RECENT DEVELOPMENTS IN PUBLIC LAW

UNITED STATES v. TORRES: THE NEED FOR STATUTORY REGULATION OF VIDEO SURVEILLANCE

Recent advances in technology have contributed to the development of new methods of electronic surveillance for domestic law enforcement purposes.[1] These new surveillance methods increase the possibility of more intrusive searches and greater invasions of privacy. For example, the government can surreptitiously film an individual's activities inside a private building without the knowledge or consent of those individuals present.[2] Congress and the courts should control the use of new surveillance methods to prevent violations of individuals' fourth amendment rights.[3]

UNITED STATES V. TORRES

On December 19, 1984, the Seventh Circuit decided issues crucial to the constitutional right to privacy of all citizens in *United States v. Torres*.[4]

Facts

On June 29, 1983, Federal Bureau of Investigation (FBI) agents in Chicago arrested a group of Puerto Rican terrorists[5] and charged them with sedititious conspiracy against the United States and related weapons and explosives violations.[6] The FBI made the arrests after 150 days of television surveillance pro-

1. New methods of visual surveillance include the use of miniature television cameras, low light level television and infrared television cameras. For a general discussion of the development and use of these devices, *see* Note, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?*, 3 HASTINGS CONST. L.Q. 261, 266-269 (1976). Although this piece limits its discussion to the use of video surveillance, advances in technology have created privacy problems in various other areas. In a recent New York Times article regarding the Privacy Act of 1974, the author discusses new privacy problems that have resulted from the increased use of computerized mail. "A letter dropped in a Postal Service mailbox has elaborate legal protection to keep anyone from intercepting it without a court order. But a message sent over the increasingly popular computer networks may be intercepted by individuals, criminals or law enforcement agencies. None of these electronic interceptions is governed by the privacy protections in current law." Burnham, *'74 Privacy Law Out of Date Disparate U.S. Groups Assert*, N. Y. Times, Dec. 26, 1984, at A1, col. 1. New advances in technology have created a broad spectrum of privacy problems not anticipated when current laws were passed.
2. The FBI frequently uses video surveillance as a law enforcement mechanism. Most situations involve either the filming of a public place or where the government has the consent of one of the parties being filmed. This piece focuses on the filming of a private location such as one's apartment or house, without the consent of any of the parties present.
3. The fourth amendment contains no general right to privacy prohibiting governmental intrusion. Rather, the fourth amendment protects the right of people to be secure in their homes against unreasonable searches and seizures. U.S. CONST. amend. IV.
4. 751 F.2d 875 (7th Cir. 1984), *cert. denied*, — U.S. —, 105 S. Ct. 1853 (1985).
5. The defendants are members of the F.A.L.N. (Fuerzas Armadas de Liberacion Nacional Puertoriquena, translated as Armed Forces of Puerto Rican National Liberation) a group of Puerto Rican separatists who are notorious for the use of terrorism and violence in their struggle to gain the independence of Puerto Rico.
6. 751 F.2d at 876.

duced over 130 hours of videotape evidence showing the defendants assembling explosives.[7]

The surveillance began in January, 1983, when the FBI monitored two apartments that were being used as safe houses[8] for the planning of terrorist activities.[9] Surveillance took place pursuant to the purported authority of section 2518(4)(c) of Title III of the Omnibus Crime Control and Safe Streets Acts of 1968 (Title III).[10] The surveillance order authorized both the interception of oral communications within the two apartments and the installation of devices that could visually monitor and record all activities taking place on the premises.[11] The orders allowed for surreptitious entries to install, monitor, and remove the equipment between January and June of 1983.[12] For more than five months the Government maintained these devices in the defendants' apartments without limitation as to when the cameras operated or the specific activities intercepted.

After his arrest and before trial, one of the defendants filed a motion to suppress the video evidence.[13] The district court ordered the suppression of the videotapes because there was no authority, statutory or otherwise, for the issuance of the warrants.[14] The trial court memorandum stated: "The evidence obtained by the government through the video surveillance was 'unlawfully intercepted'; it does not accord with any authorization under Title III, it is not protected by any law enacted by Congress; and it was acquired in violation of defendants' constitutional rights."[15]

The government appealed the trial court's decision to the Seventh Circuit Court of Appeals.[16] Two issues were raised on appeal: first, whether a Federal court may properly authorize video surveillance of a private building's interior where individuals enjoy an expectation of privacy,[17] second, whether the videotapes may be used as evidence in a criminal trial.[18] The issues and circumstances

7. *Id.* at 884.

8. Safe houses are "secret locations rented in false names where terrorist activities are planned, weapons, explosives and other materials are stored, and bombs and incendiary devices are manufactured." Brief for United States at 5, United States v. Torres, 751 F.2d 875 (7th Cir. 1984), citing Initial Application for Electronic Surveillance.

