



10-1976

United States v. Donovan

Lewis F. Powell Jr.

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Identification Issue

Winegar rev. of 3 Resps ^{Grant either this or Bernstein 74-1486}

was suppressed because Gore't had probable cause to think their conversations would be ~~tapped~~ intercepted. The taps were duly authorized vs. the Δ's whose phones ~~to~~ were to be tapped ("primary targets"). Q - Since taps were legal, why should ev be suppressed, altho Gioradano ~~to~~ may leave Preliminary Memo that way.

Notification Issue

October 31, 1975 Conference

List 1, Sheet 1

No. 75-212

UNITED STATES

v.

DONOVAN

Cert to CA 6

(Phillips, Ch. J. & Cecil, S.C.J.; Engel, con'ing & diss'ng)
Federal/Criminal

Timely

^{1/} after the event

Resps were indicted with the petrs in Spaganlo v. United States, No. 75-217, with which this case is listed. The Spaganlo petrs were severed for trial after the DC granted the motions at issue here. The Court may dispose of the cases independently.

Please see the pool memo in the related case, United States v. Bernstein, No. 74-1486 (Summer List 3, Sheet 3), held for this case.

^{1/}

With extension granted by MR. JUSTICE WHITE.

Grant on both
the identification
and notification
issues.

Phil

1. SUMMARY: Resps -- Donovan, Robbins, Buzzacco, Merlo and Lauer -- were indicted (N.D. Ohio) (Krupansky) for conspiracy to conduct and for conducting an illegal gambling business, in violation of 18 U.S.C. §§ 371, 1955. As to resps Donovan, Robbins and Buzzacco, the DC granted a motion to suppress evidence derived from a wiretap, on the ground that at the time of application there was probable cause to believe that their conversations would be intercepted, so that failure to identify them by name in the applications and orders related to the wiretap violated 18 U.S.C. §§ 2518(1)(b)(iv) and 2518(4)(a); this is the issue presented in the Government's pending petition in No. 74-1486, United States v. Bernstein. As to resps Merlo and Lauer, not known until after the applications for the wiretaps, the DC granted the motion to suppress because they had not been served with notice of the interception, in violation of 18 U.S.C. § 2518(8)(d); this issue is not in Bernstein. On a 18 U.S.C. § 2518(10)(b) appeal, CA 6 affirmed -- one judge dissenting on the Merlo/Lauer suppression as to which he would remand in light of Giordano and Chavez.

The questions are whether the Government violated Title III in this case and, if so, whether suppression of the evidence derived from the intercept is justified. 18 U.S.C. § 2518(10).

2. FACTS & DECISIONS BELOW: On November 28, 1972, Chief Judge Battisti (N.D. Ohio) authorized a Title III

interception for fifteen days, ending December 12, over two telephones used by Kotoch and Spaganlo and two used by Florea, of the communications of Kotoch, Spaganlo, Chickeno, Vara, Florea, Veres "and others, as yet unknown." On December 26, the DJ extended the order for 15 additional days as to two of the four telephones originally authorized, and issued an order authorizing intercepts over an additional phone at the same location. Each order authorized the interception of communications of Kotoch, Spaganlo, Chuc - - -, - - - Slyman, Florea "and others, as yet unknown." On February 21, 1973, the DJ ordered notice served on 37 persons whose conversations had been overheard during both periods of interception; on the Government's motion, notice to two more persons was ordered on September 11, 1973. Conversations involving all of the resps were intercepted in both periods. ^{2/} "Inadvertently," the Government did not give the court Merlo's and Lauer's names, and they never received inventory notice.

The Government concedes that resps Donovan and Robbins were "known" to it at the time of the extension application. Though the Government was aware that Buzzacco was involved in gambling activities, it disputes the conclusion that it was aware of the likelihood that Buzzacco would be overheard in conversations over the phones.

^{2/} All suppressed conversations, as in Bernstein, were with the named targets.

After a hearing, Judge Krupansky suppressed evidence as to Donovan, Robbins, and Buzzacco derived from the December 26 interception for failure to identify them and also ruled that evidence derived from both periods of interceptions be suppressed as to Merlo and Lauer for failure to notify.

Affirming, CA 6 reasoned that the failure to identify meant that the communications were "unlawfully intercepted" (§ 2518(10)(a)), because the identification requirement "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures." Giordano, 416 U.S., at 527. Only if the known parties whose communications are to be intercepted are known to the DC can it exercise strict control over intercepts. The statutory language "would plainly seem to require the naming of a specific person in the wiretap application" when the person is known to be committing the offense. United States v. Kahn, 415 U.S., at 152. "[I]t makes no difference whether the omission was inadvertent or purposeful. The fact of omission is sufficient to invoke suppression." [Petn., 10a.] Buzzacco was "known" to the Government, because at the time the December 28 application was filed the Government "had 'suspicions' that he was involved in the gambling activities."

Following United States v. Chun, 503 F.2d 533 (CA 9 1974), CA 6 concluded that the Government must be required to submit the names of all overheard parties to the DC, so that the DC may exercise informed discretion in determining who should be notified "in the interests of justice." 18 U.S.C. § 2518(8)(d). The

notice provision plays a "central role" and "suppression must follow when it is shown that this statutory requirement has been ignored," Giordano, 416 U.S., at 529, whether lack of notice was due to deliberate Government circumvention, United States v. Eastman, 465 F.2d 1057 (CA 3 1972), or inadvertent error, United States v. Wolk, 466 F.2d 1143 (CA 8 1972). Dissenting, Judge Engel agreed that the Government was obliged to advise the judge of all persons whose conversations were overheard, but disagreed that the conversations could be suppressed as "unlawfully intercepted." Since notification necessarily occurs after interception, it has little to do with deterring improper initial resort to the procedure. Suppression should be limited to those instances where the violation was shown to be deliberate, or where there was actual prejudice not curable by less drastic means. Merlo's and Lauer's identity in the conversations was first known in August 1973, and no prejudice appears on the record.

3. CONTENTIONS:

a. Re Donovan, Robbins & Buzzacco

SG recaps the arguments made in its Bernstein petition, see pool memo. The lower courts' holding that Buzzacco should have been identified illustrates the "grave practical drawbacks" flowing from applying the probable cause standard in wiretap cases. At the time the applications were filed, agents also suspected that Buzzacco was involved in bookmaking with the named suspects: they knew he was a bookmaker and that two of the

targets had placed calls to a phone Buzzacco was using. During the first intercept period, someone using a Niles, Ohio telephone and nicknamed "Buzz" or "Buzzer" was overheard discussing gambling with several named targets. (Buzzacco used several aliases.) Only after the December 28 application did agents learn that Buzzacco was using the Niles telephone. There is a conflict on the identification issue between CA 4 (Bernstein), CA 6 (Donovan), and CA D.C. (United States v. Moore, rehearing en banc denied, mandate recalled and held pending disposition of Bernstein), on the one hand, and CA 5 (United States v. Doolittle, decided en banc in favor of the government), on the other.

Resp Buzzacco contends that this Court has given adequate guidance in this area and the issue need not be reviewed and rehearses the CA 6 opinion.

b. Re Merlo and Lauer SG: On inadvertent failure to notify, CA 6 conflicts with CAs 3, 8 and 9.^{3/} The notification provision is to ensure that the subject of surveillance will eventually learn that he was electronically surveilled, so that he may proceed with a civil action under 18 U.S.C. § 2520, if he believes his rights were violated. That purpose was amply satisfied by the notice eventually received here. There was no prejudice because Merlo and Lauer had

^{3/} United States v. Iannelli, 477 F.2d 999 (CA 3); United States v. Wolk, 466 F.2d 1143 (CA 8); United States v. Chun, 503 F.2d 533 (CA 9).

a full opportunity to file and argue their motions to suppress. Even if there was a duty to advise the court that they had been overheard, there is no basis for suppression under 18 U.S.C. § 5218(10)(a). The interception was manifestly lawful when made, and violation of the notification provision does not relate substantially to any congressional intention to limit the use of intercept procedures. Suppression was not proper under Giordano and Chavez. The standard of the dissenting judge should be affirmed and made governing.

