record the conversation, finding such a procedure as not being a search within the meaning of the Fourth Amendment. In any event, the Court found that the recording was made in such a manner, with prior judicial approval, that it would have met the requirements of the Fourth Amendment if they were applicable.

53. Katz v. United States, 389 U.S. 347, 355 (1967), *quoting from* Berger v. New York, 388 U.S. 41, 57 (1967).

54. Katz v. United States, 389 U.S. 347, 355 (1967).

55. *Id.* at 355-56 n.16 (emphasis added). The Court seemed to be implying that the consensual recording of the conversations in *Osborn* might come within the meaning of the Fourth Amendment. But when the Court later reconsidered the issue of consensual interceptions in United States v. White, 401 U.S. 745 (1971), the holding of *Osborn* was reaffirmed.

after sufficient incriminating evidence has already been obtained.[56] The suspect would not need to escape, but at most would be put on notice and would therefore alter his pattern of operations. Obviously, evidence could not be destroyed if notice were given prior to the execution of the order since the "evidence" does not yet exist. The object of electronic surveillance is not to obtain evidence already in existence but to obtain evidence that will be created in the future through the interception of future communications. If presearch notice were given, no evidence would be destroyed; it simply would not materialize since the communications intended to be intercepted would no doubt be made, if at all, where they could not be intercepted.[57] Thirdly, this formulation fails to address the issue of whether the use of electronic surveillance is justified under the particular circumstances of each case. The formulation merely presumes the justifiability of the use of electronic surveillance.

But, as has been recognized by the Court, electronic surveillance will not be successful unless presearch notice is withheld.[58] Therefore, exigent circumstance must have some relation to the initial determination to be made on the use of electronic surveillance, for once the determination has been made to make interceptions, notice must be withheld for the interceptions to be successful in obtaining evidence. This formulation, by discussing the requirement of notice as if in some instances notice may have to be given before the interceptions are made, does not take full account of the debilitating effects of presearch notice. It also fails to recognize that the term exigent circumstances is inextricably related to the showing that must be made prior to the authorization of electronic surveillance to allow a procedure that requires a withholding of presearch notice.

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56. *But see* United States v. Staino, 358 F. Supp. 852, 857 (E.D. Pa. 1973); United States v. Lanza, 349 F. Supp. 929, 933 (M.D. Fla. 1972); United States v. Mainello, 345 F. Supp. 863, 873-74 (E.D.N.Y. 1972); United States v. Focarile, 340 F. Supp. 1033, 1042 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

57. "[I]f Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained." Katz v. United States, 389 U.S. 347, 355 n.16 (1967).

58. Katz v. United States, 389 U.S. 347, 355 n.16 (1967); Berger v. New York, 388 U.S. 41, 60 (1967); Lopez v. United States, 373 U.S. 427, 463 (1963) (Brennan, J., dissenting); United States v. Martinez, 498 F.2d 464, 468 (6th Cir.), *cert. denied*, 95 S. Ct. 639 (1974); United States v. Tortorello, 480 F.2d 764, 774 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. Bobo, 477 F.2d 974, 979 (4th Cir. 1973), *cert. denied sub nom.* Gray v. United States, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 73-231); United States v. Forlano, 358 F. Supp. 56, 58 (S.D.N.Y. 1973); United States v. Escandar, 319 F. Supp. 295, 298 (S.D. Fla. 1970), *remanded sub nom.*, United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam).

2. *Thwarting of an Investigation*

Another formulation of the meaning of exigent circumstances is found in the Senate floor debate on Title III. Senator McClellan, a sponsor of one of the bills from which Title III derived and the most ardent spokesman for Title III, viewed exigent circumstances as meaning "a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred."[59]

This formulation appears to ignore the direct command of *Berger* regarding the withholding of *presearch* notice by referring only to the withholding of notice *after* "such surveillance had occurred." But even if this formulation was viewed in a presearch context, as required by *Berger*, it also fails to address the initial issue of the justifiability of the use of electronic surveillance by presuming its justifiability. In this regard it therefore fails to take account of the considerations articulated above in the third criticism of the *Katz* formulation of exigent circumstances. By presuming that in some instances notice may be required to be given before the interceptions are made, it does not take full account of the effects that presearch notice will have on the successful use of electronic surveillance; nor does it recognize the relationship between the term exigent circumstances and the showing that must be made prior to the authorization of the use of electronic surveillance to allow a procedure that requires a withholding of presearch notice.

3. *The Inadequacy of Normal Investigative Procedures*

This leads to the third and most persuasive formulation of the meaning of exigent circumstances—that the Court in *Berger* was referring to the necessity requirement subsequently codified in Title III. This formulation does take full account of the fact that once interceptions are authorized presearch notice must be withheld for such interceptions to be successful, and the formulation is directly addressed to the issue of when the use of electronic surveillance is justifiable. This inherent relationship of exigent circumstances and the necessity requirement, has been recognized in a few instances. Senator Tydings, speaking during the floor debate on Title III, said:

> Mr. Justice Clark [in *Berger v. New York*] recognized what is the distinct difference between a conventional warrant and the electronic surveillance warrant: the electronic surveillance warrant depends for its success on the absence of notice. Yet Mr. Justice Clark observed the New York statute required no showing of "special facts" or "exigent circumstances" to overcome the normal requirement of pre-search notice. Here Mr. Justice Clark was referring to the analogous situation sustained by the Court in *Ker*

59. 114 CONG. REC. 14479 (1968).

> [*sic*] *v. California*, 374 U.S. 23 (1963), a case in which he authored the majority opinion . . . . Such a showing of "special facts" or "exigent circumstances" would unquestionably be met by a legislative requirement that judicial authorization for the use of electronic surveillance techniques be conditioned on a showing, for example, that "normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried." This is the English standard now for the use of wiretapping on the Home Secretary's warrant.[60]

Senator Tydings, in making these comments, was giving an almost verbatim recital of testimony given at the Senate hearings on Title III by Professor G. Robert Blakey,[61] who, as preparer of the bills that eventually evolved into Title III and as the reporter for the *ABA Standards Relating to Electronic Surveillance*,[62] is regarded as probably the foremost academic spokesman for the legitimation of electronic surveillance.

Professor Blakey also co-authored a law review article in 1967 proposing an electronic surveillance control act.[63] In the proposed statute he included the necessity requirement in essentially the same wording as it appears in Title III.[64] The comment accompanying the inclusion of the necessity requirement clearly equates the requirement with the *Berger* constitutional requirement of a showing of exigent circumstances.[65]

The ABA Standards Relating to Electronic Surveillance also discusses the necessity requirement as being of constitutional dimensions under the *Berger* requirement of a showing of exigent circumstances.[66] The comment upon the necessity requirement, very similar to the comment in Professor Blakey's article, finds that the requirement may be dispensed with where announcement might result in the destruction of evidence subject to seizure.[67] But it goes on to state:

> To overcome the general rule [of requiring notice] a showing of additional "special facts" or "exigent circumstances" is *constitutionally required. Berger v. New York* 385 [*sic*] U.S. 41, 60 (1967). The standard thus requires that a showing be made that other investigative procedures, that is, those procedures which are

60. 114 CONG. REC. 12987 (1968).

61. *Hearings, supra* note 40, at 935.

62. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—STANDARDS RELATING TO ELECTRONIC SURVEILLANCE (Approved Draft 1971) [hereinafter cited as ABA STANDARDS and referred to in text as *ABA Standards Relating to Electronic Surveillance*].

63. Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAW. 657 (1967-68).

64. *Id.* at 673.

65. *Id.* at 673 n.35.

66. ABA STANDARDS, *supra* note 62, at 139.

67. *Id.* at 139-40.

> normally conducted with notice, have been tried and have failed or appear unlikely to succeed if tried or to be too dangerous. *Such a showing in each case is necessary to meet the particularity requirement of the Fourth Amendment that governs the "exigent circumstances" exception.* A blanket rule, which would dispense with notice in an entire class of cases, would probably be impermissible.[68]

Frank S. Hogan, district attorney of New York county and a staunch advocate of the permissive use of electronic surveillance, and probably the most experienced prosecutor in its use, has also discussed the necessity requirement as being equivalent to the exigent circumstances showing required by *Berger*. In testimony before the Senate on what a permissive electronic surveillance statute should contain, he stated:

> Finally, a section should be drawn dealing with notice. This would seem to be the sticking point. Obviously, as recognized even by Justice Clark, secrecy is the essence of this mode of search. In all but the rarest cases, advance notice to anyone connected with the facility or premises under surveillance would utterly destroy the value of the tap. So the majority [in *Berger*] allows that what they deem a "defect" can be overcome by what they term "a showing exigent circumstances." *I interpret that phrase to mean that the secret surveillance is necessary because other conventional access to evidence has proven fruitless or is patently unavailing, that the conversations are expected to provide material evidence otherwise inaccessible, and that secrecy is an imperative condition of effectiveness.*[69]

C. Katz v. United States

Katz v. United States[70] lends additional support to the view that electronic surveillance should only be authorized when necessity is shown. In *Katz*, the government, without prior judicial approval, attached an electronic listening and recording device to the outside of a public telephone booth from which Katz was suspected of transmitting wagering information. Agents intercepted Katz's part of the conversations in the booth, turning on the device only when Katz entered the booth. The Court found these interceptions violative of the privacy upon which Katz justifiably relied, and an unconstitutional search and seizure under the Fourth Amendment.[71]

But the Court emphasized that nonconsensual electronic surveillance is not *per se* unconstitutional. This allayed the concern of many that *Berger v. New York* and its strict interpretation of what is consti-

68. *Id.* at 140 (emphasis added).
69. *Hearings, supra* note 40, at 1113 (emphasis added).
70. 389 U.S. 347 (1967).
71. *Id.* at 351-53.

tutionally required to permit electronic surveillance all but precluded, *sub silentio,* any use of electronic surveillance:[72]

> [I]t is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place.[73]

The Court emphasized in *Katz,* as it had in *Berger,* that "no greater invasion of privacy was permitted than that *necessary* under the circumstances."[74] This seems a clear reference to the requirement of necessity, for electronic surveillance has been viewed as a more serious invasion of privacy than other types of investigative procedures.[75] If such other conventional procedures could be successfully used if tried, then the more serious invasion of privacy involved with the use of electronic surveillance is neither necessary nor justifiable.[76]

D. Other Recognition of the Constitutional Basis of the Necessity Requirement

The *ABA Standards Relating To Electronic Surveillance,* Senator Tydings, Professor Blakey, and New York County District Attorney Frank Hogan, have all discussed the necessity requirement as being constitutionally based. Several courts also have recognized the constitutional basis of the necessity requirement, as derived from the *Berger* requirement of exigent circumstances to justify the failure to give presearch notice before the use of electronic surveillance.[77] These cases

72. *E.g.,* Berger v. New York, 388 U.S. 41, 63 (1967); *id.* at 88 (Black, J., dissenting); *id.* at 89 (Harlan, J., dissenting); *id.* at 113 (White, J., dissenting).

73. Katz v. United States, 389 U.S. 347, 354 (1967) (dictum).

74. *Id.* at 355 (emphasis added), *quoting from* Berger v. New York, 388 U.S. 41, 57 (1967).