9. 751 F.2d at 884.

10. 18 U.S.C. §§2510-20 (1982). The only statutory authority cited in the warrant application was Title III. United States v. Torres, 583 F. Supp. 86, 101 (N.D. Ill. 1984). The transcript of proceedings heard on the application was entitled: "In the matter of the application of the United States for an order authorizing the interception of wire and oral communications." *Id.* The judge hearing the application inquired about the camera, the Assistant U.S. Attorney conceded that the Statute (Title III) did not specifically authorize video surveillance but claimed that the court had authority under the All Writs Act (*see infra* note 29) to allow the surveillance by camera. The only precedent cited for this proposition was Application of Order Auth. Intereption, etc., 513 F. Supp. 421 (D. Mass. 1980). This case allowed similar video monitoring under Rule 41 of the Federal Rules of Criminal Procedure and the All Writs Act. The trial court judge in *Torres* held *Application* not to be proper precedent since it was not an adversarial proceeding. 583 F. Supp. 86, at 103.

11. 751 F.2d at 877.

12. 583 F. Supp. at 89. Applications were made for both apartments and the granting orders subsequently renewed, four and two times respectively, until the time of arrest. *Id.* at 93.

13. 583 F.Supp. at 89. The defendant's motion alleged violations of the probable cause and specificity requirements of Title III. The defendant also alleged that both the applications and renewals were based on false allegations and the orders contravened constitutional prohibitions against general searches. *Id.* The court had earlier ordered that a motion filed by one defendant would inure to the benefit of all defendants unless a defendant particularly disclaimed the advantage of that motion. *Id.* at 90.

14. *Id.* at 95-105. Title III clearly does not authorize a warrant for video surveillance. *See infra* note 30 and accompanying text.

15. 583 F.Supp. at 105.

16. 751 F.2d 875 (7th Cir. 1984).

17. 751 F.2d at 876.

18. *Id.*

presented on appeal were novel and unresolved by statute or precedent.[19] The Seventh Circuit reversed the trial court holding that Rule 41 of the Federal Rules of Criminal Procedure and the federal court's inherent authority to issue search warrants justified the video surveillance warrant issued in this case.[20] Therefore, the court found the video evidence admissible and remanded the case for trial.[21] Because the court found that video and audio surveillance pose similar privacy problems, it adopted the Title III requirements of necessity, particularity, duration, and minimization[22] to provide the Government constitutional guidelines for authorizing video surveillance by law enforcement officials.[23]

Court's Reasoning

The Seventh Circuit found two justifications for the warrant's issuance. The court used a broad reading of Rule 41 of the Federal Rules of Criminal Procedure[24] to uphold the warrant. The court relied on *United States v. New York Telephone Co.*,[25] in which the Supreme Court held that Rule 41, which covers conventional searches, must be read flexibly enough to cover electronic intrusions.[26] After analyzing *New York Telephone Co.*, the *Torres* court stated: "We

19. The Supreme Court has not addressed the question of whether video surveillance is *per se* unreasonable and therefore unconstitutional. That issue is beyond the scope of this note. *See generally* Note, *supra* note 1, (contending that video surveillance constitutes an unreasonable search). *See also* Note, *Electronic Visual Surveillance and the Right of Privacy: When is Electronic Observation Reasonable?* 35 WASH. AND LEE L. REV. 1043 (1970).

The memorandum opinion of the trial court noted that this issue, while important to the government's interests and the statutory and constitutional rights of both the defendants and the public, presents a question which had never been decided by any federal court. 583 F.Supp. at 99.

While there is no Federal precedent, a state court has found authorization for court ordered installation and operation of a video camera on private property for the prevention of crime. People v. Teicher, 52 N.Y.2d 638, 422 N.E.2d 506, 439 N.Y.S.2d 846 (1981). In *Teicher*, videotapes of transactions in a dentist's private office were admitted into evidence in the dentist's trial on charges of sexual abuse of patients. The court held that New York trial courts have inherent power to issue a warrant for video-surveillance.

20. 751 F.2d at 877-78.

21. *Id.* at 886.

22. *Id.* The majority in *Torres* apply the four Title III requirements that it considers related to the constitutional requirement of particularity to the use of video surveillance:

1) *necessity*: other investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. 18 U.S.C. § 2518(3)(c) (1982);
2) *particularity*: A warrant must contain "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates." *Id.* at § 2518(4)(c);
3) *duration*: the warrant must not allow the period of interception to be longer than is necessary to achieve the objective of the authorization, nor in any event "longer than thirty days." *Id.* at 2518(5), and;
4) *minimization*: the interception must "be conducted in such a way as to minimize the interceptions or communications not otherwise subject to interception under [Title III]."