Resps Merlo and Lauer do not agree that the record shows that failure to notify them was due to administrative oversight. They claim that CA 6 did not require the government to give the names of all overheard persons to the DJ, but only to classify all persons and to make available information regarding the classes as the DJ requires. Since the government's own standard was to include persons if "positively identified," as Merlo and Lauer eventually were, the case does not intrude upon the Government's policy. Under prior decisions of this Court, suppression is a proper remedy; in Chun, CA 9 held the notification provision "central or at least a functional safeguard in the statutory scheme." There is no conflict: In Iannelli, the deft was held to be in the inventory notice; in Wolk, defts' counsel had actual notice shortly after the 90-day-period lapsed; in Chun, on remand the DC suppressed after finding that the unnamed persons had actual notice shortly after the statutory period lapsed. Even if there is a conflict, only Chun post-dates Giordano and Chavez.

4. DISCUSSION:

a. Identification

There is a conflict on the issue, which is important to the administration of Title III. In Doolittle, CA 5 held that in the absence of any allegation of prejudice in not being named or of any indication of bad faith or attempted subterfuge by the Government, and where most of the conversations were with the named party, there is substantial compliance with the requirements of the Act. Another view (Judge Godbold in dissent in CA 5) is that those who are "targets of the intercept" must be named. And there are the views of CAs 4 and 6 in Bernstein and Donovan, shared by CA D.C. in Moore. The language of Title III (§§ 1518(1)(b)(iv), 2518(4)(a)) may support the CA 4, 6 and DC view somewhat better than the Government, but the statute is capricious if it means what those circuits hold it to. One purpose of naming persons in the application is to enable the DJ to determine whether there is probable cause to intercept that person's conversations. That person is named in the order, so that from the outset, or as the tap proceeds, the interceptions can be minimized. All of the conversations here involved one of the named persons and a resp. The Government had authority to intercept the conversation. It is difficult to see what the Government gains by not listing someone known to be involved in the crime, for it limits the opportunity to intercept conversations involving that person and other unnamed persons. On the other hand, it seems unlikely that in naming on an application someone

as to whom it had probable cause the Government would imperil its overall application as being too extensive. Accordingly, it is unclear why conversations between a named person and an unnamed person should be suppressed as to the unnamed person. Notification remains. Had the Government applied for the unnamed person and been turned down for want of probable cause to listen to his conversations, the conversation with a named person might still have been intercepted.

b. Notification

The split is less substantial on this issue, but not as weak as resps claim. For example, in Wolk and Iannelli CA 8 and CA 3 relied on lack of prejudice, as well as actual notice; the inventory was received in time to make a suppression motion, an argument the Government picks up here.

Under § 2518(8)(d), inventory notice must go to all persons named in the order or application and such others in the DJ's discretion as necessary "in the interest of justice." This connects the identification and notification requirements, a reason to prefer Donovan over Bernstein should the Court wish to grant on the identification question.

It is not clear why suppression is appropriate, for the conversation was "lawfully intercepted" (§ 2518(10)(a)(i)), at least where, as here, the conversation was with a named person

There are responses from (1) Buzzacco and (2) Merlo and Lauer, and a supplemental memo from the SG on Doolittle and Moore.

10/15/75

Nelson

DC & CA 6 Opinions in
Petn.; Doolittle in
Supp. Memo

No. 75-212, United States v. Donovan, et al.

This memorandum, dictated after a preliminary look at the briefs, is intended only as an "aid to memory" that will refresh my recollection when I return to a more careful study of the case prior to argument and decision. When an opinion is expressed or intimated, it is wholly tentative.

* * * * *

This is a case of considerable importance in the administration of the wiretap provisions of Title IV of the Omnibus Crime Control and Safe Street Act (18 U.S.C. § 2510-2520). The principal issue is whether § 2518(1)(b)(iv) requires the identification by name, in the application for authority to conduct a wiretap, of all persons whom the government has probable cause to believe may use the tapped telephone, in addition to the owner of that phone (usually referred to as the "principal target" of the tap)?

Brief Summary of Facts

The government, after extensive investigation, filed an application for authority to tap four telephones, two listed under an alias of Spaganlo and located in an apartment used by Kotoch, and two telephones in the home of Florea. The application indicated that these three "principal targets" were using the telephones to conduct an extensive bookmaking business -- using the phones to make and receive telephone calls in connection with this business from many persons. Three of such persons were identified by name in the application. Pursuant to the application, the DC issued an order authorizing the taps of these four telephones for the purpose of intercepting gambling-related communications of Spaganlo, Kotoch, and Florea, the three other named individuals, and "others as yet unknown," to and from the four telephones.

During the initially authorized interception, the government learned that respondents Donovan and Robbins were talking about gambling activities with the named targets. The initial order was extended from time to time, and also expanded somewhat, but Donovan and Robbins were not named.

Nearly three months after the taps were authorized, the government submitted to the court a list of thirty-seven (37) names in a proposed order directing service of the required "inventories" giving notice of the interceptions. This list was thought to contain all of the individuals who could be identified as having discussed

gambling over the monitored telephones. The order was signed by the DC and an inventory notice served on the persons named. Respondents Donovan, Robbins and Buzzacco were included in the list of 37, and they received notices pursuant to the order.

Allegedly through "administrative oversights," respondents Merlo and Lauer were not included in any order and were not served with inventory notices.

Decisions Below

These respondents moved to suppress evidence derived from the taps. The DC granted the motion with respect to Donovan, Robbins and Buzzacco on the ground that the failure to identify them by name in the applications and authorization orders violated §§ 2518(1)(b)(iv) and 2518(4)(a). The district court also held that, although Merlo and Lauer were not known until after the last application, evidence as to them must be suppressed because they were not served with inventories. CA6 affirmed. On the principal question (the "identification question" relating to Donovan, Robbins and Buzzacco), CA6 held -- relying on dictum in United States v. Kahn, 415 U.S. 143, 152, 155 -- that where the government has probable cause to believe persons (other than the target individuals) will be using the tapped telephones, such persons must be specifically identified by name in the intercept applications and orders. CA6 also held that the government had an implied statutory duty to

inform the issuing judge of the identities of Merlo and Lauer, and the government's failure in this respect required suppression of the evidence against them.

Discussion

As I dictate this, I have the SG's brief and that on behalf of Merlo and Lauer, but not the brief on behalf of Donovan, Robbins, and Buzzacco.

The SG argues, persuasively I think, that CA6 has erred on both issues. Although CA6 read the "plain language" precisely to the contrary, the SG argues that the plain language supports the government's position. The argument runs as follows:

Section 2518(1)(b) requires that the application for wire interception authorization set forth a full and complete statement of facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including, pursuant to subsection (iv), "the identify of the person, if known, committing the offense and whose communications are to be intercepted." Section 2518(4)(a) contains the same requirement for the interception order: it also must specify "the identity of the person, if known, whose communications are to be intercepted" (see United States v. Kahn, *supra*, 415 U.S. at 152). Thus the plain language of both Sections requires simply that "the person" committing the offense -- the target of the interception -- is to be identified if known. It does not require that "any person" or "all persons" expected to participate in incriminating conversations with the target over the monitored telephone must be so identified. Cf. 18 U.S.C. 2520. The most reasonable interpretation of this statutory language is that although it would ordinarily be expected that

many persons will be overheard, only the principal target of the interception must be identified. This will almost always be the individual whose phone is to be monitored.

I must say that the foregoing language is not quite as "plain" to me as it seems to be to the SG. Nor, is its meaning to the contrary as plainly evident as it seems to have been to CA6. Rather, my present reaction is that the precise language, standing alone, is ambiguous. It requires the identification "of the person, if known, committing the offense, and whose communications are to be intercepted."

The SG's second point is more persuasive, namely, that in context, subsection (iv) must mean what the government contends. There are four specific subsections of § 2518(1)(b) specifying what "each application shall include." Subsection (i) requires the details of the offense; (ii) requires "a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;" (iii) requires "a particular description of the type of communications sought to be intercepted;" and (iv) -- the subsection here involved -- requires "the identity of the person, if known, committing the offense and whose communications are to be intercepted." All four of these subsections are in a single paragraph (see appendix 2a to the SG's brief). It seems reasonably clear, I think, that in context these provisions relate to a "particular offense," a "particular

description" of the telephone to be tapped, a "particular description" of the type of communications sought to be intercepted on that telephone, and the "identity of the person . . . committing the offense [the same offense referred to in subsection (i)] and [the person] whose communications are to be intercepted." If the Congress had intended that all persons, whom the government had probable cause to believe might be using this specifically identified telephone, must also be named, it certainly selected ambiguous language for the purpose.