75. *See* Alderman v. United States, 394 U.S. 165, 202 (1969) (Fortas, J., concurring in part and dissenting in part); Berger v. New York, 388 U.S. 41, 56, 63 (1967); *id.* at 69 (Stewart, J., concurring in the result); Osborn v. United States, 385 U.S. 323, 352-54 (1966) (Douglas, J., dissenting); Lopez v. United States, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring in the result); *id.* at 465-71 (Brennan, J., dissenting); Olmstead v. United States, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting).

76. *Cf.* United States v. Leta, 332 F. Supp. 1357, 1362-63 (M.D. Pa. 1971).

77. United States v. Tortorello, 480 F.2d 764, 774 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973); United States v. Cox, 462 F.2d 1293, 1303 n.14 (8th Cir. 1972), *cert. denied,* 417 U.S. 918 (1974); United States v. Forlano, 358 F. Supp. 56, 58 (S.D.N.Y. 1973); United States v. Leta, 332 F. Supp. 1357, 1362-63 (M.D. Pa. 1971); United States v. Sklaroff, 323 F. Supp. 296, 307-08 (S.D. Fla. 1971), *aff'd,* 506 F.2d 837 (5th Cir. 1975); United States v. Escandar, 319 F. Supp. 295, 298 (S.D. Fla. 1970), *remanded on other grounds sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam). *See* United States v. Bobo, 477 F.2d 974, 982 (4th Cir. 1973),

buttress the conclusion that the severe invasion of privacy entailed by the use of electronic surveillance without presearch notice can be justified only if normal means of investigation have failed, would be unsuccessful if tried, or be too dangerous. Finally, the United States Department of Justice, in its brief in *United States v. Giordano*,[78] discusses the necessity requirement as a constitutional requirement:

> Title III contains provisions incorporating the requirements of the Fourth Amendment as enunciated by this Court. These provisions, which protect the individual's right of privacy, relate to the district judge's determination of probable cause, *his finding of necessity for the use of wire interception,* and the terms of the order he enters. There is no claim here . . . that *these Fourth Amendment provisions* were not complied with completely.
>
> . . . .
>
> [These provisions derive] directly from this Court's opinions in *Berger* and *Katz* . . . .[79]

From the foregoing discussion it seems clear that the necessity requirement has a constitutional foundation. Though there is some question about what was meant by the term exigent circumstances articulated in *Berger v. New York,* the most persuasive interpretation is that it refers to a showing of necessity to justify the use of electronic surveillance—a showing that has been codified in Title III by what has been referred to as the necessity requirement—that normal investigative procedures have been tried and failed, or reasonably appear unlikely to succeed if tried or to be too dangerous.

III. Standards of Construction: Title III and the Necessity Requirement

Several courts have acknowledged that the necessity requirement has a constitutional foundation. Most courts that have dealt with the necessity requirement, however, have not. Consequently the standards which have been applied in determining whether the necessity requirement has been met have placed substantial reliance upon the congressional intent behind Title III and previous judicial interpretations of such intent. But such standards are based primarily upon the assumption that the necessity requirement has only a statutory and not a constitutional foundation. Therefore, such standards may not reflect the more stringent standards and degree of compliance that might be

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cert. denied sub nom. Gray v. United States, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 73-231). *Contra, e.g.*, United States v. Perillo, 333 F. Supp. 914, 921 (D. Del. 1971).

78. 416 U.S. 505 (1974).

79. Brief for Appellant at 30-31, United States v. Giordano, 416 U.S. 505 (1974) (emphasis added).

required if the constitutional basis of the necessity requirement were recognized.

A. Title III

A major underlying purpose of Title III was to protect the privacy of wire and oral communications by establishing comprehensive procedures for regulating the use of electronic surveillance. Judges who authorize the use of electronic surveillance under Title III must strictly adhere to the statute's procedures and the congressional intent behind the establishment of such procedures. In the Senate Report several senators emphasized the strictness of the procedures to be used and of the judicial supervision to be made over the use of these procedures:

> Title III . . . would authorize carefully circumscribed and strictly controlled electronic surveillance . . . .[80]
>
> This . . . electronic surveillance would always be under strict court supervision.[81]
>
> [T]he right of privacy of our citizens will be carefully safeguarded by a scrupulous system of impartial court authorized supervision.[82]

Senator McClellan, sponsor of one of the bills that formed the basis of Title III, has continually emphasized the need for the strict adherence to the procedures and standards of the statute, as well as its underlying congressional intent. During Senate hearings on this bill he stated:

> I would not want any loose administration of this law.
>
> . . . .
>
> [I would have it] very strictly observed. It is not to become a catchall for promiscuous use. I want to see this law strictly observed with the courts adhering to the spirit and intent of it in granting the orders.[83]

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80. SENATE REPORT, *supra* note 2, at 214 (individual view of Senator Scott).

81. *Id.* at 220 (individual view of Senator Eastland).

82. *Id.* at 225 (individual views of Senators Dirksen, Hruska, Scott, and Thurmond).

83. *Hearings, supra* note 40, at 508. In addition, in reporting on the first year of operation of Title III, Senator McClellan stated: "[E]ven a cursory reading of the provisions [of 18 U.S.C. § 2518 (1968)] demonstrates that the standard set out in Title III cannot be too easily met.

. . . .

"I hope . . . that our judiciary . . . is always taking the necessary time to examine and pass on all applications thoroughly. The part they must play in scrutinizing and questioning these applications as well as requiring strict adherence to the statutory standards cannot be overemphasized."

115 CONG. REC. 23240 (1969).

. . . .

"[T]he only way this legislation will be effective . . . is by strict adherence to the standards it contains. *Id.* at 23241.

. . . .

All of the justices on the Supreme Court have recognized the strictness with which Title III must be implemented. In *United States v. Chavez,*[84] the majority said that "strict adherence by the Government to the provisions of Title III would . . . be . . . in keeping with the responsibilities Congress has imposed . . . ."[85] Justice Douglas, in dissent, joined by Justices Brennan, Stewart, and Marshall, stated that "the history of Title III reflects a desire that its provisions be strictly construed."[86] The lower federal courts also have recognized the strictness required by the procedures of Title III.[87] They have found that strict construction is required from an examination of the congressional intent behind Title III and the need to protect adequately interests of personal privacy against the inherent dangers involved in the use of electronic surveillance.

B. The Requirement of Necessity

Notwithstanding this general agreement that the procedures of Title III must be strictly construed and be strictly complied with, the federal courts, in construing the necessity requirement when it is raised

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"[M]y purpose . . . has been to help assure that this legislation will be, in fact, followed to the strictest letter of the law—both in bringing criminals to book and protecting citizens' privacy.

. . . .

"If the statute is strictly followed, it is certainly not to be expected that any unnecessary invasion of privacy will result." *Id.* at 23242.

84. 416 U.S. 562 (1974).

85. *Id.* at 580.

86. *Id.* at 597 (Douglas, J., concurring in part and dissenting in part). *Accord,* Gelbard v. United States, 408 U.S. 41, 46-47 (1972) (there must be compliance with the "stringent" conditions of Title III). *See* United States v. Giordano, 416 U.S. 505 (1974); United States v. United States District Court, 407 U.S. 297 (1972).

87. United States v. Bellosi, 501 F.2d 833, 836-37 (D.C. Cir. 1974); United States v. Capra, 501 F.2d 267, 276-77 (2d Cir. 1974), *cert. denied,* 43 U.S.L.W. 3515 (U.S. Apr. 14, 1975) (No. 74-659); United States v. Martinez, 498 F.2d 464, 468 (6th Cir.), *cert. denied,* 95 S. Ct. 639 (1974); United States v. Cox, 449 F.2d 679, 684 (10th Cir. 1971), *cert. denied,* 406 U.S. 934 (1972); United States v. Boone, 348 F. Supp. 168, 170 (E.D. Va. 1972), *rev'd on other grounds,* 499 F.2d 551 (4th Cir. 1974); United States v. Narducci, 341 F. Supp. 1107, 1109, 1115 (E.D. Pa. 1972); United States v. Lanza, 341 F. Supp. 405, 421 (M.D. Fla. 1972); United States v. Forcarile, 340 F. Supp. 1033, 1037 (D. Md.), *aff'd on other grounds sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd,* 416 U.S. 505 (1974); United States v. Kleve, 337 F. Supp. 557, 562 (D. Minn. 1971), *rev'd on other grounds,* 465 F.2d 187 (8th Cir. 1972); United States v. King, 335 F. Supp. 523, 549 (S.D. Cal. 1971), *modified on other grounds,* 478 F.2d 494 (9th Cir. 1973), *cert. denied,* 417 U.S. 920 (1974); United States v. Eastman, 326 F. Supp. 1038, 1039 (M.D. Pa. 1971), *aff'd on other grounds,* 465 F.2d 1057 (3d Cir. 1972); United States v. Escandar, 319 F. Supp. 295, 298 (S.D. Fla. 1970), *remanded on other grounds sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973). *But cf.* United States v. Caron, 474 F.2d 506 (5th Cir. 1973) (dictum) (illegal wiretap evidence could be used to impeach the defendant).

on a suppression motion, have not adhered to this standard of strictness. Several different formulations of the standard of compliance to be applied to the necessity requirement have been suggested. All of these formulations find that the requirement may be satisfied by less than strict compliance with Title III's provisions. The main rationale for this relaxed standard is the discussion of the necessity requirement found in the Senate Report. The report states that the requirement is patterned after traditional search warrant practice, and that the determination of whether necessity exists entails a consideration of all the facts and circumstances of the particular case.[88]

Courts have found the key operational sentence in the report's guidelines on the requirement of necessity to be: "[w]hat the provision envisions is that the showing be tested in a practical and commonsense fashion."[89] Several federal courts have adopted this practical and commonsense fashion test.[90] When it has been used it has become a simple basis upon which to make a rather conclusory finding of necessity, with a recitation of various allegations of the interception application affidavit being considered sufficient to support the finding.

Other courts have found that there need be only "substantial compliance" with the necessity requirement.[91] The finding of requisite necessity under this test has also been made upon the basis of affidavit allegations that are simply found to be "sufficient." A serious problem

88. SENATE REPORT, *supra* note 2, at 101.

89. *Id.* at 101. The report cites *United States v. Ventresca*, 380 U.S. 102 (1965), as shedding some light on the words "practical and commonsense fashion."

"This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief . . . without detailing any of the "underlying circumstances" upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." *Id.* at 108-09 (1965) (footnote omitted).

90. *In re* Dunn, 507 F.2d 195, 196 (1st Cir. 1974); United States v. Robertson, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 74-974); United States v. Brick, 502 F.2d 219, 224 n.15 (8th Cir. 1974); United States v. James, 494 F.2d 1007, 1015-16 (D.C. Cir. 1974); United States v. Whitaker, 343 F. Supp. 358, 362-63 (E.D. Pa. 1972), *rev'd on other grounds*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973). In none of these cases was the strictness of the procedures of Title III mentioned.

91. United States v. Falcone, 364 F. Supp. 877, 889-90 (D.N.J. 1973), *aff'd on other grounds*, 505 F.2d 478 (3d Cir. 1974); United States v. Tortorello, 342 F. Supp. 1029, 1036 (S.D.N.Y. 1972), *aff'd on other grounds*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. King, 335 F. Supp. 523, 535 (S..D Cal. 1971), *modified on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974). *See* United States v. Escandar, 319 F. Supp. 295, 319 (S.D. Fla. 1970), *remanded on other grounds, sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam). In none of these cases was the strictness of the procedures of Title III mentioned.

with decisions that adopt this test is that none of them discuss what "substantial compliance" means or what the necessity requirement and compliance with it entails.