Id. 751 F.2d at 883-84. The effect of the *Torres* decision is to take video surveillance, a more intrusive search than Title III, and reduce the amount of statutory safeguards provided, thus reducing the constitutional privacy afforded individuals.

23. 751 F.2d at 883-84.

24. Rule 41(b) states:

A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

25. 434 U.S. 159 (1977).

26. *Id.* at 169, (dictum). The search in *New York Telephone Co.* employed the use of a pen register, a mechanical device attached to a telephone line at a central telephone office, which records numbers dialed from a particular telephone by detecting electronic impulses. *Id.* at 161 n.1.

The defendants in *Torres* make the argument that even assuming Rule 41 is applicable, the orders issued in this case violate the Rule. Rule 41(c) requires that the warrant:

cannot think of any basis on which [Rule 41] might be sufficiently flexible to authorize a pen register, bug, or wiretap, but not a camera."[27]

The court further justified the issuance of the television surveillance warrant as an exercise of the inherent power of a court of general jurisdiction to issue a search warrant.[28] This inherent authority is supported by pre-Title III decisions that found wiretapping reasonable under the fourth amendment despite the lack of any statutory authorization.[29]

Although the warrants upheld in *Torres* were issued pursuant to the Government's purported authority under Title III, the Act does not specifically authorize warrants for television surveillance.[30] Title III defines "intercept" as "the aural[31] acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device."[32] The legislative history of the Act reveals that "[o]ther forms of surveillance are not within the proposed

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shall command the officer [to whom it is delivered] to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority . . . authorizes its execution at times other than daytime.

Subparagraph(d) of Rule 41 which governs the execution and return with inventory, requires that:

[t]he officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken.

It is clear that the Government agents failed to conform to the requirements of Rule 41 when they executed the orders in question. 583 F. Supp. at 104.

Regarding Rule 41, at least one commentator has argued that it "appears to have been intended to cover only tangible property, not intangibles such as intercepted oral communications and visual images." *See* Note, *supra* note 19, at 1054 n. 85.

27. 751 F.2d at 877-78. The defendants argued in their brief that *New York Telephone Co.* actually cuts against the Government's contention. They claim that the *New York Telephone Co.* decision was premised upon the fact that pen registers are a much less intrusive search than Title III surveillance (bugs and wiretaps). "Since *New York Telephone Co.* was based upon the minimal privacy intrusion, if any, entailed by the use of a pen register, the decision provides no authority for the authorization of video surveillance." Brief for Appellee at 51, United States v. Torres, 751 F2d 875 (7th Cir. 1984). The proposed legislation discussed *infra* at note 75 amends Title III to include pen registers.

28. 751 F.2d at 878.

29. *See e.g.*, Berger v. New York, 388 U.S. 41 (1967) and Katz v. United States, 389 U.S. 347 (1967).

Although the *Torres* court did not discuss the All Writs Act, the Government argued that this Act further authorized the issuance of the warrant. Brief for the United States, *supra* note 8, at 21. The All Writs Act grants Federal courts power "to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1982). The Supreme Court has "repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." United States v. New York Telephone Co. 434 U.S. 159, 172 (1977). The Government claimed an order for video surveillance was necessary to enforce the Title III orders because of the defendant's intentional acts to prevent successful oral interception. Previous attempts of oral interception were frustrated when the defendants played a radio during their meetings and spoke in code so that their conversations, if intercepted, could not be understood. Brief for the United States, *supra* note 8, at 21.

The district court in *Torres* responded to the Government's argument of The All Writs Act by claiming:

> [T]he statute presupposes existing complete jurisdiction "and does not contain a new grant of judicial power." *Hyde Construction Company v. Koehring Company*, 348 F.2d 643, 648 (10th Cir. 1965). The government's argument on this point consists or the common fallacy in logic: begging the question, because it assumes that Title III gives a federal judge the authority to issue an order for visual surveillance when it does not.

583 F.Supp. at 105.

30. Three courts have held that Title III does not apply to video surveillance. Application of Order Auth. Interception, etc, 513 F. Supp. 421 (D.Mass. 1980); People v. Teicher, 52 N.Y.2d 638, 422 N.E.2d 506, 439 N.Y.S.2d 846 (1981); and Sponick v. City of Detroit Police Dept. 49 Mich App. 162, 211 N.W.2d 674 (1973).

31. The word "aural" means to come into possession through the sense of hearing. WEBSTER'S 3D NEW INT'L DICTIONARY 144 (1966).