The SG also relies on the legislative history of the statute as supporting its interpretation, arguing that Congress hardly could have intended to impose more stringent requirements with respect to identification of persons who might use the tapped telephone than the Fourth Amendment would require. Although little evidence is to be found in the government's brief documenting the legislative history in this respect, I do think it reasonable to assume -- especially in view of the burdensome nature of a different view -- that Congress was attempting to comply with the Fourth Amendment requirements identified so particularly in Berger v. New York, 388 U.S. 41, and especially in Katz v. United States, 389 U.S. 347.

The SG also makes a reasonably persuasive argument that no genuine interests (in privacy or otherwise) are served by naming persons other than the "principal target" (owner or principal user

of the telephone to be tapped). See, e.g., pp. 31, 32 of the SG's brief. It is argued, realistically I would think, that if the view of CA6 prevails, law enforcement officers will adopt a policy of "over inclusion" with the result that intercept applications will identify all persons with respect to whom there is any possibility that probable cause may be found to exist. Not only would this impose a substantial burden on law enforcement, but it would result -- it is said -- in exposure and embarrassment of possibly innocent persons when the intercept papers become public during motions to suppress. The SG puts it this way:

An expansive reading of the naming requirement thus will significantly complicate law enforcement efforts and subject those named, but not in fact overheard, to predictable harm. These disadvantages might be justified if the requirement protected any substantial private or public interest. But no important interests are served by the inclusion of the names of persons other than the principal target in an intercept application and order. Indeed, the consequences which flow from the failure to name such persons are so insubstantial that we submit that Congress could not have intended to hamper the use of electronic interceptions in combatting major crimes by requiring that all persons who may be expected to be overheard must be named.

* * * *

As to the second issue, whether the failure to name Merlo and Lauer in the inventory orders required suppression of evidence obtained against them, I am inclined to agree with the

views expressed in dissent by Circuit Judge Engel of CA6. See p. 18a, et seq., of the petition for certiorari.

* * * *

I appreciate, of course, that normally we construe Title 3 strictly. But this rule of construction derives from a desire to assure that the authority to invade the privacy of a telephone is not abused by the police, and conversely to protect the legitimate privacy of telephone users. It is not clear to me, at least in the absence of seeing the brief on behalf of the principal respondents and further consideration of the issue, that either of these purposes (i.e., preventing abuse by police and protecting legitimate privacy) will be furthered by affirmance of CA6. The invasion of privacy occasioned by a wiretap is a privacy of the person who owns or controls the telephone. Other persons who elect to call, or to talk with, the owner of the telephone normally do so at their own peril. As the Court held in United States v. White, 401 U.S. 745, if an interception has been made with the "named targets' permission", persons talking with him would have no constitutional basis for complaint. It would be illogical to conclude that merely because the interception is authorized by a court, rather than by consent of the owner of the telephone, persons such as these respondents would have a greater right to complain.

9/22/76 NOTE FOR THE FILE

I spoke with Mike Rodak this morning, and he informed me that it appears that Donovan and Robbins are not going to file briefs in this case. Thus, the only brief ^(opposed to the SG) we have on the issue of failure to name someone in the initial application is that filed by Buzzaco.

gene

BENCH MEMO

TO: Mr. Justice Powell DATE: September 28, 1976
FROM: Eugene Comey

No. 75-212 U.S. v. Donovan

I. THE EXISTENCE VEL NON OF A NAMING REQUIREMENT

The first question presented by this case is whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in an application to intercept telephone communications of all persons whom the government has probable cause to believe it will overhear participating in conversations about illegal activity. This question is raised by only three of the five respondents: Donovan, Robbins, and Buzzaco. Unfortunately, the brief filed on behalf of respondent Buzzaco is fairly thin - both in terms of pages and in terms of analysis - and Mr. Rodak has informed me that respondents Donovan and Robbins are apparently not going to file a brief in this Court. The combination of those factors leaves us with an effective presentation for the government's position, but no effective presentation for the other side. Of course, that problem is alleviated to some extent given the availability of a number of CA opinions rejecting the SG's interpretation.

A. The Precise Issue

A good deal of the SG's analysis turns on the statutory requirement that the government's application include "the identity of the person, if known, committing the offense and

whose communications are to be intercepted." 18 U.S.C. (emphasis added), 2518(1)(b)(iv). See id. at 2518(4)(a) (the judicial order authorizing the interception shall specify "the identity of the person, if known, whose communications are to be intercepted") (emphasis added). The SG contends that under a reasonable interpretation of this statutory language, the government is required to identify "only the principal target of the investigation." Brief at 18 (emphasis added). According to the SG, this will almost always be the person whose phone is to be monitored. Id.

At the outset, it is important to stress the precise boundaries of the SG's interpretation. The SG does not contend that each application need "identify" only one person. To the contrary, when the government seeks authorization to intercept conversations on a number of phone lines, the SG apparently concedes that the application would have to name the "principal target" (if known) for each separate phone number. Moreover, if two or more persons are known to be using the telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief at 18 n. 13. Thus, the SG reads the statutory phrase "identify the person" to mean "identify the 'principal target' of the investigation." He is not suggesting that the government can satisfy the statutory mandate merely by naming a single individual when there are in fact several principal targets.

The application in the instant case, for example, sought authorization to intercept telephone communications involving

an illegal bookmaking business over two telephones listed under an alias of Spangalo at an apartment used by Kotech, and two other telephones in the home of Florea. The application was accompanied by an affidavit containing extensive information from six reliable sources indicating that those three individuals were using the telephones to conduct an illegal gambling business.

Interestingly enough, the application also identified three other individuals - Chickeno, Vara and Veres. According to the papers filed by the government with the District Court, the three principal targets (Kotech, Spaganlo and Florea) would place calls to and receive calls from these three other named individuals as part of the illegal bookmaking business. But the government does not consider the three other named individuals "principal targets," and would apparently contend that it was unnecessary to identify them in the application.


B. The Relevance of United States v. Kahn

Before examining the SG's contention with respect to the language and legislative history of the statute, it would be fruitful to take a brief look at the relevance of the Kahn* case to the inquiry sub judice. In Kahn, the government applied for an intercept order alleging that one Irving Kahn was a bookmaker who operated from his residence and used two home telephones to conduct his illegal business, and the DC authorized the interception. In the course of

* 415 U.S. 143 (1974).

the wiretap, the government intercepted conversations between Irving Kahn and his wife, Minnie Kahn, concerning illegal gambling activities, and also conversations between Minnie Kahn and a "known gambling figure" concerning certain betting information. The government subsequently indicted both Irving and Minnie Kahn for a federal gambling offense, and introduced into evidence the intercepted conversations.

The Kahns filed motions to suppress, and CA7 ruled that conversations involving Minnie Kahn had to be suppressed. According to CA7, in order to be admissible the intercepted conversations had to meet two requirements: (1) that Irving Kahn be a party to the conversation; and (2) that his intercepted conversations be with "others as yet unknown." In effect, CA7 read these provisions of § 2518 as if they required that the application and order identify "all persons, known or discoverable, who are committing the offense and whose communications are to be intercepted."

This Court reversed, noting that the statute requires identification "only of those 'known' to be 'committing the offense.'" 415 U.S., at ^{153.}  The Court held that:

Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons "as yet unknown". . . . 415 U.S., at 155.

you There are two ways to read the holding in Kahn. The first reading is fairly straightforward, and most *off*ly comports with the language of the opinion: The statute requires the application to identify only those persons who are known to be committing the offense; Minnie Kahn, though "known", was not known to be committing the offense; therefore, it was not error to fail to name Minnie Kahn in the application. That reading would be dispositive of the instant case, since it is agreed that the government had probable cause to suspect that Donovan, Robbins, and Buzzaco would use the telephone wire and would do so while committing the offense.

The SG urges a second interpretation of Kahn. In his view, this Court could have assumed that the statute required the identification in the application of all persons "known to be committing the offense." Since Minnie Kahn was not "known to be committing the offense," there was no error. On that view, the Court found it unnecessary to decide whether the identification of only the principal target would be sufficient, since in any event the unnamed person was not a target at all.

Both interpretations are plausible, and Kahn is thus not technically dispositive of the case sub judice. If it turns out that neither the language of the statute nor its legislative history proves to be dispositive, and resolution of the issue turns on a balancing of competing policy considerations, Kahn could be harmonized with a decision going either way.