Even more troubling are the three cases that have found that the government's burden in regard to the showing of necessity is "not a great one."[92] In these cases great reliance was placed on the allegations of the affidavits supporting the interception application, with an apparent acceptance of the conclusory nature of the allegations. In two of these cases the allegations of the affidavits were substantially identical.[93] Both maintained that the informants involved refused to testify and that conventional search warrants are inadequate in gambling offenses since usually insufficient evidence is seized to prove all the elements of the crime. Upon these two allegations the requirement of necessity was found to have been met. In the other case, *United States v. Staino*,[94] the necessity requirement was found to have been satisfied by an allegation that normal investigative techniques could not effectively establish the scope of the counterfeiting conspiracy involved. The problem with this test is that it utterly ignores and directly contradicts the congressional intent and judicial recognition that the procedures of Title III be strictly construed and be strictly complied with.

A serious inadequacy of all of these tests—practical and commonsense fashion, substantial compliance, and "not a great burden"—is that they become evocative words that inexorably lead to a "clear," summary finding of necessity without intervening analytical steps that would require an explication of the criteria and facts being evaluated in determining whether necessity exists. The finding is made, but the basis for the finding and the analysis leading to that finding remain unarticulated.

Still another test that has been used has been to regard the purpose and intent of the necessity requirement as only one of insuring that a showing be made of the difficulties that would be encountered in the use of normal investigative techniques.[95] Though this test,

92. United States v. Staino, 358 F. Supp. 852, 856-57 (E.D. Pa. 1973); United States v. Askins, 351 F. Supp. 408, 414-15 (D. Md. 1972); United States v. Whitaker, 343 F. Supp. 358, 362-63 (E.D. Pa. 1972), *rev'd on other grounds*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973). In none of these cases was the strictness of the procedures of Title III mentioned.

93. United States v. Askins, 351 F. Supp. 408, 414-15 (D. Md. 1972); United States v. Whitaker, 343 F. Supp. 358, 362-63 (E.D. Pa. 1972), *rev'd*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973).

94. 358 F. Supp. 852, 856-57 (E.D. Pa. 1973).

95. United States v. Robertson, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 74-974); United States v. Pacheco, 489 F.2d 554, 564-65 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975)

focusing on the difficulties involved in the use of normal investigative techniques, does attempt to identify at least one of the elements involved in the making of the finding of necessity, it has been a relatively easily satisfied test. To make the required showing of difficulty in using normal investigative techniques has been a simple matter of alleging whatever difficulties are inherent in the particular situation for which an interception order is sought. Frequently used allegations are the need to determine the scope of the alleged conspiracy and the identity of its members, the fact that narcotics dealers have only a few trusted associates, or that traditional search warrants do not produce evidence on all the elements of gambling offenses. When such allegations are made, a conclusion that such difficulties are sufficient to show the necessity for the entry of an interception order has been found to follow easily.

The problem with this test is that it ignores the explicit wording of the necessity requirement; namely, that normal investigative procedures have been tried and have failed, or reasonably appear unlikely to succeed if tried or to be too dangerous. Instead this test substitutes the requirement of a mere showing that normal investigative procedures would be difficult to use. But the necessity requirement is not met by merely showing *difficulty*; there must be a showing that normal procedures are *inadequate* since unsuccessful, unlikely to succeed, or too dangerous. A showing that the use of normal investigative procedures would be difficult does not necessarily lead to the conclusion that such procedures would be inadequate since unsuccessful or too dangerous. The use of this test seriously undercuts the explicit wording of the necessity requirement and changes the focus of the showing, making it much easier to meet.

An example of the ease with which this "difficulty" test may be met is found in *United States v. Robertson.*[96] In *Robertson,* an agent disclosed at an evidentiary hearing on the necessity issue that, though physical surveillance of the defendant was possible, it was impractical since the agent was white and the gambling operations were located in a black neighborhood. To call in black undercover agents would have been costly and inconvenient, though such agents were available. The court, coupling the "difficulty" test with the "practical and commonsense fashion" test, found that the government was not required to call in other agents to meet the showing of necessity required before an interception order could be entered. Apparently

(No. 73-1510); United States v. Lanza, 349 F. Supp. 929, 933 (M.D. Fla. 1972); United States v. King, 335 F. Supp. 523, 535 (S.D. Cal. 1971), *modified on other grounds,* 478 F.2d 494 (9th Cir. 1973), *cert. denied,* 417 U.S. 920 (1974).

96. 504 F.2d 289 (5th Cir. 1974), *cert. denied,* 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 74-974).

the testimony of the agent was found to be a sufficient basis upon which to uphold the original finding of necessity. In addition, the court found the allegation that the scope and extent of the gambling operation still needed to be determined as further support for the upholding of the initial finding of necessity.

Some courts have also permitted the necessity requirement apparently to be more easily met for certain types of alleged offenses than for others. Allegations of a large scale conspiracy,[97] gambling operations,[98] narcotics operations,[99] or the fact that wire communications are usually an ingredient of the offense[100] have, in some instances, been accorded more deferential treatment by courts in their review of whether a sufficient showing of necessity has been made. This sort of deference to the type of crime alleged, or to certain characteristics of such crimes, without a rigorous examination of the actual factual context in which the case arose is in direct contradiction to the congressional intent that the determination of necessity be made upon "a consideration of all the *facts* and *circumstances*" of the particular case.[101]

All of these different tests and interpretations of the standards to be applied to the necessity requirement fail to comply with the overall congressional intent that the requirements of Title III be strictly

97. United States v. Mainello, 345 F. Supp. 863, 873-74 (E.D.N.Y. 1972); United States v. Lanza, 341 F. Supp. 405, 419-20 (M.D. Fla. 1972); United States v. King, 335 F. Supp. 523, 535 (S.D. Cal. 1971), *modified*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); United States v. Escandar, 319 F. Supp. 295, 304 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam).

98. *E.g.*, United States v. Bobo, 477 F.2d 974, 982-83 (4th Cir. 1973), *cert. denied sub nom.* Gray v. United States, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 73-231); United States v. Kahn, 471 F.2d 191, 201 (7th Cir. 1972), *rev'd*, 415 U.S. 143 (1974); United States v. Carubia, 377 F. Supp. 1099, 1108 (E.D.N.Y. 1974); United States v. Lanza, 356 F. Supp. 27, 30 (M.D. Fla. 1973); United States v. Askins, 351 F. Supp. 408, 414-15 (D. Md. 1972); United States v. DeCesaro, 349 F. Supp. 546, 551 (E.D. Wis. 1972), *rev'd*, 502 F.2d 604 (7th Cir. 1974); United States v. Mainello, 345 F. Supp. 863, 873-74 (E.D.N.Y. 1972); United States v. Leta, 332 F. Supp. 1357 (M.D. Pa. 1971).

99. *E.g.*, United States v. Falcone, 364 F. Supp. 877, 889-90 (D.N.J. 1973), *aff'd*, 505 F.2d 478 (3d Cir. 1974); United States v. Escandar, 319 F. Supp. 295, 303 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam). *See* United States v. James, 494 F.2d 1007, 1016 (D.C. Cir. 1974).

100. United States v. Bobo, 477 F.2d 974, 982 (4th Cir. 1973), *cert. denied sub nom.* Gray v. United States, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 73-231); United States v. Lanza, 349 F. Supp. 929, 933 (M.D. Fla. 1972); United States v. Leta, 332 F. Supp. 1357, 1363 (M.D. Pa. 1971); United States v. Escandar, 319 F. Supp. 295, 303 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam).

101. SENATE REPORT, *supra* note 2, at 101 (emphasis added). "A blanket rule, which would dispense with notice in an entire class of cases, would probably be impermissible." ABA STANDARDS, *supra* note 62, at 140.

construed and applied. This is in large measure attributable to the conflict between this general intent and the specific comment concerning the necessity requirement found in the Senate Report that states that the requirement is to be interpreted in a "practical and commonsense fashion." Because of the less strict standards applied to the construction of the necessity requirement, the criteria and factors used to determine the adequacy of the showing of necessity remain unarticulated. Courts base many of their conclusions on perfunctory reasoning and uncritical reliance on the allegations of interception application affidavits. The necessity requirement is an essential provision for the protection of the privacy of wire and oral communications, one of the main purposes behind Title III. Close attention to this requirement seems compelled by recognition of its constitutional foundations. But courts have failed to accord appropriate attention to this requirement and strictly to construe and apply it so as to protect adequately the privacy of wire and oral communications.

It should be emphasized that the foregoing discussion has focused solely upon the interpretation given the necessity requirement by federal courts in deciding suppression motions based on a contention of a failure to meet the requirement, or in deciding appeals from such decisions. But the initial decisions on the authorization of electronic surveillance are not made at such suppression hearings. They are made by judges upon an application for an interception order. These judges must make a finding of necessity before the use of electronic surveillance is permitted.

Several courts have interpreted this to mean only that the judge must make a determination of necessity, not that such a finding need be stated in the interception order, or that the facts and circumstances relied upon by the judge and the reasons for the finding of necessity be stated.[102] The judge is not required to place a full and complete statement of the reasons for the finding of necessity in the interception order.[103] This interpretation of the necessity requirement derives from the language of Title III that requires the judge to make a determination of necessity, but does not specify that the finding of necessity must be among the items included in the interception order.[104] Therefore, the basis for the initial decision on the issue of necessity may remain

102. United States v. Mainello, 345 F. Supp. 863, 874 (E.D.N.Y. 1972); United States v. Tortorello, 342 F. Supp. 1029, 1036 (S.D.N.Y. 1972), *aff'd*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. Escandar, 319 F. Supp. 295, 304 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam). *But see* United States v. Curreri, 363 F. Supp. 430, 435 (D. Md. 1973).

103. Cases cited note 102 *supra.*

104. 18 U.S.C. § 2518(4) (1970). *See* note 11 *supra.*

entirely undisclosed. And since there has been no case discovered in researching this note in which the necessity requirement has not been found to have been met, this initial determination is all but conclusive on the issue of necessity.

Some judges do include a statement of their findings on the issue of necessity in their interception orders.[105] But these statements are couched in such conclusory terms as "normal investigative procedures reasonably appear unlikely to succeed if tried."[106] Thus, even when a statement concerning the finding of necessity is included in the interception order, it is set forth in a form that fails to disclose the factual and analytical basis for the determination. As a result, regardless of whether a finding of necessity is included in the interception order, the critical point at which the all but conclusive determination of necessity is made remains completely unarticulated. This prevents any close scrutiny of the interpretation or construction given the necessity requirement in the first instance.

In addition, many judges who have authorized interceptions have also been the judge hearing the suppression motion challenging the finding of necessity.[107] Though this procedure would possibly allow the discovery of some of the criteria used in initially authorizing the interception order and how the authorizing judge construed the necessity requirement, there is also considerable pressure upon the judge to uphold the interception order he initially entered and a definite potential bias on his part.

The potential bias is obvious: the judge has already made a prior determination that necessity has been shown for that particular order and that determination is now being challenged as being inadequate. The pressure on the judge derives from the fact that law enforcement officers, relying on the interception order, have expended a consider-

105. *E.g.*, United States v. Kahn, 471 F.2d 191, 200-01 (7th Cir. 1972), *rev'd*, 415 U.S. 143 (1974); United States v. Tortorello, 342 F. Supp. 1029, 1036 (S.D.N.Y. 1972), *aff'd*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. Curreri, 363 F. Supp. 430, 435 (D. Md. 1973); United States v. Scott, 331 F. Supp. 233, 245 (D.D.C. 1971).