32. 18 U.S.C. § 2510(4) (1982).

legislation."[33]

The defendants argued that Congress has forbidden the use of television surveillance since it is not explicitly authorized by Title III[34] and consequently, defendants argue, Federal courts are deprived of the power they would otherwise have to issue warrants for video surveillance.[35] The defendants support this argument by pointing out that Congress explicitly authorized the use of video surveillance under the Foreign Intelligence Surveillance Act of 1978 (FISA),[36] an act that establishes procedures for electronic surveillance of foreign agents. The defendants claim that through Title III and FISA Congress has effectively prohibited the use of video monitoring in domestic criminal investigations.[37]

The Seventh Circuit rejected the defendant's argument and stated that each statute is intended to be exclusive in its domain: Congress enacted FISA to allow the Government to monitor foreign agents and enacted Title III to regulate only domestic investigations.[38] The court stated that Congress has never addressed the issue of judicial authorization of television surveillance for Federal criminal investigations.[39] The Seventh Circuit did request, however, a legislative response to resolve this problem.[40] The court noted that it is anomalous to have detailed statutory regulation of bugging and wiretapping[41] but not of television surveillance, and to have detailed statutory regulation of television surveillance of foreign agents but not of domestic criminal suspects.[42]

In a concurring opinion, Judge Cudahy criticized the majority for disregarding the clear purpose of both statutes (FISA and Title III): to subject intrusive forms of electronic surveillance to strict statutory control.[43] He stated that the majority erred both in concluding that the Government may engage in video surveillance without regard to statutory requirements and in adopting only certain Title III requirements as constitutional guidelines for the proper authorization of video surveillance.[44]

Judge Cudahy concluded that if neither Title III nor FISA expressly authorized the video surveillance employed in this case, as the majority concludes,[45] such surveillance would be prohibited by law.[46] Judge Cudahy did, however, find express statutory authorization for the surveillance in this case. He stated that if Title III and FISA are construed together, there is proper statutory authority to

33. S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2178.
34. Brief for Appellees, *supra* note 27, at 44.
35. *Id.* at 47.
36. 50 U.S.C.A. §§1801-11 (West Supp. 1984). Section 1801(f)(4) of the Act authorizes the use of video electronic surveillance in foreign intelligence cases. The Act broadly defines electronic surveillance to cover television by including in the definition the use of "an electronic, mechanical or other surveillance device . . . for monitoring to acquire information, other than from a wire or radio communmication . . . ." 50 U.S.C.A. § 1801(f)(4) (West Supp. 1984)

    In discussing the definition of "electronic surveillance", the legislative history of FISA stated it could also include miniaturized television cameras and other sophisticated devices not aimed merely at communications. S. REP. No. 604, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. Code Cong. & Ad. News 3904, 3936.
37. Brief for Appellee, *supra* note 27, at 47.
38. 751 F.2d at 881.
39. *Id.* at 882.
40. *Id.* at 885.
41. *Id.*
42. *Id.*
43. *Id* at 888.
44. *Id.* at 889-90. *See supra* note 22 and accompanying text.
45. The majority held that Title III and FISA are exclusive in their own domain. 751 F.2d at 881. Clearly, Title III did not authorize the video warrant, see *supra* note 23, and FISA applies only to surveillance of foreign agents. 50 U.S.C.A. § 1801 (West Supp. 1984).
46. 751 F.2d at 889. Judge Cudahy also stated: "In addition, if the video surveillance here was not authorized by statute, then the officers who engaged in it may have committed a federal crime." *Id.*

conduct video surveillance in domestic criminal situations.[47] Judge Cudahy found that the FISA definition of electronic surveillance, which includes video,[48] is incorporated into Title III and electronic video surveillance is therefore authorized by and subject to Title III.[49] Judge Cudahy concluded that tying Title III to FISA avoids the anomaly of having the most dangerously intrusive form of electronic video surveillance regulated by less stringent Title III requirements.[50]

POLICY CONSIDERATIONS

Effective video surveillance as a law enforcement technique is a relatively recent technological development,[51] but its use by Federal law enforcement agents is increasing.[52] Video surveillance has not yet received significant congressional consideration and as the *Torres* decision demonstrates, the lack of comprehensive legislation causes uncertainty among courts and provides potential for serious violations of an individual's fourth amendment rights.

Video surveillance is inherently more intrusive than wiretapping or bugging. Its potential for abuse is great. As opposed to wiretapping, video surveillance is a continuous and uninterrupted search.[53] Whereas oral interception is limited to periods of actual communications,[54] video surveillance cannot be limited merely to the times of activity, criminal or otherwise.[55] Thus, video surveillance poses an excessive and unnecessary invasion of personal privacy by filming every aspect of a person's life in order to record criminal activity.

Moreover, the privacy interest actually invaded by video surveillance is much greater than the invasion posed by a Title III interception. The moment one person speaks with another, he has lost part of the expectation of privacy accorded to the speech. The person spoken to can always relate what he has heard. On the other hand, when a person believes he is alone, absent any known observers, he

47. *Id.* at 887. Judge Cudahy stated:
> [A] careful evaluation of Title III and FISA, and of the interplay between those two statutes, shows that the video surveillance in this case should be subject to the requirements of Title III. . . . [I]t is clear that Congress intended the statutes to be read together, providing a comprehensive and exclusive system of control.