*Kahn
not necessarily
dispositive
- could point
either
way*

C. The SG's Contentions

The SG relies primarily on three arguments to support his interpretation of the naming requirement: (1) neither the language nor the structure of the Act requires identification of all known persons; (2) the history of the statute does not indicate that a broad naming requirement is appropriate; and (3) policy considerations indicate that the preferable interpretation is that only the "principal target" need be named in the application.

(1) The language and structure of the Act. The SG first pursues a "plain meaning" approach to the interpretation of the statute. The statutory provision at issue refers to "the person" rather than to "all persons" or "any person," and therefore, so the argument runs, the statute requires identification only of the target of the investigation. This argument is silly. The language of the statute is obviously ambiguous, and the mere fact that Congress used the term "the person" is not conclusive. I have no doubt that one could discover other statutes using the term "the person" which have been held to mean "more than one." Moreover, as noted above, the government has conceded that it must identify each and every "principal target" if a number of individuals use the telephone "equally" to commit the offense. As a result, the statutory language is no less consistent with the interpretation of CA6 than it is with the interpretation proffered by the

government; if the term "the person" is consistent with "several principal targets," it seems equally consistent with "all persons known to be committing the offense."

The SG's second contention, and one which you have found somewhat more persuasive, is that the context of § 2518(1)(b)(iv) strongly supports the "principal target" interpretation.

There is some merit to the SG's suggestion, but the argument loses much of its force when one takes into account the fact that the SG concedes that there can be several "primary" users all of whom must be named. There is no indication in § 2518(1)(b) that Congress was aware of the "multiple primary user" problem, or that it intended to require identification *only* of those "primary users" who utilize the facility "equally" to commit the offense. Most important, § 2518(1)(b) offers no basis on which to draw a line between a "primary user" and a "non-primary user." Indeed, the SG never suggests how it is that government officials are supposed to determine whether two persons "known to be committing the offense" use the phone "equally" in that regard. Thus, although the contextual argument has some surface appeal, it is a less than satisfactory ground on which to choose between the interpretation proffered by the SG and that adopted by CA6.

For the same reasons I find unsatisfactory the SG's contention that the structure of the Act supports the "primary target" interpretation. For example, § 2518(i)(e) requires that an intercept application disclose all previous applications

The SG's contextual argument is not as strong as I first thought

"involving any of the same persons, facilities or places specified in the application." ^{(Emphasis added).} On its face, that language suggests that Congress expected that in some cases intercept applications would identify more than one person. Unfortunately, the statutory language itself gives no indication of the circumstances that Congress ^{thought} might give rise to such a situation. It may well be that Congress recognized that a given application might cover more than one phone, and thus the application would list several "primary" users. But the language in 2518(1)(e) is just as consistent with the view that Congress expected an intercept application to name all persons "known to be committing the offense." Section 2518(1)(e) thus provides no additional insight concerning the statutory construction issue before us.

The SG makes a fairly peculiar argument with respect to § 2518(1)(e). According to the SG, if one reads ²⁵¹⁸ (1)(b)(iv) to require identification of all persons "known to be committing the offense" rather than just the "primary target," persons will often be named who are not in fact subsequently overheard. The SG then goes on to contend that "[n]o purpose would be served by requiring that such persons be identified in subsequent applications for intercept orders as having been listed in previous applications." Brief at 21. In effect, the SG contends that it is silly to require the naming of persons other than "primary targets" since if they ^(the non-primary users) eventually are named as targets in subsequent applications (relating to

the same or different offenses) the government will have to disclose that the nontarget had been named but not overheard in a prior application. The SG's observation may be accurate, but he errs when he concludes that no purpose would be served by requiring the naming of persons other than primary targets. Indeed, unless the government is required to name all those persons it has probable cause to believe will be overheard, the District Court on subsequent applications may be denied relevant information. Suppose for example, that the government has probable cause to believe that primary target A uses his phone to conduct a gambling business with B, C, D, and E. Each person has his own phone and each is in daily contact with the others. The government applies for an intercept order identifying only A, the primary user, and gets an order authorizing a tap on A's phone. Suppose also that the tap proves to be of no value and the District Court refuses an extension. The government can then file an application (probably with a different District Court) identifying B as a primary target and seeking an intercept order with respect to B's phone. Since A is not named in this application, the government is not obligated to disclose the prior application indicating that it has already made one intercept attempt concerning this same gambling business and the intercept was unsuccessful. Indeed, the government would be free to do this again with C, then with D, and finally with E. If the "primary target" interpretation of 2518(1)(b)(iv) obtains in the subsequent

application process, the government would not be required to disclose the prior applications. Thus, there are at least some situations in which the disclosure requirement of 2518(1)(e) -- providing relevant information to the DC -- could serve a useful function under the interpretation of 2518(1)(b)(iv) adopted by CA6.

Finally, the government suggests that its reading of the identification requirement is supported by § 2510(11), which grants standing to seek suppression to any party to an intercepted conversation or to "a person against whom the interception was directed." The government correctly notes that there are only two classes of persons who have standing under § 2510(11) to move for suppression: parties to intercepted conversations; and the person whose telephone is monitored. Alderman v. United States, 394 U.S. 165, 175 n. 9, 176. From that the SG concludes that "a person against whom the interception was directed" is simply the "principal target," the same person referred to in § 2518(1)(b)(iv).

But the standing provisions under § 2510(11) are unrelated to the naming requirements of § 2518(b)(1)(iv). Regardless of whether Donovan, Robbins, or Buzzaco were named in the intercept application, they would not have standing to seek suppression of conversations to which they were not a party. The fact that they would not have standing under such circumstances is not probative of whether Congress intended that only the "principal targets" be named in the application.

In fact, the government's reliance on the standing provision raises more questions than it answers. If the SG is correct in his contention that "a person against whom the interception was directed" is "simply the principal target, the same person referred to in § 2518(1)(b)(iv)," Brief at 22, why did not Congress refer instead to "the person identified in the application." At other points in the statute, Congress does refer to "the persons identified in the application"; and given the government's contention, it would have made sense for Congress to have used more precise cross-reference in the standing provision. The use of different language could suggest that Congress intended the standing provision to be more narrow than the naming requirement.

Second, the relevance of the standing provision becomes even less clear when we analyze one of the SG's own hypotheticals. Suppose for example, that two men (A and B) use a telephone in a store "equally" to commit an offense, and that neither A nor B is the proprietor of the store. The intercept order is authorized naming A, B, and P, the proprietor. Suppose the only intercepted conversation is one between C and D, which implicates A, B, C, D, and P in the illegal activity. Who has standing to make a motion to suppress? Certainly C and D, since their conversation was intercepted. And certainly P, the proprietor, since it is his phone that is being tapped. But A and B would not have standing to seek suppression of the conversation between C and D. ^{Yet} ^{nevertheless} The government was required by

§ 2518(1)(b)(iv) to name A and B in the application for the intercept order. That disposes of the suggestion that there is a connection between the standing and naming provisions.

In conclusion, I cannot find anything in the language of the provision at issue or the structure of the Act which is dispositive of the question sub judice.

(2) The history of the statute. The SG argues that the history of the statute supports his construction of the naming requirement. He begins by noting that this Court's decisions in Berger v. New York 388 U.S. 41, and Katz v. United States, 389 U.S. 347, served as guidelines in the drafting of Title III. Moreover, Title III has a dual purpose: (1) protecting the privacy of wire and oral communications; and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized.

The SG's strongest "history" argument is that it would be inconsistent with this legislative history to interpret § 2518(1)(b)(iv) as imposing a broad naming requirement extending beyond what is constitutionally necessary. The SG contends that ^(in "usual" searches) there is no constitutional requirement that the person whose property is to be searched and whose things are to be seized be name^d, and that in the electronic surveillance

context there is no constitutional necessity to name anyone, even if known, in the application order. The SG notes, however, that Congress may have read Berger and Katz as requiring the naming of the subject of the surveillance. But he concludes that: "[Congress] would hardly have read those cases as requiring the naming of all parties likely to be overheard conversing about the offenses under investigation. In neither case was that issue involved, either directly or by implication." Brief at 25-26.