106. *E.g.*, Application of the United States for an Order Authorizing the Interception of Wire and Oral Communications, No. NDC-27, (N.D. Cal., June 11, 1973); Application of the United States for an Order Authorizing the Interception of Wire Communications, No. 5, (N.D. Cal., Mar. 15, 1972); United States v. Curreri, 363 F. Supp. 430, 435 (D. Md. 1973); United States v. Mainello, 345 F. Supp. 863, 873 (E.D.N.Y. 1972).

107. *E.g.*, United States v. Garramone, 374 F. Supp. 256, 258 (E.D. Pa. 1974) (local court rule required the judge authorizing the interceptions to hear all motions attacking the validity of the order); United States v. Falcone, 364 F. Supp. 877, 879 (D.N.J. 1973), *aff'd*, 505 F.2d 478 (3d Cir. 1974); United States v. Staino, 358 F. Supp. 852, 854 (E.D. Pa. 1973); United States v. D'Alfonso, 357 F. Supp. 1341, 1342 (E.D. Pa. 1973); United States v. Mainello, 345 F. Supp. 863, 867 (E.D.N.Y. 1972).

able amount of time and effort upon making the interceptions and possibly making further investigation based upon leads received from these interceptions. To decide, after the interceptions have been made, that the necessity requirement had not been met at the time the interceptions were authorized would require the suppression of all the electronic surveillance evidence and prohibit any derivative use of it.[108]

In summary, judicial interpretations and implementation of the necessity requirement seem to be in direct conflict with the congressional intent that Title III procedures be strictly construed and applied. This conflict has risen in part from the abbreviated treatment of the necessity requirement given in the Senate Report, and the fact that the report's treatment itself directly conflicts with the expressed congressional intent to apply and construe strictly Title III's provisions. The necessity requirement is a key provision in the attempt to protect privacy interests. But the basis of the initial determination of necessity remains shrouded in a conclusory statement in the interception order, if such a finding is included at all. Therefore the interpretations and construction given the necessity requirement in the first instance remain unknown and indiscernible.

IV. The Necessity Requirement in Factual Context

Since the determination of necessity should be made upon consideration of all the facts and circumstances of the particular case, a full understanding of how the requirement has been construed and implemented is essential. Therefore it is important to examine the factual context in which applications are made and interception orders entered. Three problems that are confronted in attempting to discuss the necessity requirement in its factual context are inadequate reporting of the facts and circumstances surrounding cases, the averments of the interception application affidavit, and the basis of the finding of necessity. Notwithstanding these problems, the factual context of a few cases shall be examined to aid in an understanding of the present effectiveness of the necessity requirement in protecting the privacy of wire and oral communications.

A. United States v. Bynum

In *United States v. Bynum* an interception order was obtained for both wire and oral communications. The interception was authorized to obtain evidence of alleged illegal narcotics activities, the extent and scope of the related conspiracy and the identity of its members, and the alleged bribery and corruption of law enforcement officials in

108. 18 U.S.C. § 2515 (1968).

futherance of the conspiracy.[109] Bynum and another defendant, Cordovano, were the central figures in the conspiracy that encompassed purchasing, processing, distribution, and sale of various narcotics. Prior to obtaining the interception order, the government conducted extensive visual surveillance and had received information about the operation from several informants. One such informant, Stewart, an alleged lieutenant in the organization,[110] became an informant after he had been arrested for narcotics sales to undercover agents. Stewart's role in the operation was important; he was selling heroin and cocaine for Cordovano and picking up and delivering large amounts of heroin sold to Bynum and Cordovano by their suppliers.

Stewart, while acting as "a trusted key member of the conspiracy,"[111] reported to law enforcement officers daily,[112] "supplying the Government with *detailed* information"[113] about the conspirators and the operation. Stewart continued to sell and deliver heroin for Bynum and Cordovano. At this point the interception order was obtained. Stewart remained an integral part of the conspiracy and a trusted member. Cordovano and Bynum discussed with Stewart plans to rob other drug dealers in the area during a narcotics shortage. This plan was ultimately executed. Stewart contined to make large purchases for Bynum and Cordovano. He was also present when they discussed plans to murder a corrupt policeman believed to have turned informant. Through all of these activities, Stewart remained *"fully accepted as a member of the core group."*[114]

At the trial, the government's case rested principally upon Stewart's testimony,[115] samples of drugs he received from Bynum, Cordovano, and the operation's suppliers, photographs of the cash which Stewart used in the narcotics transactions, and tape recordings made by Stewart of telephone conversations he had with the defendants.[116] The evidence produced by the electronic surveillance was

109. 360 F. Supp. 400, 408 (S.D.N.Y.), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974). This case originated as United States v. Bynum, 475 F.2d 832 (2d Cir. 1973), where the court of appeals remanded the case to the district court for an evidentiary hearing on another issue.

110. Petitioner's Brief for Certiorari at 13, Bynum v. United States, 417 U.S. 903 (1974).

111. United States v. Bynum, *remanded*, 475 F.2d 832, 834 (2d Cir. 1973).

112. Petitioner's Brief for Certiorari at 7, Bynum v. United States, *vacated*, 417 U.S. 903 (1974).

113. United States v. Bynum, *remanded*, 475 F.2d 832, 834 (2d Cir. 1973) (emphasis added).

114. United States v. Bynum, 485 F.2d 490, 495 (2d Cir. 1973) (emphasis added).

115. United States v. Bynum, *remanded*, 475 F.2d 832, 834 (2d Cir. 1973).

116. Petitioner's Brief for Certiorari at 7, Bynum v. United States, *vacated*, 417 U.S. 903 (1974).

introduced apparently only to corroborate Stewart's testimony.[117] The court of appeals emphasized the important role that Stewart played in the prosecution:

> [T]he detailed facts which amply document and support the Government's case here, are uniquely provided by the informant witness Stewart, whose regular reports to Government agents enabled them to independently make surveillance and confirm the conspiracy and the overt acts charged in the indictment.[118]

The defendants contended that electronic surveillance was not necessary since a plethora of normal investigative techniques had been successful in obtaining incriminating evidence, and in obtaining information on the scope and extent of the conspiracy. The defendants emphasized the successful and extensive uses to which Stewart had been put. The affidavit in support of the interception application concluded that "normal investigative procedures reasonably appear unlikely to succeed and are too dangerous to be used."[119] But the facts of the case reveal that such procedures were being used successfully. The court of appeals, in discussing the necessity requirement, found:

> A reading of the detailed affidavits which were submitted in support of the wiretap . . . indicating reason to believe that Bynum had engaged in the corruption of officials and violence against informants, and that he was a long time narcotics violator, amply supports the issuance of the orders here made.[120]

This was the entire discussion in the opinion devoted to the necessity requirement. The court failed to make any reference to the fact that, prior to the interception application, the informant was a trusted key member of the conspiracy providing detailed information and physical evidence to the government or that he was recording his telephone conversations with the other defendants and turning them over to the government.

B. United States v. James

United States v. James[121] involved an interception order obtained largely upon information received from an informant, Lewis, who volunteered his services to make the case against one Jackson, allegedly the largest narcotics wholesaler in the Washington, D.C. area. Lewis' reliability was established by the fact that he had previously obtained evidence that was effectively used in obtaining convictions against four major Washington, D.C. narcotics dealers.

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117. United States v. Bynum, *remanded*, 475 F.2d 832, 834 (2d Cir. 1973).

118. United States v. Bynum, 485 F.2d 490, 495 (2d Cir. 1973).

119. Petitioner's Brief for Certiorari at 12, Bynum v. United States, *vacated*, 417 U.S. 903 (1974).

120. United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973).

121. 494 F.2d 1007 (D.C. Cir. 1974).

Prior to the government's application for an interception order, Lewis phoned Jackson and arranged a purchase of heroin. A narcotics agent monitored the call with Lewis' consent; therefore the monitoring was not an "interception" under Title III.[122] Another agent accompanied Lewis to the location at which the sale was to be consummated. Jackson, however, took only Lewis to where the narcotics were secreted, and a sale was made. A week later Lewis arranged another sale with Jackson over the telephone. Again, the narcotics agent monitored the call with Lewis' consent. The sale arranged by this call was consummated in the presence of the agent. On both occasions Jackson was alleged to have taken evasive action to prevent visual surveillance by narcotics agents. The interception application affidavit stated that physical surveillance was not productive because Jackson was extremely cautious, that he lived in a closely knit neighborhood, and implied that it was impossible to obtain the local telephone numbers that Jackson called.[123] The court of appeals found that normal investigative procedures had failed or reasonably appeared unlikely to succeed in penetrating Jackson's enterprise:[124]

> Considering the matter in a practical and commonsense fashion we find that although the informant [Lewis] had made two purchases of drugs from Jackson it was reasonable to believe that these transactions were only minor items in Jackson's enterprise, and that the exposure of his entire operation required different and more sophisticated techniques. Certainly it was clear that surveillance techniques and infiltration would be frustrated by Jackson's extreme caution.[125]

The court's discussion of the necessity requirement omitted any reference to the fact that narcotics agents had been able to consensually monitor the calls made by Lewis to Jackson, witness narcotics sales made by Jackson, or that Lewis had been instrumental in obtaining convictions against other major narcotics dealers in the area.

C. United States v. Fantuzzi

The facts in *United States v. Fantuzzi*[126] disclose that an informant, one Estrada, volunteered to supply information concerning a cocaine importing and distributing organization operated by persons "with whom she had become closely associated."[127] After becoming

122. 18 U.S.C. § 2511(2)(c)&(d) (1968).

123. United States v. James, 494 F.2d 1007, 1014 (D.C. Cir. 1974). The inference that the local numbers that Jackson called could not be discovered appears to be a patent misrepresentation. *See* text accompanying notes 177-82 *infra.*

124. *Id.* at 1015.

125. *Id.* at 1016.

126. 463 F.2d 683 (2d Cir. 1972).

127. *Id.* at 684.

an informant, Estrada met all the members of the alleged conspiracy through a friend who was one of the conspirators. Through information provided by Estrada, the "dimensions of the conspiracy became apparent."[128] She continued to relay information on cocaine transactions to agents. Subsequently another informant began working with Estrada. Together they executed a ten thousand dollar purchase of cocaine from two other members of the conspiracy. During this time Estrada remained a trusted member of the conspiracy, witnessed numerous cocaine transactions and attended numerous planning discussions, and associated with the conspirators socially on a daily basis.

Despite the fact that the conspiracy was small in scale, Estrada knew and was trusted by all seven of its members, and was providing the government with detailed information on the activities of the conspirators, the government was able to obtain an interception order.

D. United States v. Poeta

In *United States v. Poeta*[129] the government's case at trial was built principally on the testimony of an informant, Cohen, and of one of the main purchasers from the organization. Cohen, a trusted confederate in the heroin importation and distribution operation, was the go-between for the operation and it's suppliers and purchasers. He received instructions from the defendant Poeta on where to make heroin pickups, to deliver the heroin, and to return the purchase money to Poeta. Cohen was finally arrested for his part in the operation and agreed to cooperate with the government in obtaining evidence about the conspiracy and its activities. Upon release from custody he continued to work for the organization, providing information and also consenting to the monitoring of his telephone and the "bugging" of his apartment.