Id.

48. See *supra* note 36 and accompanying text.

49. Judge Cudahy stated in his concurring opinion:
> In view of the language of both Title III and FISA, the purposes of both statutes, the practical connections between audio and video surveillance methods and the silence in the legislative history on the subject, it is most sensible to view the statutory dilemma as the result of inadvertence rather than design. FISA's 'conforming amendments' simply did not mesh the gears of the statutes quite as smoothly as Congress had intended.

751 F.2d at 894.

50. *Id.* at 895.

51. The use of hidden television cameras has long been recognized. However, with the development of minitiarized cameras, the scope of possible interceptions was greatly expanded. *See generally* Note, *supra* note 1, at 266-69.

52. The Justice Department recently reported that federal agents installed secret television surveillance cameras in 16 cases in 1984. Burnham, *When Television Watches People*, N.Y. Times, March 10, 1985, §4, at 2E, col.3.

53. Wiretapping conversation tunes eavesdroppers in as to when to begin interception. However, an attempt to acquire videotape of illegal activity would require continuous filming or random interval filming, which would greatly reduce the possibility of a successful investigation. *See* Note, *supra* note 1, at 286-87.

54. In the case of either a wiretap or a bug, no actual interception is possible until the parties are speaking or otherwise manifesting sounds capable of interception.

55. In the case of video surveillance without simultaneous unaided observation of activities, it is impossible to film only criminal activity. In *Torres*, the cameras were apparently set up to begin filming anytime anyone entered the apartment. Therefore, any and all activities were the subject of video interception.

has an absolute expectation of privacy even if engaging in criminal activity.[56] While electronic eavesdropping may be avoided by maintaining silence, video surveillance is literally inescapable.[57]

The apparent lack of statutory authority for video surveillance should not be remedied by mere reliance upon the federal courts' inherent authority to issue warrants and subject only to ad hoc provisions of Title III.[58] Without statutory authorization, the use of video surveillance will become widespread. The absence of specific regulation will make video surveillance warrants too easily accessible and the potential for abuse even greater.[59] Congress must strike a balance between the constitutional right to privacy[60] and the public safety[61] by subjecting video surveillance to statutory safeguards to prevent serious abuses and constitutional violations.

NEED FOR CONGRESSIONAL RESPONSE

In *Katz v. U.S.*[62] and *Berger v. New York*[63] the Supreme Court held that wiretapping and bugging were not unreasonable searches within the fourth amendment.[64] Following these decisions, Congress recognized the need to enact statutory safeguards for the protection of fourth amendment rights.[65] Similarly, in response to the uncertainty created by *Torres*, Congress should again enact legislation to further protect constitutional rights. It must specify the proper application procedures for, and the conditions of, the Government's use of electronic video surveillance.

It seems unlikely that Congress would stringently regulate video surveillance of foreign agents while providing little or no regulation of such surveillance in domestic criminal cases. Specifically, the Foreign Intelligence Surveillance Act allows that a judge may only issue an order approving electronic surveillance if he finds: (1) that the President authorized the Attorney General to approve the application; (2) a Federal officer made the application and it was approved by the Attorney General; (3) there is probable cause that a foreign power is involved;

56. Note, *supra* note 1, at 294.
57. *Id.* Light level television uses an extremely sensitive visual detector which allows filming of an area which appears dark to an unaided eye as if it were daylight. *Id.* at 267-68. Even darkness is no longer a barrier to video surveillance. *Id.*
58. *See supra* notes 20 and 22 and accompanying text.
59. Warrants authorized absent statutory regulation pose a serious risk of being held unconstitutional as general warrants. In striking down New York's wiretap statute in Berger v. New York, the Supreme Court stated:

> New York's broadside authorization rather than being "carefully circumscribed" so as to prevent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in *Entick v. Carrington,* 19 How. St. Tr. 1029, and which were then known as "general warrants.". . . The fourth Amendment's requirement that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized" repudiated these general warrants and "makes general searches. . .impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275. U.S. 192, 196 (1927).