Senate report ambiguous
 It is difficult to assess the weight that should be given to this particular legislative history argument. Unfortunately, the Senate Report makes it almost impossible to determine exactly what it was Congress intended to require. Take for example the discussion in the report concerning the requirements for the intercept application:

Subparagraph (b) requires that a full and complete statement of the facts and circumstances relied upon by the applicant be set out, including (i) the details as to what type of offense has been, is being, or is about to be committed, (ii) the place where, or the facilities or phone from which the communication is to be intercepted, (iii) a particular description of the type of the communication which it is expected will be intercepted, and (iv) the identity of the person, if known, who is committing the offense and whose communications are to be intercepted. Each of these requirements reflects the constitutional command of particularization. (Berger v. New York, 388 U.S. 41, 58-60 (1967); Katz v. United States, 389 U.S. 347, 354-56 (1967).)

Senate Report at 101. The cited portion of Berger includes a summary of the New York statute at issue in that case, especially its requirement that the application name "the person or persons

whose communications are to be overhead or recorded." See 388 U.S. at 59 (emphasis added). The Berger opinion describes that statutory requirement as one which "does no more than identify the person whose constitutionally protected area is to be invaded." 388 U.S., at 59. On the basis of the Senate Report's citation to that language in Berger, I think it is simply impossible to tell whether Congress thought it was necessary to name just the "primary target" or "all persons known to be committing the offense." Unfortunately, the cited portion of Katz is of no help in clarifying that ambiguity.

The section of the Senate Report dealing with the requirement that the intercept order itself identify "the person" whose conversations are to be intercepted is just as troublesome:

Subparagraph (4) sets out in subparagraphs (a) through (e) the requirements that each order authorizing or approving the interception of wire or oral communications must meet. Subparagraph (a) requires the order to specify the identity, if known, of the individual whose communications are to be intercepted. See West v. Cabell, 153 U.S. 78 (1894). Senate Report 102

The citation to West is confusing since that case concerns proper identification of the subject of an arrest warrant, and it has no particular relevance to search warrants. Yet the Report cites West, without explanation, for the requirement that the order identify "the person" whose communications are to be intercepted.

The final aspect of the legislative history relied on by the SG is also inconclusive. The SG points out that the

discussion of the inventory requirement of § 2518(8)(d) in the Senate Report reflects the assumption that only the person whose telephone is to be monitored is to be named in the order. That discussion discusses a hypothetical in which "the subject" of the interception order moves from one location to another, and suggests that in such circumstances the court could postpone service of the required inventory. Read in context, that discussion has little bearing on the precise requirements of the naming requirement with respect to applications. The SG also errs in this regard when he claims that the bill as reported out of committee required an inventory to be served only on "the person named in the order." To the contrary, the bill as reported out of committee required service of such inventories to "the persons named in the order of the application." Senate Report at 17 (emphasis added).

Both Reg. history and the language & structure of Act are inconclusive

The legislative history is as inconclusive as the language and structure of the Act. Consequently, the decision in this case may have to rest on a balancing of the relevant governmental and private interests. The SG apparently recognizes as much, since he devotes almost as much attention to the policy arguments (12 pages) as he does to the statutory language and legislative history arguments (15 pages).

D. Policy Considerations

(1) Adverse effects on the effectiveness of law enforcement. The SG contends that a naming requirement for "all

persons known to be committing the offense" would be practically impossible to comply with. According to the SG, information with respect to various suspects will be in the hands of different federal officers, some of whom may well be scattered across the country. Moreover, information is likely to be in different government files under different aliases and nicknames. Despite these practical difficulties, under a broad naming requirement the government must make two probable cause determinations with respect to every suspect: first, whether he is committing the offense, and (2) whether he will be overheard during the interception participating in the offenses under investigation.

A broad naming requirement would obviously place more of an administrative burden on government officials than would the "primary target" requirement interpretation suggested by the government. But the fact that the administrative burden would be heavier does not mean that it would be intolerable, or that it would bring an end to the usefulness of the wire-tapping device. In short, I think the SG's administrative burden argument exaggerates the effect a broad naming requirement would have on the "average" application for an intercept order.

In the first place, when an individual's complicity in the crimes being investigated and his likely use of the target telephones is merely "discoverable," he is not "known" within the meaning of the statute's particularity requirements.

Govt must have probable cause of both complicity and use

United States v. Kahn, supra. It is only when the government has probable cause as to both complicity and use of the phone that the government must name the individual in the application. The SG suggests that it will be difficult to "gather" information from various government officials so that it can be "totaled up" to determine whether it rises to the level of probable cause. But in the context of the other requirements for an intercept order, such information will normally come to the attention of the government officials seeking the order. The statute requires that the intercept application contain "a full complete statement of the facts and circumstances relied upon by the applicant . . . including details as to the particular offense that has been, is being, or is about to be committed." 18 U.S.C. 2518(1)(b)(i). And the statute also requires the application to set forth "a full and complete statement as to whether or not other investigative techniques have been tried and failed or why they reasonably appear, unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(1)(c). I think it is fair to conclude that in the process of collecting the data and information necessary to present the required "full and complete statements," the appropriate government officials are likely in most cases to have before them the relevant information on which to base a probable cause decision relevant to the naming requirement.

(2) The overinclusiveness problem. The second difficulty highlighted by the SG is that the agents and government attorneys must make these decisions themselves, at least in the first

simply means that at the time of the application the marginal participant did not qualify as a "person known to be committing the offense." As long as there was probable cause to justify an intercept order with respect to the major ^(participante) ~~practice part(s)~~ it is not unconstitutional to seize conversations of those who were "unknown" at the time of the application. Thus, had the District Court ruled ab initio that there was no probable cause as to the marginal participant, interception of his conversations would nevertheless have been permissible. Consequently, suppression is inappropriate when an appellate court upsets a District Court's finding of probable cause as to the marginal participant.

The second difficulty asserted by the SG is that those who are not overhead engaging in illegal conversations will suffer when the intercept papers become public during motions to suppress. According to the SG, in a similar context the naming of persons as unindicted co-conspirators has been held to impinge on judicially cognizable personal interests in reputation and ability to obtain employment. Brief at 32, citing United States v. Briggs, 514 F.2d (CA5). The SG surprises me! His recent petitions and briefs in this Court have made considerable use of last Term's decision in Paul v. Davis, 96 S. Ct. 1155, and I am sure he must realize that Paul takes the punch out of this second asserted difficulty.

The third and final asserted difficulty is that agents cannot realistically present to the issuing judge all the

But
the
stigma
remains
& there
may be
state tort
action

information they possess about every suspect who might be overheard. The assertion rests on two assumptions: that there will be a large number of suspects with respect to every telephone intercept order, and that the government has considerable information on each of those suspects. I doubt that a gambling or drug operations makes such widespread use of any one given telephone that the SG will have to name hundreds of suspects for each phone. Moreover, the larger the alleged conspiracy using the phone, the more suspicious an issuing judge would become with respect to the availability and usefulness of alternative investigative techniques. Realistically, the agents in most cases will face a manageable number of suspects with respect to each tap, and they need only present to the magistrate information in the government's hands pertaining to complicity in the particular crimes under investigation. Finally, the underlying difficulty of requiring agents to guess about "probable cause" applies only to marginal cases; surely there are a number of suspects as to whom government agents have absolutely no doubt that probable cause is lacking.

In sum, there is some merit to the administrative burden argument, but I would probe the SG at oral argument to determine how significant a problem this really is.

(3) The Other Side of the Coin - Compensating Benefits from a Broad Naming Requirement. The SG contends that the burdens imposed under a broad naming requirement do not achieve any compensating benefits. I think the SG is wrong.

The SG starts by pointing out that the chief safeguard of privacy under the Act is the minimization requirement, and that the inclusion of names in the application in addition to the subject of the application will not facilitate minimization. On this point the SG is correct, and I would conclude that minimization is not furthered by a naming requirement.

But the SG errs I think when he suggests that a broad naming requirement would not aid a judge in deciding whether an interception order should issue. There are at least two ways in which a broad naming requirement would prove useful ^{information} to an issuing judge. First, disclosure ^{of} prior application^s for intercepts must be presented to the issuing judge only with respect to individuals named in the application under consideration. Since Congress believed that information about prior surveillance is necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs, identification of all persons as to whom the government has probable cause facilitates judicial control by providing the complete history that Congress deemed necessary for an informed decision. Suppose for example that two of three persons named in an application were named in five prior applications which produced no useful information. The issuing judge would certainly want to weigh that evidence in the balance in determining the need for instant application. But if the government names only the third person, who is the "primary target", there is no requirement that the government disclose prior applications as to the other two unnamed individuals.