Based on information received directly from Cohen and from the consensual monitoring of his telephone conversations, an interception order was obtained. In the application affidavit detailed reference was made to the consensually monitored conversations over Cohen's telephone.[130] The order relied on the affidavit's averments that normal investigative means would be difficult in view of the cautious manner of the persons to be surveilled and their use of narcotics jargon and Spanish in an effort to disguise their transactions over the telephone.[131]

In all four of the foregoing cases normal investigative procedures were being used successfully to obtain evidence on the scope and

128. *Id.*
129. 455 F.2d 117 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972).
130. *Id.* at 119.
131. *Id.* at 120.

extent of the conspiracy, the identity of its members, and, most importantly, on the high level members of the conspiracy. But in all the cases an interception order was obtained upon a finding of necessity by the issuing judge. If interception orders may be obtained under such circumstances the necessity requirement may well have become a mere paper provision.

V. The Application Affidavit

A critical component of any interception application is the affidavit in support of the application. The affidavit is usually incorporated by reference into the application, with the application containing only a brief conclusory statement concerning the necessity for using electronic surveillance. The application and the affidavit, taken together, must provide a "full and complete statement" as to the necessity of resorting to the use of electronic surveillance.[132] But these affidavits have tended to be insufficient in making this required showing by containing only cursory and conclusory averments of the inadequacy or difficulty of using normal investigative techniques. Such averments have become boilerplate terms included in every application where they can conceivably fit the general facts of the case or the type of offense allegedly involved.

At least one court has recognized that this has occurred. In *United States v. Kahn,*[133] the court found that where the government could have engaged in questioning to obtain additional information such questioning should have been attempted to meet the necessity requirement. If the attempt to gain further evidence by questioning was unsuccessful, the court failed to see "why the agent could not state the reason for lack of success . . . ."[134]

> The conclusionary [*sic*] statement in the application and affidavit that "normal investigative methods reasonably appear unlikely to succeed and are too dangerous to be used" is too slender a reed upon which to rest the invasion of [the defendant's] privacy.
>
> . . . .
>
> We find no justification in the record for not determining from the informants used for the government's application and affidavit whether [the defendant] had received or sent, through the particular telephone numbers, communications with respect to unlawful

132. United States v. Carubia, 377 F. Supp. 1099, 1108 (E.D.N.Y. 1974); United States v. Falcone, 364 F. Supp. 877, 889 (D.N.J. 1973), *aff'd,* 505 F.2d 478 (3d Cir. 1974); *see* United States v. Mainello, 345 F. Supp. 863, 874 (E.D.N.Y. 1972); United States v. Escandar, 319 F. Supp. 295, 304 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam).

133. 471 F.2d 191 (7th Cir. 1972), *rev'd on other grounds,* 415 U.S. 143 (1974).

134. United States v. Kahn, 471 F.2d 191, 197 (7th Cir. 1972), *rev'd,* 415 U.S. 143 (1974).

> gambling activities; and the government has not shown that had it conducted its investigation with the care Congress intended to protect personal privacy, it would not have discovered whether or not [the defendant] had implicated herself by her conversations [with others].[135]

The most conclusory averments included in affidavits, and the one courts have found of critical importance in determining the necessity issue, are those stating that due to the nature of the alleged offense and the manner in which it is perpetrated, normal investigative procedures appear unlikely to succeed if tried. Such averments are sometimes supported by some factual recitations such as the absence of available informers,[136] the refusal of available informants to testify,[137] and the extreme caution of the subject.[138] But these affidavits fail to meet the requirement of a "full and complete statement" since the necessity sections have primarily alleged conclusions derived from the general experience of officers with the type of offense allegedly involved, and have not specified the actual experiences or facts of the individual case in which the application is being made. For example, an examination of the interception application affidavits filed in two separate gambling investigations[139] revealed that in a critical portion of the affidavits the exact same wording was used:

> My experience and the experience of other Special Agents of the Federal Bureau of Investigation has shown that gambling raids and searches of gamblers and their gambling establishments have not in the past resulted in gathering physical or other evidence to prove all elements of the offense. Through my experience and the exper-

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135. *Id.*

136. *E.g.*, United States v. Falcone, 364 F. Supp. 877, 889 (D.N.J. 1973), *aff'd*, 505 F.2d 478 (3d Cir. 1974).

137. *E.g.*, United States v. Kahn, 415 U.S. 143, 145 (1974); United States v. Brick, 502 F.2d 219, 224 (8th Cir. 1974); United States v. Bobo, 477 F.2d 974, 983 (4th Cir. 1973), *cert. denied sub nom.* Gray v. United States, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 73-231); United States v. Askins, 351 F. Supp. 408, 414 (D. Md. 1972); United States v. Mainello, 345 F. Supp. 863, 873 (E.D.N.Y. 1972); United States v. Whitaker, 343 F. Supp. 358, 363 (E.D. Pa. 1972), *rev'd*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973); United States v. Escandar, 319 F. Supp. 295, 303 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam); Petitioner's Brief for Certiorari at 13, Fein v. United States, 42 U.S.L.W. 3074 (U.S. July 25, 1973) (No. 73-175).

138. *In re* Dunn, 507 F.2d 195, 196 (1st Cir. 1974); United States v. James, 494 F.2d 1007, 1014 (D.C. Cir. 1974); United States v. Falcone, 364 F. Supp. 877, 889 (D.N.J. 1973), *aff'd*, 505 F.2d 478 (3d Cir. 1974); United States v. Mainello, 345 F. Supp. 863, 873 (E.D.N.Y. 1972); United States v. Focarile, 340 F. Supp. 1033, 1043 D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

139. United States v. Consentino, Criminal No. 72-936 LHB (N.D. Cal., filed July 18, 1974); United States v. Spagnuolo, Criminal No. 73-0342 AJZ (N.D. Cal., filed July 13, 1972).

> ience of other Special Agents who have worked on gambling cases, I have found that gamblers frequently do not keep records. If such records are maintained, gamblers immediately prior to or during physical search destroy these records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish:
>
> (a) The involvement of all the conspirators in the offenses;
> (b) The period of operation which the records reflect, and,
> (c) The gross amount of wagers accepted in a single day, because records are difficult to interpret, and are of little or no significance without further knowledge of the gambler's activities, associations, and manner and method of conducting the gambling business.[140]

The following paragraph in each of the affidavits explained the general procedure by which illegal gambling operations are run. The wording of this paragraph is essentially identical in each affidavit, with minor word variations. In addition, another portion of the affidavits, though not similar in wording, alleged that electronic surveillance is needed to establish the size of the gambling business since normal investigative procedures are inadequate in this regard.

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140. In all of the affidavits examined the averment quoted in the text appeared in exactly the same wording—even in the two extension application affidavits, where no new averments for the need for continued suveillance were included.

Four affidavits were examined from the investigation culminating in United States v. Cosentino, Criminal No. 72-936 LHB (N.D. Cal., filed July 18, 1974); Affidavit in Support of Application at 16-17, Application of the United States for an Order Authorizing the Interception of Wire Communications, No. NDC-15 (N.D. Cal., filed Dec. 21, 1972); Affidavit in Support of Application at 11, Application of the United States for an Order Authorizing the Continued Interception of Wire Communications, No. NDC-15 (Extension) (N.D. Cal., filed Dec. 21, 1972); Affidavit in Support of Application at 17, Application of the United States for an Order Authorizing the Interception of Wire Communications, No. NDC-18 (N.D. Cal., filed Dec. 21, 1972); Affidavit in Support of Application at 16, Application of the United States for an Order Authorizing the Interception of Wire Communications, No. NDC-20 (N.D. Cal., filed Dec. 21, 1972).

Five affidavits were examined from the investigation culminating in United States v. Spagnuolo, Criminal No. 73-0342 AJZ (N.D. Cal., filed July 13, 1972): Affidavit in Support of Application at 12-13, Application of the United States for an Order Authorizing the Interception of Wire Communications, No. NDC-14 (N.D. Cal., filed Aug. 28, 1972); Affidavit in Support of Application at 12-13, Application of the United States for an Order Authorizing the Continued Interception of Wire Communications, No. NDC-14 (Extension) (N.D. Cal., filed Aug. 28, 1972); Affidavit in Support of Application at 15, Application of the United States for an Order Authorizing the Interception of Wire Communications, No. NDC-19 (N.D. Cal., filed Aug. 28, 1972); Affidavit in Support of Application at 22-23, Application of the United States for an Order Authorizing the Interception of Wire and Oral Communications, No. NDC-27 (N.D. Cal., filed June 11, 1973); Affidavit in Support of Application at 18-19, Application of the United States for an Order Authorizing the Continued Interception of Wire and Oral Communications, No. NDC-27 (Extension II) (N.D. Cal., filed June 11, 1973).

Interception application affidavits involving other crimes also resort to the use of boilerplate language. In three separate narcotics cases examined,[141] the affidavits contained almost identical wording in the portion intended to show the necessity for resorting to electronic surveillance:

> My experiences and the experiences of other Special Agents of the Bureau of Narcotics and Dangerous Drugs has shown that individuals dealing in large quantities of narcotics are particularly covert in their activities and wary of surveillance by State and Federal law enforcement personnel. Such dealers rarely keep records, deal personally with a very few trusted individuals and isolate themselves from other individuals in the distribution organization. Through experience it has also been learned that individuals dealing in large quantities of narcotics frequently change telephone numbers to avoid detection and receive, store, and deliver narcotics at varying locations.[142]

Another boilerplate term found in every affidavit examined, regardless of the type of offense alleged, is that normal investigative procedures appear unlikely to succeed in establishing the full extent of the conspiracy, the identity of all the conspirators or aiders and abettors of the operation, and the hierarchy of the organization.

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141. United States v. Chavez, Criminal No. 71-406 SAW (N.D. Cal., filed May 6, 1971), *suppression of wiretap evidence aff'd*, 478 F.2d 512 (9th Cir. 1973), *rev'd*, 416 U.S. 562 (1974); United States v. Yu, Criminal No. 74-202 CBR (N.D. Cal., filed Sept. 11, 1974); United States v. Scully, Criminal No. 73-0272 SC (N.D. Cal., filed Apr. 30, 1974).

142. Two affidavits were examined from the investigation culminating in United States v. Chavez, Criminal No. 71-406 SAW (N.D. Cal., filed May 6, 1971), *suppression of wiretap evidence aff'd*, 478 F.2d 512 (9th Cir. 1973), *rev'd*, 416 U.S. 562 (1974): Affidavit in Support of Application at 11, Application of the United States for an Order Authorizing the Interception of Wire Communications, No. 5 (N.D. Cal., filed Mar. 7, 1972); Affidavit in Support of Application at 6, Application of the United States for an Order Authorizing the Interception of Wire Communications, No. 6 (N.D. Cal., filed Mar. 7, 1972).

Three affidavits were examined from the investigation culminating in United States v. Scully, Criminal No. 73-0272 SC (N.D. Cal., filed Apr. 30, 1974): Affidavit in Support of Application at 4-15, Application of the United States for an Order Authorizing the Interception of Wire Communications, No. NDC-31 (N.D. Cal., filed June 14, 1973); Affidavit in Support of Application at 46, Application of the United States for an Order Authorizing the Interception of Wire Communications, No. NDC-32 (N.D. Cal., filed June 14, 1973); Affidavit in Support of Application at 81-82, Application of the United States for an Order Authorizing the Interception of Wire and Oral Communications, No. NDC-34 (N.D. Cal., filed June 14, 1973).