388 U.S. at 58. The trial court in *Torres* found that the warrants in issue "had all the force of general warrants." 583 F.Supp at 104.
60. *See supra* note 3.
61. The concerns for public safety are evident in a case such as *Torres.* The majority opinion stated: "[t]here is no right to be let alone while assembling bombs in safe houses." 751 F.2d at 883. Such concerns must be delicately balanced with the constitional right of privacy.
62. 389 U.S. 347 (1967).
63. 388 U.S. 41 (1967).
64. *Id.* at 353.
65. *See* S. REP. NO 1097, *supra* note 33, at 2113. The provisions of Title III go beyond the constitutional mimimum standards set in *Berger* and *Katz* for a reasonable search. *See e.g.*, §2518 requirements, *infra* note 81 and accompanying text.

and (4) the proposed minimization procedures of section 1801(h) are met.[66] Once issued, the judge may approve a surveillance order "for the period necessary to achieve its purpose" or for 90 days whichever is shorter.[67] Section 1806 of FISA has additional statutory safeguards allowing victims of unlawful interceptions to make motions to suppress.[68] FISA also provides for in camera and exparte review of video tapes by a district judge,[69] suppression of evidence found to be in violation of the Act,[70] and the destruction of unintentionally acquired information.[71]

FISA also provides for a special court to hear and grant applications for electronic surveillance under the Act.[72] Finally, section 1807 of FISA provides criminal sanctions for violations of the foregoing provisions.[73]

Currently, no Federal statute authorizes video surveillance for domestic law enforcement. However, the Seventh Circuit in *Torres* chose to allow video surveillance despite the lack of Congressional authorization. Other courts may choose to follow this precedent.

If Congress wishes to remove the ambiguity and forbid the video surveillance of private citizens, it should statutorily deny authorization. Conversely, if Congress wishes to allow video surveillance, it should enact express statutory authorization delineating guidelines for its use.

The *Torres* court adopted some of the safeguards provided by Title III[74] yet

66. 50 U.S.C.A. § 1805(a) (West Supp. 1984) Pursuant to § 1801(h), the Attorney General is required to adopt specific procedures designed "to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." *Id.* at 1801(h).

Title III's § 2518(5) requires that the interception of communication be conducted in such a way as to minimize the interception of communication not otherwise subject to interception. 18 U.S.C. §2518(5) (1982). *See generally* Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 STAN. L. REV. 1411 (1974). An agent has complied with the minimization requirement if he has shown a high regard for the right of privacy and has done all he reasonably could to avoid unnecesary intrusion. United States v. Tortorello, 480 F. 2d 764, 784 (2d Cir. 1973) *cert. denied*, 414 U.S. 866 (1973).

67. 50 U.S.C. § 1805(d) (West Supp. 1984). Title III's duration requirement states "[n]o order. . . may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days." 18 U.S.C. § 2518(5) (1982). The provision is intended to prevent the issuance of blank warrants of the type condemned in *Berger*. S. REP. NO. 1097, *supra* note 33, at 2192. When it is necessary to conduct surveillance for a period of time longer than that specified, the provision provides for extensions. In *Torres*, the applications for the two safehouses were renewed, effectively allowing the video monitoring to continue for five months. 583 F.Supp at 93.

68. 50 U.S.C. § 1806(e). (West Supp. 1984).

69. *Id.* at § 1806(f).

70. *Id.* at § 1806(g).

71. *Id.* at § 1806(i).

72. *Id.* at § 1803.

73. *Id.* at § 1809. Additional guidelines for appropriate application procedures for video surveillance are found in title nine of the United States Attorneys' Manaul (USAM). U.S. Dep't of Justice, United States Attorneys' Manual, Title 9, (1984). Pursuant to the manual, a request for video surveillance may be approved as a matter of course when no intrusion on a person's legitimate privacy right appears to be involved. (USAM at 9-7.1010.). However, when justifiable expectations of privacy exist, the use of video surveillance may be considered an equivalent to a search and, thus, requires judicial authorization. *Id.* When court authorization for video surveillance is deemed necessary, the application and order should be based on Rules 41(b) and 57(b) of the Federal Rules of Criminal Procedure and the All Writs Act. *Id.* at 9-7.1030 The application and order should be supported by an affidavit which establishes probable cause that evidence of a Federal crime will be obtained through the video surveillance and should include: (1) a particularized description of the premises to be surveilled; (2) names of the persons to be surveilled; (3) a description of the steps to be taken to ensure that surveillance will be minimized so as to effectuate only the purposes for which the order is issued; and (4) a statement of the duration of the order which shall not exceed thirty days. *Id.* The USAM stresses the importance of making the video surveillance order separate from the Title III order to avoid the possible suppression of evidence for lack of statutory authority for the warrant. *Id.*

74. *See supra* note 22 and accompanying text.

when compared to the stringent regulations provided by FISA, these ad hoc requirements appear insufficient to insure the protection of individuals' privacy. Moreover, it is possible that other courts may choose to provide even fewer safeguards when authorizing video surveillance. If Congress is going to allow video surveillance, it must implement a comprehensive statutory scheme for its use and prevent subjecting the constitutional right to privacy to the discretion of individual courts.