The second way in which a broad naming requirement could prove useful to the issuing judge is by providing information relevant to the judge's resolution of the question whether normal investigative procedures have been tried and have failed or reasonably appear likely to fail or to be too dangerous. If the judge is aware that the government actually has probable cause with respect to five persons rather than simply one "primary target," he might expect the government to meet a higher standard of proof with respect to the failure of normal investigative techniques. Congress noted that normal investigative procedure would include, for example, standard visual or oral surveillance techniques, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants. Senate Report, at ____.

This is not to say that the government would be required to show that alternative investigative techniques were ineffective with respect to each individual. But when the issuing judge has to decide the need for an intercept order to get at a particular gambling business or drug operation, the availability of alternative techniques might be evaluated somewhat differently if the issuing judge has information concerning other members of the group as to whom the government has probable cause.

Finally, the SG notes that naming a person in an intercept application triggers two statutory requirements: first, if named in the order, the person must be furnished with an inventory notifying him that the interception was authorized

not necessarily
The identity
of many
mafia
members
is known
but
evidence
is often
usually
not available

and advising him whether and for how long ^{it} was in effect; and second, any subsequent applications to monitor calls in which the person is named must disclose all previous applications in which he was named. I have already indicated how a broad naming requirement when considered in the context of the latter requirement could facilitate proper administration of the Act by the issuing judge. ^{See pp 9-10 supra.} There remains for discussion the mandatory notice provision..

The SG argues that whether or not named in an order a person whose conversations are intercepted will receive notice if the issuing judge so directs. The statute provides not only for mandatory notice to those named in the order but also for discretionary notice to those whose conversations are intercepted. *all will receive notice - but not mandatory of parties named*
It is clear from the Senate Report that Congress thought that mandatory notice was essential with respect to the "subject" of the intercept. "Yet the intent of the [mandatory notice] provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all . . . authorized interceptions must eventually become known at least to the subject, He can then seek appropriate civil redress . . . if he feels that his privacy has been unlawfully invaded." Senate Report at 105. Unfortunately, as I noted earlier, it is difficult to determine what Congress meant by the "subject," especially since the statutory language implementing the mandatory notice provision has always referred to "the persons" named in the order.

Since the language of the provision and the legislative history provide no firm basis on which to resolve the statutory construction issue, the only principled approach to the problem is to weigh the administrative costs against the compensating benefits in light of the expressly stated dual congressional objectives. See page 12 supra. Such a balancing leaves the Court with three alternatives. First, the Court can go to one extreme and adopt the "primary target" interpretation suggested by the SG. The second alternative is to go to the other extreme and adopt the "all persons known to be committing the offense" approach suggested by respondents. Under the latter interpretation, failure to name such a person results in suppression of evidence derived from the tap in a proceeding against the unnamed individual.

Fortunately, there is a third alternative, though it is somewhat difficult to square with the language of the statute. CA5, sitting en banc, has adopted a "bad faith or attempted subterfuge" approach. Under this approach, CA5 interprets § 2518(b)(1)(iv) to establish a broad naming requirement, but refuses to require suppression of evidence as long as the government was in "substantial compliance" with the statutory provision. This seems to make considerable sense to me. On the one hand, I don't think the administrative burdens outweigh the compensating benefits, and for that reason I prefer the broad naming requirement. On the other hand, if the authorities

CA5 "good
faith
approach"
(see p. 29
- 31 -)

are about to move in and seek an intercept order to put the crunch on an illegal drug operation, you don't want to require suppression of valid evidence simply because there was an agent in Brooklyn who had probable cause to believe that X would participate in incriminating conversations and who forgot to mention that fact to his superior officers. The dual purposes of the statute are best served if we attempt to force the government to gather as much information as possible about all real subjects and present that information to the issuing judge.

But as long as there is no evidence of bad faith or attempted subterfuge, there is no need to require suppression, if the government is nevertheless in substantial compliance with the requirement.

The difficulty with this compromise approach is that it must somehow or other be worked into the portion of the statute dealing with 'suppression'. Since the SG devotes the third portion of his brief to the availability of suppression as a remedy, I will discuss the good faith alternative again in Section III of this memo. See page **29** infra.

II. THE NATURE OF THE NOTICE REQUIREMENT

The second question presented by this case is whether 18 U.S.C. 2518(8)(d) requires that the government advise the court of the identity of every person whose conversation has been overheard in the course of a wire interception so that the court may ~~require~~ determine whether to require that such person be served ~~with~~ with notice of the interception. In the instant case the government intended to provide the DC with the names of all persons whose conversations the government had overheard during the interceptions. Respondents Merlo and Lauer were not named in the proposed orders submitted to the DC and ~~never~~ were never ~~served~~ served with inventory notice. It is worth noting that the Department of Justice's policy is actually to provide less information to the DC than was provided in this case; current policy ^{is} is to provide the issuing judge with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment, and to provide other names only if so requested by the issuing judge. See Brief for the SG at 39 n. 34.

The SG makes two brief arguments on this issue. First, the

statute does not expressly require that the government routinely provide the issuing judge with any specific information upon which to base his exercise of discretion, either precise identification of individuals ~~as the court below apparently required~~ or descriptions of categories of individuals, as the court found ~~reasonable~~ necessary in United States v. Chun, 503 F.2d 533, 540 (CA9). In this regard the government notes that it is a simple matter for the judge to ask for whatever information he thinks he needs to make a notice-order decision. The government's second argument is that if it is appropriate to read into the statute some duty on the part of the government to inform the court of ~~the~~ ^{those} whose conversations have been intercepted, that duty should only ~~require~~ require the government to use its best efforts to provide a complete list of such persons.

Respondents (Merlo and Lauer) argue, as did both the majority and the dissenting judge ~~below~~ below, that the judge has no independent information as to the unnamed parties who have been overheard on the intercepts and must ~~depend on the~~

depend on the government to disclose that information in order that he may exercise his discretion. According to respondents, the government must perform its disclosure duty with some greater degree of care than was exercised in the instant case.

To me, this is not a difficult issue. The statute clearly makes no express reference to the nature of the information, if any, that the government must on its ^{own} ~~+~~ initiative provide to the issuing judge in order that he can exercise his statutory discretion. But it is silly to suggest that the government is under no obligation to provide any information until the issuing judge furnishes a request for certain data. A fair compromise ⁱⁿ ~~between~~ ^{the} ~~between~~ various competing interests at stake is the standard adopted by CA 9 and by the panel (and dissenter) in the instant case:

[A]lthough ~~the~~ the judicial officer has the duty to cause the filing of the inventory, it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted conversations. Therefore we feel justified in imposing upon the latter the duty to classify ~~under~~ all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his § 2518(8)(d) discretion, we also hold that the government is required to furnish such information as is available to it.

503 F.2d at 540 United States v. Chun, supra, . I think

Real issue is whether suppression is required?

CA 9 correctly ^{concluded} ~~concluded~~ that such an allocation of responsibility will best serve the dual purposes of Title III.

The real issue with respect to the notice provisions of the Act is not whether the government has to name all the names or ^{classes} ~~merely~~ ~~classes~~ of persons who were overheard, but rather whether suppression is an appropriate remedy for violation of the ~~appropriate~~ whatever notice requirements are considered appropriate. That question is discussed in the next section.

III. SUPPRESSION AS A REMEDY

Section 2518(10)(a) permits motions to suppress on the following grounds:

- (1) the communications was unlawfully intercepted;
- (2) the order of ^{authorization} ~~authorization~~ or approval under which it was intercepted is insufficient on its face; or
- (3) the interception ~~was~~ was not made in conformity with the order of authorization or approval.

The only arguably relevant section of the ~~statute~~ statute is subdivision

- (1) ~~dealing~~ dealing with instances in which the communication was unlawfully intercepted.

This Court has ~~on~~ two occasions on considered section

2518(10)(a)(1). In United States v. Giordano, 416 U.S.

505, 527, the Court held that ^{that section} ~~it~~ embraced "any of those statutory requirements that directly and substantially implement the congressional ~~intention to~~ intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

It is clear that section 2518(1)(a)(1) does not require suppression for "every failure to comply fully with any requirement of Title III." United States v. Chavez, 416 U.S. 562, 574-75.