Two affidavits were examined from the investigation culminating in United States v. Yu, Criminal No. 74-202 CBR (N.D. Cal., Sept. 11, 1974): Affidavit in Support of Application at 13, Application of the United States for an Order Authorizing the Interception of Wire Communications, No. NDC-37 (N.D. Cal., filed Apr. 9, 1974); Affidavit in Support of Application at 13, Application of the United States for an Order Authorizing the Continued Interception of Wire Communications, No. NDC-37 (Extension) (N.D. Cal., filed Apr. 9, 1974).

From the great similarity in the averments in the affidavits, and the fact that such averments focus on the general characteristics of the offense alleged and not the facts of the actual case, it may be concluded that such averments are employed in a perfunctory manner not commensurate with the express requirements of Title III. The use of boilerplate terms to fulfill this constitutional requirement and key provision intended to insure the protection of privacy of communications completely undercuts the central focus of the requirement—that a specific need be shown in each specific case by an examination of the facts and circumstances involved before the use of electronic surveillance will be authorized.

The danger that boilerplate terms would be developed to meet the necessity showing was recognized in the Senate floor debate on Title III:

> [Title III] further requires a showing that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." We agree with the thought that underlying this requirement, that is, that wiretapping and eavesdropping should not be used unless absolutely necessary. [Title III] *should not, however, leave open the possibility of satisfying this requirement by a boiler plate recital of the statutory language. It should provide for a description with particulars of the efforts that have been made to obtain evidence without wiretapping or eavesdropping and a reasoned justification of the need for using wiretapping and eavesdropping methods.*[143]

Senator McClellan, reporting on the first year of operation of Title III, expressed serious concern over how the necessity requirement was being implemented. After emphasizing the strictness of the necessity requirement, and the fact that electronic surveillance may be used only as a last resort, he continued:

> [A] number of the affidavits [in support of the applications] left something to be desired when it came to demonstrating that "normal investigative techniques" had been exhausted. Here, too often, the affidavits were phrased in conclusionary [*sic*] terms, and not enough of the agency's law enforcement experiences that bore on the decision to use a technique of surveillance was made explicit for the court.
>
> . . . .
>
> I would suggest . . . that the applications should be more complete on their face.[144]

143. 114 CONG. REC. 14474 (1968) (remarks of Senator Long) (emphasis added); *see also* 114 CONG. REC. 12297 (1968) (remarks of Senator Fong).

144. 115 CONG. REC. 23240 (1969). In United States v. King, 335 F. Supp. 523 (S.D. Cal. 1971), *modified*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974), the district court, while upholding the showing of necessity, also expressed criticism of the lack of completeness of the affidavit. "[T]he Government might have been

In one recent case in the district court for Northern District of California,[145] an F.B.I. agent, testifying at an evidentiary hearing on the necessity issue, admitted to the use of boilerplate language to fulfill the showing of necessity:

> Q. Did the [Department of Justice] Strike Force attorneys assist you in the drafting of your Affidavit . . . ?
>
> . . . .
>
> A. Yes.
>
> Q. Yes? Okay. How did they assist you in preparing these documents?
>
> A. They assisted me in preparing it by furnishing me what you refer to in legal terms as boiler plate or whatever it is . . . .[146]
>
> . . . .
>
> Q. Is that your format in that Affidavit?
>
> A. That is my format, yes sir.
>
> . . . .
>
> Q. The language in those Affidavits is 100 percent your language, you didn't have any assistance in drafting it?
>
> A. Essentially, the language is 100 percent mine. Like I say, the [Strike Force Attorneys] may have reviewed it and changed a word here and there to make it read like a legal document should read.[147]
>
> . . . .
>
> A. [C]ertain boiler plate information was utilized in preparing these Affidavits. . . . [I]t's a case of where you are trying to get the job done as quick [*sic*] as you can get the job done. If the wording fits the occasion as far as the general context, it's easier to tell a stenographer to . . . copy from a certain . . . line to a certain . . . line from another document, and if the wording fits, that happens on occasion. That could have happened here. I don't recall.
>
> . . . .
>
> Q. And can you recall . . . how many times this boiler plate technique that you've mentioned has been used in obtaining Title III applications in this District?
>
> A. I can't recall, sir.
>
> Q. What do you mean . . . when you said boiler plate?
>
> A. Well, this is the terminology that I've heard mentioned by attorneys where the wording predicating some statements or something of this nature is general—general wording is utilized.
>
> . . . .

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well-advised to include a more detailed summary as to the inadequacy of other investigative techniques." 335 F. Supp. at 535.

145. United States v. Spagnuolo, Criminal No. 73-0342 AJZ (N.D. Cal., filed July 13, 1972).

146. Transcript of Hearing on Motion to Suppress at 426, United States v. Spagnuolo, Criminal No. 73-0342 AJZ (N.D. Cal., filed July 13, 1972).

147. *Id.* at 427.

Q. And in particular in preparing your Affidavit that's in issue in this particular proceeding . . . do you recall any conversations with any . . . Strike Force attorneys where they suggested or told you to use any boiler plate language?

A. I don't recall. It could have been—it could have been. I don't recall.[148]

From the F.B.I. agent's testimony, contradictory as it is, it can be seen that interception application affidavits do indeed contain boilerplate allegations used in every case in which they fit the general context. But even when such affidavits do contain factual allegations related to the actual case involved, these affidavits still fail to show any proof that *all* types of normal procedures appear to be inadequate or unsuccessful. The fact that *some* normal procedures have been unsuccessful or reasonably appear to be unlikely to succeed or to be too dangerous is not sufficient to show that *all* types of normal investigative procedures would be unsuccessful.

VI. The Availability of Normal Investigative Techniques

The Senate Report on Title III recognizes that normal investigative techniques include, but are not limited to, standard aural and visual surveillance, general questioning or interrogation under an immunity grant, use of regular search warrants, and infiltration of conspiratorial groups by undercover agents or informants.[149] Necessity, however, may be shown without actually attempting any of these techniques—either by showing they reasonably appear unlikely to succeed if tried or would be too dangerous.[150]

Some courts have construed the necessity requirement to mean that all possible normal techniques need not be exhausted and that electronic surveillance need not be used only as a last resort.[151] But the necessity requirement, by its very language, does demand the exhaustion of all normal techniques—either by actual attempted use of such techniques or by showing that such techniques reasonably appear unlikely to succeed or to be too dangerous to attempt. The Supreme

148. *Id.* at 548-50.

149. SENATE REPORT, *supra* note 2, at 101.

150. *Id.*

151. United States v. Pacheco, 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 73-1510); United States v. Falcone, 364 F. Supp. 877, 889 (D.N.J. 1973), *aff'd*, 505 F.2d 478 (3d Cir. 1974); United States v. Bleau, 363 F. Supp. 438, 441 (D. Md. 1973); United States v. Staino, 358 F. Supp. 852, 856 (E.D. Pa. 1973); United States v. Lanza, 356 F. Supp. 27, 30 (M.D. Fla. 1973); United States v. Askins, 351 F. Supp. 408, 414 (D. Md. 1972); United States v. Whitaker, 343 F. Supp. 358, 362-63 (E.D. Pa. 1972), *rev'd*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973); *see* United States v. Tortorello, 480 F.2d 764, 774 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

Court, in *United States v. Kahn*,[152] accorded some recognition to this point. The Court found that the necessity requirement is "designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime."[153] *Berger* also requires that electronic surveillance be used only as a last resort, for, as discussed above, the reference to exigent circumstances in *Berger* is most persuasively interpreted as a reference to the concept embodied in the necessity requirement. Senator McClellan has also referred to the necessity requirement as "a requirement designed to make the use of these techniques [electronic surveillance] a tool of last resort."[154] The Department of Justice manual on the use of electronic surveillance under Title III, in describing the necessity requirement, also states that "interception under Title III is to be considered an investigative tool of last resort. . . ."[155] Thus, unless the showing of necessity is predicated on the use of normal procedures being too dangerous, *the use of electronic surveillance under Title III should be used only as a last resort,* permitted only after it has been shown that normal procedures have failed or appear unlikely to succeed or to be too dangerous.

A. Informants

The use of informants has been an invaluable law enforcement tool for obtaining information and, in some cases, testimony at trial. But the Senate Report makes repeated reference to the inadequacy of the use of informants in organized crime cases, due mainly to the violent nature of organized crime, the unreliability of informants, the need to maintain the confidentiality of the informant, and the insulated position of the top members of the criminal hierarchy.[156] The report, though, did recognize that there were exceptions to this situation:

> All of this is not to say that significant cases have not been developed by law enforcement agents using conventional techniques and based upon the testimony of brave martyr-witnesses.[157]

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152. 415 U.S. 143 (1974).

153. *Id.* at 153 n.12.

154. 115 CONG. REC. 23240 (1969). Later in this speech Senator McClellan referred to the necessity requirement as requiring the exhaustion of normal investigative techniques. *Id.*

155. U.S. DEP'T OF JUSTICE, MANUAL FOR CONDUCT OF ELECTRONIC SURVEILLANCE 18 (1969). This manual became public information under the Freedom of Information Act in Hogan v. United States, Civil No. 73-1385 WM (S.D. Fla., filed Jan. 25, 1974).

156. SENATE REPORT, *supra* note 2, at 72-74; *Id.* at 186 (individual view of Senator Bayh); *Id.* at 214-15 (individual view of Senator Scott); *Id.* at 235-36 (individual views of Senators Dirksen, Hruska, Scott, and Thurmond). *E.g.*, ABA STANDARDS, *supra* note 62, at 35, 71-74.

157. SENATE REPORT, *supra* note 2, at 73.

Informants are extensively used to gather information upon which interception applications are based.[158] Since the use of informants is a normal investigative technique, the inadequacy of this technique should be shown to meet the requirement of necessity. But no court has held that the availability of informants precludes a finding of necessity from being made, thereby requiring a denial of an interception application or suppression of its fruits. Four main justifications have been articulated for this result—the refusal of informants to testify,[159] concern over guarding the confidentiality of the informant to insure his safety and continued effectiveness,[160] the inability of informants to determine the full scope of the alleged conspiracy,[161] and that necessity can be shown simply by the type of crime allegedly involved.[162]

These justifications ignore the potential effectiveness of the use of informants, especially when combined with the use of other conventional techniques. That informants can provide extensive, detailed information is evident from the fact that great reliance is placed upon information they obtain in establishing probable cause for the issuance of regular search warrants and interception orders.[163] Informants can

158. *E.g.*, United States v. James, 494 F.2d 1007, 1013 (D.C. Cir. 1974); United States v. Bynum, *remanded*, 475 F.2d 832, 834 (2d Cir.), 360 F. Supp. 400 (S.D.N.Y.), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated*, 417 U.S. 903 (1974); United States v. Fantuzzi, 463 F.2d 683, 684 (2d Cir. 1972); United States v. Poeta, 455 F.2d 117, 119 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); United States v. Tortorello, 342 F. Supp. 1029, 1037 (S.D.N.Y. 1972), *aff'd*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. Focarile, 340 F. Supp. 1033, 1041 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

159. *See* note 137 *supra*. To find the requirement of necessity as being met by the refusal of the informant to testify is in essence to allow the government to make the determination as to whether electronic surveillance will be used, for the government will thereby be inclined to discourage the already reluctant informer from testifying.