The Electronic Surveillance Act of 1984

Congress is currently considering a bill that would include video surveillance in the interceptions authorized by Title III.[75] The bill, The Electronic Surveillance Act of 1984, amends section 2510(4) of Title III by striking out the word "aural".[76] If adopted, every application and order for video surveillance would have to comply not only with the requirements of *Torres*, but also the additional comprehensive requirements imposed by Title III. While the *Torres* court only imposes the necessity, particularity, duration, and minimization requirements,[77] Title III also requires that either the Attorney General, Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney in the case of a state or political subdivision authorize an application for surveillance orders.[78] The application applies only where such interception may provide, or has provided evidence of specified crimes.[79] Furthermore, under Title III, an order can be issued only upon a finding of probable cause regarding the crime and the evidence that will be obtained through the interception as well as a finding of probable cause that the facilities from where the communication is to be intercepted are being used in connection with the commission of such offenses.[80]

Additional Title III provisions incorporated by H.R. 6343 mandate that all interceptions be disclosed to the target after the investigation has concluded,[81] and provide a statutory exclusionary rule for unlawfully intercepted information.[82]

75. H.R. 6343, 98th Cong., 2d Sess., (1984). The bill was introduced on October 1, 1984 by Representative Kastenmier (D-Wis) and is entitled the "Electronic Surveillance Act of 1984." H.R. 6343 was sent to the House Judiciary Committee but died at the end of the 98th Congress. It has not yet been introduced in the current Congress.

Introducing the bill, Representative Kastenmier stated: "Technology has outstripped existing law on electronic surveillance leaving loopholes for wiretappers, public and private. My bill closes those loopholes, restoring the result intended by Congress when it passed the law criminalizing wiretapping, the Omnibus Crime Control and Safe Streets Act of 1968." 130 CONG. REC. E4107-08 (daily ed. Oct. 1, 1984) (statement of Rep. Kastenmier).

76. H.R. 6343, *supra* note 75, at § 2. *See supra* note 31 and accompanying text.

77. *See supra* note 22 and accompanying text.

78. 18 U.S.C.A. §2516 (1982).

79. *Id.*

80. *Id.* at §2518(3). The problem in applying this standard to video surveillance is apparent. Video surveillance results in the observation of acts or stationary objects. Under this standard, the application would have to specify the precise location within the premises where the acts were expected to take place or the objects to be located. Without such particularity, the officer would be allowed discretion as to the placement of the camera and risks an unauthorized search. *See supra* note 59 and accompanying text. This problem does not arise with wiretapping and is unlikely with bugging or eavesdropping. Allowing cameras to be installed in every room on the premises risks the possibility of being held a "general search by electronic device" expressly unauthorized in *Berger*, 388 U.S. 57. *See* Note, *supra* note 1, at 283, n.133.

81. 18 U.S.C. § 2518(8)(d) (1982).

82. *Id.* at 2515, 2818(10)(a) Section 2515 provides that when any interception is acquired in violation of this chapter, no part of its contents or evidence derived therefrom may be used at trial, hearing, other proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee or other authority. *Id.* This statutory exclusionary rule prevents use of illegally obtained evidence in more situations than the case law exclusionary rule, which states that any evidence obtained in violation of the fourth amendment would be barred from a federal prosecution. *Weeks v. U.S.*, 232 U.S. 382 (1914).

Police officers engaging in warrantless searches are subject to criminal penalties,[83] and targets of unlawful interceptions have a private cause of action for damages.[84]

In addition to the current Title III requirements, H.R. 6343 requires that an application for a video surveillance warrant include the specific investigative objectives and interception targets to which the application pertains.[85] The bill would also amend section 2518 of Title III to require that no interception take place unless at least one of the parties to the communication is identified within the order.[86] Also, there must be probable cause that virtually everyone using the designated facility or telephone is doing so for the purpose that is the object of the investigation.[87] In addition, an order authorizing the interception of a wire or oral communication under the proposed bill may authorize physical entry to install an electronic, mechanical or other device only upon a showing by the applicant that there is no other less intrusive means of affecting the interception.[88] This increases the government's burden to prove there were no less intrusive means available, while Title III only requires that the applicant state why other means are unlikely to succeed.[89] Additional requirements proposed by H.R. 6343 include (1) the enforcement of a "good faith" intent to minimize the interception,[90] and (2) reports made every two weeks to the issuing judge showing progress toward the objective.[91]

Analysis of the Electronic Surveillance Act of 1984

It is unlikely that Congress intended to stringently regulate the use of wiretapping in Title III while leaving the more intrusive surveillance of the video camera unregulated. The more logical view is that technology has only recently made video surveillance possible and legislation has not kept up with technology.[92] H.R. 6343 provides a statutory remedy for the anomalous situation of the authorization of video surveillance as presented by *Torres*.