A. Suppression for Failure to Comply with a Broad Naming Requirement

If ~~you~~ ^{you} accept the government's "principal target" interpretation of the naming requirement, there is no real problem with suppression. The only suppression situation would be where the government failed to name even the primary target, and I doubt that the SG would contend that under such circumstances suppression was inappropriate. On the other hand, if you think there is a ~~broad~~ ^{broad} ~~naming requirement, when is suppression an appropriate~~

"broad naming requirement," is suppression an ~~and~~ available remedy under the statute as interpreted by this Court?

? I think the answer is yes. As I noted earlier, the statutory language and legislative history ~~is not of use~~ fail to resolve the merits of the issue concerning the scope of the naming requirement. But the policies that would justify imposition of a broad naming requirement, see pages 21-22 supra, ~~are such as to~~ would also warrant the conclusion that the naming requirement "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations ~~as~~ clearly calling for the employment of this extraordinary investigative device." Giordano, supra, at 527.

I also mentioned earlier that it might be difficult to work a "good ~~faith~~ faith" approach into the statutory language. On reflection, I ~~don't~~ don't think the problem is all that serious. One would simply argue that the intercept order is lawful where the government in good faith makes a reasonable effort to name in the application all those known to be committing the offense. Thus,

mere inadvertent failure to name a person whose conversations were subsequently overheard would not make the intercept unlawful. On the other hand, if the government knowingly and intentionally refused to give the issuing judge the name of ~~the~~ a person known to be committing the offense, the basic intercept is unlawful as to that person and suppression is appropriate.

B. Suppression for Failure to Comply with a Notice Requirement

For similar reasons I agree with Judge Engel's ~~dissent~~ dissenting opinion which analyzes the availability of the ~~the~~ suppression remedy for violations of the notice requirement.

gene

[C. OCT. 12, 1976]

Dunovan

75-212

This is
from the CAS
panel opinion,
which was
eventually
approved by
a majority of
CAS sitting
en banc

[7] The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in Kahn, they argue that, not being "unknown," they should have been named in the authorization. They contend that since they were not named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity only of Doolittle, the co-owner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent. All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes and received transcripts of the conversations prior to use against them at trial, as if they had been named in the order. Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretap application. The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to them inadmissible under 18 U.S.C.A. § 2518(10)(a).

ReverNaming
requirements
- must.

I Sec. 2518(1)(b)(iv), DC suppressed wire-tap evidence of Donovan & 2 others who were not named in Application & Order for the ~~wire-tap~~ wire-tap even tho. Gov't had probable cause to believe their communications would be intercepted. CA 6 affirmed.

Language & history of ~~the~~ statute not clear, ^{and unclear,} although a somewhat stronger case can be made for view adopted by CA 6.

Suppression (§ 2518(10)(a)) provides that "unlawfully intercepted" communications must be suppressed. But Chavez said this section does not require suppression of "every failure" to comply with Title III. And Giordano indicated that this section applies to statutory requirements that "substantially implement Congressional intent."

I do not think suppression is required under these standards. Donovan et al were not disadvantaged in any significant way.

II. Notice Requirement. Inadvertent failure to have notified two Δ of the interceptions caused them no injury. I'd not suppress.

As to standard for suppression, see Engel's dissent - ~~the~~
2/a-23a

Frey (SG)

Can't ~~suppress~~ suppress ev. for
post-intercept ~~failure~~ failures

§ 2518(9) sets forth requirements
of notice to A + expressly
provides for suppression.

* * * *

As to "naming" issue, Kahn
did not consider status of
people who call in from outside.
The Kahn household phone was
being intercepted - not phone's of
who calls in.

In this
right.

A person named is given no
additional right or protection.
If DC concludes there is no
probable cause, it ~~it~~ will strike
name - but govt may nevertheless
intercept calls from this
individual.

Probably cause ~~is~~ as to
any particular person is not
required under Title III as a
condition to warrant authorization.

Berkman (Rex)

No inventory notice was ever served on Mexico & ~~the~~ Law.

Govt was least negligent - but can't say "there was bad faith".

Suppression is necessary ~~is~~ in any event.

Post intercept procedure^{as} necessary because targets cannot be notified in advance w/out defeating the purpose of the tape.

J. Marshall: If a party to crime is known, ~~the~~ Rex says he must be named. But if not known, his intercepted communications need not be suppressed - provided his name is thereafter revealed to DC. Marshall asked if this^{distinction} makes little sense.

The Chief Justice

~~Stevens~~ Parred

xxxxxxx Stevens, J. Affirm

~~Justice says it must~~
be read in light of
§ 2518 (?)

Intercept's validity
not affected in any realistic
way by failure to name.
Suppression is certainly not
appropriate.

x x x

After discussion,
CJ voted to Reverse

There are violations
~~but~~
§ 2515 is relevant.
Notice requirement
is fundamental.

Brennan, J.

Affirm

Wrote Gelland &
studied leg. history
then. Title III must
be read literally &
SGE is wrong.
CA was right

Stewart, J.

Parred (Affirm)

Statute probably does
require naming of those
as to whom probable cause
existed.

One can defer discretion
power in DC to notify
persons who were intercepted.

But it is difficult
to argue that intercept
was unlawful. Thus
suppression would
not be appropriate, if
this view is right.

x x x

After discussion, said
he would Affirm
(no reason)

Reverse

Gov't wrong as to what
it should have done,
but Gov't is right as
to suppression.

Gordano & Chavez
tend to support
this view.

Affirm

No discussion

Blackmun, J. Reverse

Agree with Byron.
Could remand to
~~that~~ to consider
possible bar ?

Powell, J. Reverse

See my notes
- which I used as basis
of my discussion

Over op. should say
~~to~~ persons ~~should~~
be named if known.

Rehnquist, J. Reverse

Agree with me.

MEMORANDUM

TO: Gene Comey
FROM: Lewis F. Powell, Jr.

DATE: November 20, 1976

No. 75-212 United States v. Donovan

I like your first draft and, subject to the questions below, think it fairly close to being ready for a printed Chambers draft.

Apart from minor editing, I have no comments or questions with respect to Parts I and II. These are well and tightly written.

I do have some questions as to Part III, although I could be satisfied - after discussion - that it is substantially adequate as drafted. In Parts I and II we categorically "hang" the government with two statutory violations. In Part III we relieve the government and the dissent will say that, for practical purposes, we have written out of the statute the provisions addressed in Parts I and II. It is therefore desirable that our Part III be as persuasive as we can properly make it.

As presently drafted, as you and I agreed at the outset, principal reliance is placed upon language in Gierdano and Chavez. The language we rely upon makes three points: (1) every failure to comply with requirements of Title III does not render the "interception of the wire or oral communications

'unlawful'; (ii) suppression is required only for a failure to comply with statutory requirements that implement congressional intent "to limit the use of intercept procedures"; and (iii) suppression is not appropriate where the requirement violated does not play a "substantive role" in the regulatory scheme.

The SG's brief (p. 46 et seq.) relies primarily on the language of § 2518(10)(a)(i), authorizing suppression only (so far as we are concerned) where the communication was "unlawfully intercepted". The SG disposes of Merlo and Lauer by saying that this subsection has no application to violations arising after the interception is completed. Subsequent errors are irrelevant to the lawfulness of a prior interception.

This precise line of analysis does not fit the other three respondents. The SG nevertheless makes a rather good argument: by virtue of the intercept order, the government was entitled to overhear the conversations of the named targets and others unknown to the government. There probably were scores of persons whose conversations thus were intercepted, but this did not make these interceptions unlawful. Also, as you state, the failure to identify by name in the application and order all those likely to be overheard does not, under the statute, affect the decision of the Court whether to authorize the interception. That decision turns upon the statutory conditions you have outlined.

In short, the fact that incriminating conversations of others not named may be overheard is, as the SG puts it, simply not relevant to the judge's decision. This being so, the SG reasons that the failure to name suspected co-conspirators, no more than the failure to name unsuspected co-conspirators, cannot invalidate the interception order and render unlawful the communications intercepted.

The SG thus emphasizes, more than our draft does, the precise language of subsection (i) "unlawfully intercepted", rather than the more generalized language from Giordano and Chavez.

The focus of the emphasis in your draft is summarized at the top of page 21:

"Although both statutory requirements are undoubtedly important, we do not think that they function directly and substantially to limit the use of intercept procedures."

The foregoing reference to limiting the use of intercept procedures appeared first in Giordano, 416 U.S., at 527, and was repeated in Chavez (p. 575). I do not read it as a judicial broadening of subparagraph (i). Rather it is an elaboration of its purpose.