160. SENATE REPORT, *supra* note 2, at 236 (individual views of Senators Dirksen, Hruska, Scott, and Thurmond).

161. United States v. Pacheco, 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 73-1510); United States v. Lanza, 356 F. Supp. 27, 30 (M.D. Fla. 1973); ABA STANDARDS, *supra* note 62, at 71-74; *see* United States v. Robertson, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 74-974); United States v. James, 494 F.2d 1007, 1016 (D.C. Cir. 1974); United States v. Carubia, 377 F. Supp. 1099, 1103 (E.D.N.Y. 1974); United States v. Staino, 358 F. Supp. 852, 857 (E.D. Pa. 1973); United States v. Lanza, 349 F. Supp. 929, 933 (M.D. Fla. 1972); United States v. Mainello, 345 F. Supp. 863, 874 (E.D.N.Y. 1972); United States v. Lanza, 341 F. Supp. 405, 419 (M.D. Fla. 1972); United States v. Focarile, 340 F. Supp. 1033, 1042 (D. Md.) *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974); United States v. King, 335 F. Supp. 523, 535 (S.D. Cal. 1971), *modified*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); United States v. Escandar, 319 F. Supp. 295, 303 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam).

162. *See* notes 97-100 *supra*.

163. There is a potential conflict between the use of informants to establish prob-

provide information on the identity of the individuals involved in the alleged criminal operations, the purpose and location of meetings or illegal transactions, and the hierarchy of the organization. They can continue to advance their position in the organization while simultaneously providing a continuous flow of increasingly valuable information to law enforcement officials. Information obtained from informants or evidence obtained by them and turned over to law enforcement officials—such as samples of drugs, betting slips, photographing of cash used in illegal transactions, and consensually recorded conversations—can provide the basis for the obtaining of regular search warrants. Additionally, informants may be used to help introduce undercover agents into the criminal operation, or set up meetings, sales, purchases, or other illegal transactions and be accompanied by an undercover agent at the consummation of the transaction, or even enable the transaction to be directly consummated by the agent.

This effectiveness of the use of informants has been implicitly recognized by the Supreme Court in *Aguilar v. Texas*[164] and *Spinelli v. United States*,[165] where the Court attempted to establish some guidelines for the use of information obtained from informants in search warrant affidavits. When read together, these two cases require the search warrant affidavit to recite sufficient facts about the reliability of the informant and of the manner in which the informant's information was obtained to allow the magistrate to make an independant and informed decision on the issue of probable cause. To show the reliability of the informant, the affiant invariably states that the informant has been reliable in the past by providing information on past occasions that have lead to convictions. Therefore, when information from informants is used in interception application affidavits, the affiant is placed in the position of having to show the effectiveness of the informant in the past to establish the informant's reliability while simultaneously alleging the inadequacy of the use of informants to establish the necessity for resorting to the use of electronic surveillance. This inconsistency has gone unnoticed by the courts.

Perhaps the most effective use to which informants may be put, and one completely ignored by the courts when deciding the issue of necessity, is the consensual monitoring or recording of telephone conversations between informants and members of the alleged criminal operation, consensual "bugging" of informants' residences or other

able cause for an interception order and the necessity requirement. The more detailed and complete the informant's information, the more it may undercut the necessity averment that the use of informants, or other normal investigative techniques, reasonably appears unlikely to succeed or otherwise be inadequate.

164. 378 U.S. 108 (1964).

165. 393 U.S. 410 (1969).

premises, and the equipping of informants with recorders or transmitters. Consensual interceptions are not governed by Title III;[166] therefore such interceptions are normal investigative techniques that, to meet the necessity requirement showing, must be shown to be unlikely to succeed or to be too dangerous to attempt.

The same sort of evidence that can be obtained from Title III interceptions may also be developed through the use of such consensual interceptions. Informants can make telephone calls arranging illegal transactions or sales with members of the illegal operation and consent to the monitoring and recording of such conversations. Evidence obtained from such calls or conversations may be invaluable in providing probable cause to make arrests, in obtaining search warrants, and in developing leads that may be further investigated to obtain additional information. The higher up the informant is in the criminal hierarchy the more valuable this evidence-gathering tool may be. But even when this technique has actually been used prior to the application for an interception order, and such conversations have been consensually monitored and recorded, research has discovered no court that has found that the availability of this technique precluded a finding of necessity.[167]

There is one major problem, though, with the use of consensual interceptions. There has been, and continues to be, a strong judicial and law enforcement policy of protecting the confidentiality of the identity of informants unless the informant may have evidence material to the guilt or innocence of the accused.[168] The problem develops due to the fact that, in making any overt use of the consensually intercepted conversations, law enforcement officials may either directly or indirectly disclose the identity of informants. In researching this note no case has been found that has required disclosure of the identity of informants on the issue of necessity, so law enforcement officials, to protect the identity of informants, would not want to make any use of consensual interceptions that would jeopardize this confidentiality.

Since there are so many possible ways in which the availability of informants may be exploited as an investigative tool, courts should require what Title III explicitly demands—a "full and complete statement" as to why the use of informants is or will be inadequate. The

166. 18 U.S.C. § 2511(2)(c)&(d) (1968).

167. *See* United States v. James, 494 F.2d 1007, 1014 (D.C. Cir. 1974); United States v. Poeta, 455 F.2d 117, 119 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); United States v. Staino, 358 F. Supp. 852, 855 (E.D. Pa. 1973); United States v. Focarile, 340 F. Supp. 1033, 1041 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

168. McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957).

force of this proposition seems especially strong when other investigative procedures are also available and could be used in combination with information received from informants. Continued judicial deference to conclusory boilerplate statements in interception affidavits that the use of informants is or would be inadequate seems directly contrary to the letter and spirit of the necessity requirement.

To aid in a careful and complete examination of these issues when allegations are made that there was an inadequate showing of necessity, courts should require at least an *in camera* examination of informants so as to be able to fully discover firsthand the position and capabilities of the informants. This *in camera* examination should be done prior to the authorization of interceptions under Title III, and before any ruling on any suppression motion based on a contention that the necessity requirement has not been met because the use of informants would have been an adequate investigative technique—either by itself or in conjunction with the use of other conventional techniques.

B. Undercover Agents

Undercover agents have been successfully used in many cases where electronic surveillance has been used, both before and after the issuance of the interception order.[169] There are many advantages to the use of undercover agents relative to the use of informants. Protection of the confidentiality of the identity of the agent is not a major concern, nor are there problems of reliability of information received firsthand by an agent, of the agent's credibility as a witness at trial, or with consensual interception of conversations when the agent is a party to the conversation. Undercover agents may also be used to infiltrate criminal organizations and thereby obtain incriminating evidence and information on a continuing basis. With such evidence and information search warrants may be obtained or other conventional investigative techniques used to pursue leads developed by the agent.

Courts have paid little attention to the fact that undercover agents have been successfully used prior to the application for an interception order, or the apparent prospect of their continued use after the interception order has been obtained. For example, in *United States v.*

169. *E.g.*, United States v. James, 494 F.2d 1007, 1014 (D.C. Cir. 1974); United States v. Manfredi, 488 F.2d 588, 592 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); United States v. Herrmann, 371 F. Supp. 343, 347 (E.D. Wis. 1974); United States v. Staino, 358 F. Supp. 852, 855 (E.D. Pa. 1973); United States v. Lanza, 341 F. Supp. 405, 415 (M.D. Fla. 1972); United States v. Focarile, 340 F. Supp. 1033, 1041 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974); United States v. King, 335 F. Supp. 523, 536 (S.D. Cal. 1971), *modified*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); United States v. Scott, 331 F. Supp. 233, 241 (D.D.C. 1971).

James,[170] discussed above, an informant was used to set up two narcotics sales made to an undercover agent by the alleged head of the narcotics operation—the man who was the main target of the investigation and who was later named as the subject of an interception order. The informant also permitted the consensual monitoring and recording of his telephone conversations and the "bugging" of his apartment. The finding of necessity for the interception order was based on the need to expose the entire operation and the improbable prospects of successful penetration of the operation by the informant due to the extreme caution of the target of the investigation. No mention of the use of consensual interceptions or of undercover agents was made, nor were the potentialities of success of such procedures evaluated. Thus, even when illegal transactions with the key figures of an illegal operation are consummated in the presence of an undercover agent, the necessity requirement still has been found to have been met, even though other normal investigative techniques were also apparently available to be used.[171]

The use of undercover agents provides many different potential avenues by which to obtain incriminating information and evidence. Especially when combined with the use of other conventional techniques, this technique may provide a means of obtaining information and evidence on the scope, extent, and hierarchy of the suspected illegal operations. An interception application affidavit should provide a detailed and complete explanation as to why the use of undercover agents would be inadequate.

C. Regular Search Warrants

Regular search warrants may be used to search for and seize contraband, fruits and instrumentalities of the alleged crime, or now even mere evidence of the alleged crime.[172] Search warrants have been, and will continue to be, an effective law enforcement tool of great evidentiary value. Any number of normal investigative techniques may be used to gather the information necessary to establish the probable cause required to obtain a search warrant.

But courts have found that the availability of this traditional procedure, even when probable cause to search exists, does not preclude a finding of necessity. This has been done by finding that in certain types or classes of crimes, the use of search warrants is inadequate—not because of the facts of the specific case, but because of the nature of the alleged crime. Courts, relying uncritically upon conclusory

170. 494 F.2d 1007 (D.C. Cir. 1974).

171. *See* note 169 *supra*.

172. Warden v. Hayden, 387 U.S. 294 (1967).

boilerplate terms, have found that search warrants are inadequate in gambling cases since the use of such warrants fail to produce evidence on all the elements of the offense, and any records kept by the operation can easily be destroyed.[173] This type of reliance upon conclusory boilerplate terms is also found in narcotics cases where "raids are traditionally unsuccessful in gathering evidence of importation and distribution of narcotics,"[174] and narcotics dealers "rarely keep records, deal personally with a few trusted individuals [and] receive, store, and deliver narcotics at varying locations in order to avoid detection."[175] Great reliance is also placed upon the law of conspiracy in making interception applications, where a standard boilerplate term is that normal investigative procedures are unlikely to succeed in determining the full extent of the conspiracy, the identity of all its members, and the hierarchy of the organization.[176]

None of these boilerplate terms used in the interception application affidavits are based upon a consideration of the specific facts of the actual case in which the interception application is being made. Rather they are based only upon the opinion and general experience of the affiants or that of other agents. To accept an affiant's conclusions, without requiring a statement of the facts relied upon by the affiant in determining that the use of search warrants will be inadequate, is to ignore the requirement of a "full and complete statement" of all the facts and circumstances of the particular case leading to the conclusion that the use of normal investigative procedures will be inadequate.

D. Visual Surveillance

Visual surveillance is a standard law enforcement technique that is used in virtually every investigation. Though visual surveillance by itself is not usually a complete investigative tool, when it is combined with other normal investigative techniques it can be very effective. Visual surveillance of the locus of suspected illegal activities and of the people and materials entering and leaving the location may provide

173. United States v. Bobo, 477 F.2d 974, 983 (4th Cir. 1973), *cert. denied sub. nom.* Gray v. United States, 43 U.S.L.W. 3551 (U.S. Apr. 14, 1975) (No. 73-231); United States v. Poeta, 455 F.2d 117, 120 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); United States v. Askins, 351 F. Supp. 408, 414 (D. Md. 1972); United States v. Mainello, 345 F. Supp. 863, 873 (E.D.N.Y. 1972); United States v. Whitaker, 343 F. Supp. 358, 363 (E.D. Pa. 1972), *rev'd*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973).