By simply imposing certain Title III requirements to video surveillance, the Seventh Circuit defeats the purpose of Title III.[93] H.R. 6343 would remedy this

83. 18 U.S.C. §2511(1) (1982).
84. *Id.* at §2520.
85. H.R. 6343, *supra* note 75, § 6(a). The order authorizing intercepts under Title III is required to specify the identity of the person (if known) whose communications are to be intercepted and the period of time for which authorization is valid. 18 U.S.C. § 2518(4) (1982).
86. H.R. 6343, *supra* note 75, at § 6(d).
87. *Id.*
88. *Id.* Section 2518(1)(c) of Title III requires that a granting order only be issued upon a finding that normal investigative procedures have been tried and failed or appear unlikely to succeed if tried, or are too dangerous.

    When the same objective can be accomplished by a conventional search or electronic eavesdropping, video surveillance will fail to meet the necessity requirement. Note, *supra* note 1, disclaims the need for video surveillance. The author claims that Title III was passed as a special tool to combat organized crime and that wiretapping has been successful in fulfilling this objective. *Id.* at 290-94.
89. 18 U.S.C. §2518(1)(c) (1982).
90. H.R. 6343, *supra* note 75, § 6(e). On minimization requirement, *see supra* note 66.
91. *Id.* at § 6(f).
92. This analysis precludes acceptance of Judge Cudahy's concurring opinion in *Torres* which called for Title III and FISA to be read together as a comprehensive law enforcement scheme. *See supra* note 47 and accompanying text.

    If video surveillance was not considered by Congress a feasible form of surveillance in 1968, then Title III is an antiquated statute. The problem stemming from outdated statutes has been described:

    > When antiquated statutes remain unamended by Congress for protracted periods of time, ambiguity weakens application of the law to contemporary problems. In resolving statutory ambiguities, judges will, of necessity exercise authority over the policymaking that Article I of the Constitution entrusts to elected representatives.

    Fein, *Regulating the Interception and Disclosure of Wire, Radio, and Oral Communications: A Case Study of Federal Statutory Antiquation* 22 HARV. J. LEGIS. 47, 48-49 (1985).
93. Title III has two main purposes: 1) to protect the privacy of wire and oral communications and 2) to

oversight since all Title III provisions would apply to video surveillance. Primarily, enactment of H.R. 6343 would provide the statutory authorization of video surveillance warrants and avoid the reliance on the court's inherent authority to issue a search warrant. Moreover, by incorporatiing video surveillance within Title III, H.R. 6343 would effectively subject such surveillance to rigid statutory regulation.

H.R. 6343 would prohibit the use of video surveillance except by law enforcement agents involved in the investigation or prevention of serious crimes.[94] Each offense listed in Title III has been chosen because of its seriousness or because it is characteristic of organized crime.[95] Thus, the threat posed to an individual's right to privacy by video surveillance will not be present except in the offenses statutorily determined by Title III.

Decentralized control over authorization leaves the power to apply for video surveillance orders in the hands of local law enforcement personnel. However, by limiting the application and authorization to central authorities, H.R. 6343 prohibits the possibility that divergent practices will develop and makes an identifiable person answerable for abuses. H.R. 6343 supplies additional protection for privacy rights by providing a statutory exclusionary rule for the suppression of illegally obtained evidence,[96] limiting the period of time for which surveillance is authorized,[97] and calling for periodic judicial supervision.[98] In the event that the provisions for use of video surveillance are violated, the Act provides victims with a statutory remedy of civil damages.[99]

Finally, the use of video surveillance under H.R. 6343 would require judicial review of the showing of probable cause.[100] By adopting Title III's probable cause requirements,[101] and including the requirement that no less intrusive means be available to effect the search,[102] the proposed legislation will satisfy the constitutional test of *Katz* and *Berger* which requires that electronic surveillance techniques be used only under the most precise and discriminate circumstances.[103]

CONCLUSION

The *Torres* court imposed four important requirements on the use of video surveillance: necessity, particularity, duration, and minimization. However, for video surveillance to be used in a manner guaranteed to protect the right to privacy, *all* Title III procedural provisions should apply. Enactment of The Electronic Surveillance Act of 1984 would insure that video surveillance would not be authorized without the full protection of Title III safeguards, effectively protecting individuals' right to privacy.

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delineate on a uniform basis the circumstances and conditions under which the interception of wire and oral communication may be authorized. S. REP. NO. 1097, *supra* note 33 at 2153. See *supra* note 53 and accompanying text.

94. 18 U.S.C. §2516 (1982).
95. S. REP.No. 1097, *supra* note 33, at 2186.
96. 18 U.S.C §2515 & 2518(10)(a) (1982).
97. *Id.* at §2518(5) (1982).
98. H.R. 6343, *supra* note 75, at §6(f).
99. 18 U.S.C. §2520 (1982).
100. *Id.* at §2518(3).
101. *Id.*
102. H.R. 6343, *supra* note 75, at §6(d).
103. 388 U.S. at 58.

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