174. United States v. Escandar, 319 F. Supp. 295, 303 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam).

175. *See* note 142 *supra.*

176. This averment was found in every interception application examined.

probable cause to obtain search warrants that may be executed while incriminating evidence is suspected of being on the surveilled persons or premises. Visual surveillance may be made of meetings and suspected illegal sales or other transactions, and may be filmed to preserve the evidentiary value of such surveillance. Follow-up investigations may then be made of the people present at such meetings or transactions, and of other leads developed through visual surveillance. Through such ever-widening investigations, combined with whatever other conventional investigative techniques that are available, the scope, extent, and hierarchy of the suspected illegal operations may possibly be discovered without resorting to the use of electronic surveillance.

E. Pen Registers

The use of pen registers[177] is not governed by the procedures established in Title III.[178] Therefore, they also are to be considered a normal investigative procedure. But courts have failed to recognize this fact, for in many cases the order permitting the use of pen registers is obtained at the same time as the Title III interception order.[179] In

177. A pen register is a device attached to a given telephone line, usually at a central telephone office. A pulsation of the dial on the line to which the pen register is attached records dashes on a paper tape equal in number to the number dialed. The paper tape then becomes a permanent and complete record of outgoing numbers called on the particular line. With reference to incoming calls, the pen register records only a dash for each ring of the telephone but does not identify the number from which the incoming call originated. The pen register cuts off after the number is dialed on the outgoing calls and after the ringing is concluded on incoming calls without determining whether the call is completed or the receiver answered. There is neither recording nor monitoring of the conversation with a pen register. The mechanical complexities of the pen register are more fully explained in United States v. Focarile, 340 F. Supp. 1033, 1038-41 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974). The above explanation also applies to touch tone decoders, which are simply the device used on modern touch tone telephones.

178. United States v. Giordano, 416 U.S. 505, 548-53 (1974) (Powell, J., concurring in part and dissenting in part); United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974); United States v. Lanza, 341 F. Supp. 405, 421-22 (M.D. Fla. 1972); United States v. Focarile, 340 F. Supp. 1033, 1038-39 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974); United States v. Vega, 52 F.R.D. 503, 507 (E.D.N.Y. 1971); United States v. King, 335 F. Supp. 523, 549 (S.D. Cal. 1971), *modified*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); United States v. Escandar, 319 F. Supp. 295, 303-04 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam); SENATE REPORT, *supra* note 2, at 90.

But pen registers, like electronic surveillance, would not be successful unless presearch notice is withheld. Therefore, the considerations of *Berger v. New York* may be relevant, especially the exigent circumstances requirement. No court has yet recognized this potential problem.

179. United States v. Brick, 502 F.2d 219, 223-24 (8th Cir. 1974); United States

such instances there has been no discussion devoted to an explanation of why the use of pen registers could not have been attempted prior to the application for an interception order. In a few cases authorization for the use of a pen register has been applied for, authorized, and used prior to the application for an interception order.[180] This seems at least an implicit recognition of the potentiality of success possible with the use of pen registers.

The use of a pen register, coupled with an examination of long distance toll records, will give law enforcement officers a complete record of all outgoing local and long distance calls made from the telephone to which the pen register is attached. From this information expanded investigation of the location of the telephones to which outgoing calls were made, and of the persons associated with the premises, may in turn provide information about the extent, scope, and hierarchy of the suspected illegal operation. As the Senate Report emphasized,[181] and the congressional findings on Title III explicitly state,[182] the telephone remains an essential vehicle for communication in organized crime operations. The use of pen registers, especially when combined with other conventional techniques, can be an effective tool to exploit this dependence on telephones without accomplishing the greater invasion of privacy entailed by the use of electronic surveillance. Unfortunately, none of the affidavits examined made any mention of the prior use of pen registers or why an attempt to use them would be unsuccessful.

F. Immunity Grants

Though the use of general questioning and interrogation under an immunity grant is recognized in the Senate Report as a normal investigative technique,[183] there has been only infrequent discussion of the

v. Kahn, 471 F.2d 191, 192 n.2 (7th Cir. 1972), *rev'd*, 415 U.S. 143 (1974); United States v. Bynum, 360 F. Supp. 400, 412 (S.D.N.Y. 1973); United States v. Boone, 348 F. Supp. 168, 169 (E.D. Va. 1972), *rev'd*, 499 F.2d 551 (4th Cir. 1974); United States v. Lanza, 341 F. Supp. 405, 421 (M.D. Fla. 1972); United States v. King, 335 F. Supp. 523, 548 (S.D. Cal. 1971), *modified*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); United States v. Perillo, 333 F. Supp. 914, 915 (D. Del. 1971); United States v. Escandar, 319 F. Supp. 295, 297 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam).

180. United States v. Falcone, 364 F. Supp. 877, 889 (D.N.J. 1973), *aff'd*, 505 F.2d 478 (3d Cir. 1974); United States v. Focarile, 340 F. Supp. 1033, 1036 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

181. SENATE REPORT, *supra* note 2, at 71-74, 89, 236 (individual views of Senators Dirksen, Hruska, Scott, and Thurmond).

182. Omnibus Crime Control and Safe Streets Act of 1968, Title III, § 801(c), 82 Stat. 212.

183. SENATE REPORT, *supra* note 2, at 101.

availability or inadequacy of this technique in cases involving Title III interception authorizations,[184] and no mention of it in any of the interception application affidavits examined. Perhaps this is partly due to the Senate Report's repeated reference to the code of silence of organized crime, enforced by actual or threatened violence, as necessitating the resort to the use of electronic surveillance.[185] In any event, immunity grants are a widely used and potent law enforcement tool. An articulation of the reasons for the inadequacy of its use should be included in the interception application affidavit in order to comply with the requirement of a "full and complete statement" of the inadequacy of conventional investigative techniques.

VII. Conclusion

The necessity requirement is a key provision of Title III designed to protect the privacy of wire and oral communications and a constitutional requirement prescribed by *Berger v. New York*. However, Title III provides no guidelines for its interpretation. As a result, the requirement has been interpreted so broadly that it has become no requirement at all. Law enforcement officials use boilerplate terms in their interception application affidavits to meet the requirement. But these terms fail to provide the "full and complete statement" as to the inadequacy of normal investigative techniques required by Title III. The affidavits do not describe all of the normal investigative techniques used or that are available to be used, and why the use of such techniques would be inadequate, nor have courts required this degree of completeness. In fact, the affidavits do not even meet the standards established in the Department of Justice's manual on the use of electronic surveillance under Title III:

> Each request for authorization should contain . . . [a] complete description of the investigation being conducted—its origin, development, and present status. This description must include a detailed analysis of all investigative procedures utilized and considered and a statement as to the reasons for their inadequacy.[186]

184. The only case found in researching this note that contained any discussion as to the inadequacy of the use of immunity grants was United States v. Leta, 332 F. Supp. 1357, 1362-63 (M.D. Pa. 1971).

185. SENATE REPORT, *supra* note 2, at 72; *id.* at 186 (individual view of Senator Bayh), *id.* at 236 (individual views of Senators Dirksen, Hruska, Scott, and Thurmond).

186. U.S. DEP'T OF JUSTICE, MANUAL FOR CONDUCT OF ELECTRONIC SURVEILLANCE 8 (1969). "The most troublesome requirement is that of Section 2518(1)(c), which calls for a detailed statement of the other investigative procedures used or rejected." *Id.* at 17. But the manual contradicts itself later: "In the event that it does become necessary to divulge [to the judge] the exact nature of all the investigative procedures used, any confidential information can be safeguarded [by sealing the application and order]." *Id.* at 18.

To meet the necessity requirement courts should require a detailed statement describing the normal investigative techniques used or available to be used and an explanation of why the use of such techniques was rejected as inadequate. This statement should be based upon a consideration of the facts and circumstances of the specific case in which the interception application is being made and not merely based on a conclusory boilerplate statement based on the affiant's general experience or that of other law enforcement agents, as is the present practice.

The necessity requirement should not be a mere paper provision, but instead strictly construed, applied, and observed in order to accomplish the purposes for which it was intended. To do this, courts will have to begin to more closely scrutinize the necessity showing and demand a detailed and complete explanation of why normal investigative procedures have been tried and failed, or reasonably appear unlikely to succeed if tried or to be too dangerous. Statutory amendments to Title III are also needed to set guidelines for the interpretation of the necessity requirement and to insure that courts are carefully and closely examining the necessity allegations in the interception application affidavits. The latter can be accomplished by requiring a detailed written finding on the basis for the authorizing court's determination of necessity to be filed by the judge along with the interception order.

To so construe the necessity requirement will perhaps make it more difficult to obtain authorizations for the use of electronic surveillance under Title III. But it will also help protect the privacy interests of all citizens, for electronic surveillance is not a discriminating investigative tool; it permits the interception of innocent conversations of the law-abiding as well as the incriminating conversations made by the criminal.

> [R]estrictions upon means of law enforcement handicap society's capacity to deal with two of its most deeply disturbing problems: the fact and fear of crime. . . . [But the] "history of liberty has largely been the history of observance of procedural safeguards." And the history of the destruction of liberty . . . has largely been the history of the relaxation of those safeguards in the face of plausible-sounding governmental claims of a need to deal with widely frightening and emotion-freighted threats to the good order of society.[187]

187. Amsterdam, *Perspectives on The Fourth Amendment*, 58 MINN. L. REV. 349, 354 (1974) (footnote omitted). "[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 which could lead to further laxity in years to come, with serious consequences to personal liberties, as from concern over the rights of the accused in a given case." United States v. Giordano, 469 F.2d 522, 530 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974), *quoting from* United States v. Narducci, 341 F. Supp. 1107, 1115 (E.D. Pa. 1972).

ADDENDUM

Since the writing of this note a recent case, *United States v. Kerrigan*, 514 F.2d 35 (9th Cir. 1975), has found some merit in the defendant's contention that the necessity showing made was insufficient although upholding the authorizing judge's finding of necessity. Recognizing the fact that law enforcement agencies use boilerplate allegations to meet the necessity requirement, the court expressed criticism of this practice and found the showing sufficient only because of the strong factual context of the case. After summarizing the allegations of the affidavit, the court stated:

> We agree with appellants that the boilerplate recitation of the difficulties of gathering usable evidence in bookmaking prosecutions is not a sufficient basis for granting a wiretap order. To hold otherwise would make § 2518(1)(c) and (3)(c) mere formalities in bookmaking cases. However, in this case, agents had engaged in investigation for over three months, including physical surveillance of the suspects, had reasonably established that their informants would not testify, and had reason to believe that the other evidence thus far produced would not support a conviction. Further, physical surveillance of the residence identified by informants as housing the four "front office" telephones disclosed that it was fronted by a 5-foot high chain link fence topped by 3-stranded barb wire and had two large dogs patrolling the area between house and fence. Thus the government demonstrated a factual basis for its concern that the suspects might have time and inclination to destroy evidence in case of search.
>
> While this Court gives little weight to conclusionary statements about the outcome of future investigations, we also recognize that the law does not require that a wiretap be used only as a last resort. On balance we find that the affidavit, while marginal, does suffice to meet the requirement of 2518(1)(c). United States v. Kerrigan, 514 F.2d 35, 38 (9th Cir. 1975).

Hopefully the *Kerrigan* case, briefly touching many issues raised in this note, portends a closer judicial scrutiny of the necessity requirement and the allegations of application affidavits designed to meet the requirement.