* * *

At this point, Gene, I emphasize that I have no doubt as to the basic soundness of your analysis. I am simply

saying that perhaps it can be buttressed by a more specific reliance on the language of subsection (1).

* * *

The SG's brief on "suppression" makes several other points that may be worth considering as possible additions to, or elaborations of, our footnotes.

1. There is nothing in the legislative history to suggest that the inventory or naming requirements "occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance". Chavez, at 578 (SG, pp. 49, 50).

2. There is no occasion to create an exclusionary rule where none is provided by Title III. The SG argues, with reason, that the statutory provisions for suppression are exclusive where, as with respect to the issues in this case, there is no constitutional violation (SG, pp. 50, 51).

3. No substantial rights of respondents were affected, a thought you had in mind with your "second" suggestion in your memo to me. In the cases of Donovan, Robbins and Buzzacco, each of them received inventory notices even though they had not been named. They do not suggest anyway in which they were disadvantaged. Nor did Merlo and Lauer suffer any impairment of substantial rights. They certainly had actual notice,

as a practical matter, that their conversations had been intercepted when inventories were served on 37 of their confederates. But apart from this irrelevant observation, the intercept papers were made available to all of the defendants no later than December 1973, affording - as the record in this case demonstrates - abundant time to permit pretrial suppression motions, and prepare for trial (which has not yet been held). The SG also notes that the primary statutory protection against surprise at trial is 18 U.S.C. 2518(9). (SG's brief p. 53).

4. In footnote 43 (p. 51) the SG cites a number of Courts of Appeals decisions said to have refused to suppress errors of the types involved here where there has been no showing of prejudice. This is no issue of "prejudice" in the case before us, and perhaps it is unwise to address it even in a footnote. What do you think?

* * *

Despite the length of this memorandum, I do not think substantial revision of Part III is indicated. But I am inclined to think that the opinion would be strengthened by a more explicit reliance upon the language of subsection (i), and by including in the footnotes some of the SG's points.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 7, 1976



Re: No. 75-212, United States v. Donovan

Dear Lewis:

In due course I will circulate a dissent in this case.

Sincerely,

Jm.
T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

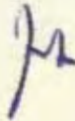
December 9, 1976

Re: 75-212 - United States v. Donovan

Dear Lewis:

Although I agree with Parts I and II, I will
await the dissent before deciding on Parts III and
IV.

Respectfully,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

✓

December 9, 1976

Re: No. 75-212 United States v. Donovan

Dear Lewis:

Please join me.

Sincerely,

wm

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 10, 1976

Re: No. 75-212 - U. S. v. Donovan

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 10, 1976

PERSONAL

Re: 75-212 - United States v. Donovan

Dear Lewis:

As written, I can only concur in the judgment and in all but Part IIA of the Court's opinion. I cannot agree, however, with ~~the Court's~~ ^{your} construction of the identification provisions of § 2518(1)(b)(iv). In my view, the statute plainly requires a wiretap application to identify by name the principal target of the investigation. The application in the instant case complies with that requirement. Since Congress demanded no more, I would conclude that no statutory violation occurred with respect to the application.

In Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975), you stated the familiar proposition that the starting point in every case involving construction of a statute is the language itself. The statute before us requires no more than that a wiretap application specify the "identity of the person, if known, committing the offense and whose communications are to be intercepted." 18 U.S.C. § 2518(1)(b)(iv). While requiring only the identification of "the person" whose communications are to be intercepted, Congress manifestly contemplated that interceptions effected pursuant to a single application and order could well potentially affect a large number of persons, particularly on incoming calls. Under the statute, notice of the intercept can be provided by order of the federal district court to "parties" other than persons named in the application. Id., § 2518(8)(d). Similarly, standing to object to intercepted communications is conferred upon "[a]ny aggrieved person" Id., § 2518(10)(a). Finally, the statute confers a civil damages remedy upon "[a]ny person" whose communications are unlawfully intercepted or used in violation of the statute.

Congress' clear recognition that multiple parties would potentially be affected by a single wiretap does no more than recognize the reality that numerous persons may call in and that some of them will be fellow "hoods." This is manifest from the statute itself. This has significant bearing upon our interpretation of § 2518(1)(b)(iv). In fashioning highly specific

requirements with respect to wiretap applications, Congress carefully avoided the use of plural language found in other parts of the same statute; instead, Congress spoke in the singular, requiring identification of "the person" whose communications are to be intercepted. Unless Congress meant something other than what it said, Congress had not thought to require the naming of "any [other] person" who might be caught up by the intercept.

You emphasize, however, that the statute expressly recognizes that more than one person may be named in a wiretap application. Ante, at 10. That is indeed true. See § 2518(1)(e), (8)(d). But I would think this is all the more reason for focusing upon the precise language in the provision establishing specific requirements for an application. Since Congress expressly contemplated that applications might contain more than one name, its failure in §2518(1)(b)(iv) to require the naming of "any [other] person" or "the persons" whose communications are to be intercepted must mean that the suggested open-ended identification requirement was not intended. In other words, Congress reasonably foresaw that for a variety of reasons actual wiretap applications might contain the names of more than one person. But Congress did not translate its recognition of what an application might contain into a command as to what it must contain, as is now proposed.

The plain words of the statute, of course, might have to bow in the face of compelling legislative history to the contrary. But there is none. Indeed, you observe that Congress' intent is enwrapped in its interpretation of this Court's decisions in Berger and Katz. But I think it is neither necessary nor appropriate on this sparse record to decide how Congress decided to read the prior decisions of this Court. The point is that we do not know. What we do know is that these provisions "[were] intended to reflect the constitutional command of particularization." Ante, at 12. The language of the four precise statutory requirements confirm that purpose. 1/ For me, the very precision of the

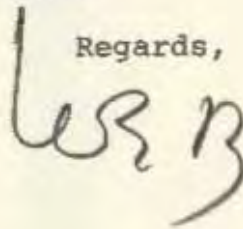
1/ Thus, § 2518(1)(b) requires the application to contain a "full and complete statement of the facts and circumstances", including "a particular description of the nature and location of the facilities" Likewise, the provision requires "a particular description of the types of communications."

language employed by Congress in § 2518(1)(b) strongly points to the conclusion that Congress meant exactly what it said in establishing an identification requirement in the singular. Also important, that exact language comports with Fourth Amendment requirements under our subsequent holding in United States v. Kahn, 415 U.S., at 155, and thus fulfills the express legislative purpose.

I would therefore interpret this statute to mean what it says. Whether wisely or not, Congress decided, consistent with Fourth Amendment strictures, to require only the identification of "the person" whose conversations are to be intercepted. Since it is clear Congress shifted from plural language to singular, I would take Congress at its word.

I hope you have not "hardened":

Regards,

A handwritten signature in dark ink, appearing to be 'LWB' or 'Lewis B.', written in a cursive, stylized font.

Mr. Justice Powell

December 13, 1976

No. 75-212 United States v. Donovan

Dear Chief:

Thank you for your thoughtful letter of December 10.

Although I would agree that the statutory construction question with respect to § 2518(1)(b)(iv) is not free from doubt, I reached a different conclusion after rather careful study. Moreover, my Conference notes indicate clearly that your view of the statute did not attract a "Court".

My opinion, as now written, will impose a hortatory obligation on the government to name persons whose communications it reasonably expects to intercept. But the important holding in the case is that a failure to name will not result in exclusion of the intercepted communications.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 13, 1976

Re: No. 75-212 - United States v. Donovan

Dear Lewis:

By a separate letter I am joining your opinion. I have only the following minor comments:

- I prefer not to do this. The note would not be a brief one. Our holding makes clear that we adopt a different standard.*
1. You will recall that at conference I was somewhat attracted to Judge Godbold's position in dissent in United States v. Doolittle, 518 F.2d 500, 501, 503 (1975), where he thought the standard might be "a person against whom the interception was directed." On further reflection, I have concluded that probable cause is perhaps the better standard. I wonder, however, whether a footnote reference to Judge Godbold's suggested standard and our rejection of it might be in order. Perhaps not. As you wish about this. I mention it only because it might shore up my joinder a little for me personally.
2. I wonder whether the adoption of the Chun Test, p. 16 and n. 21, with which I agree, might not be more strongly stated if the footnote were worked into the text and if the conclusion as to Merlo and Lauer were spelled out there.

Sincerely,

Harry

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

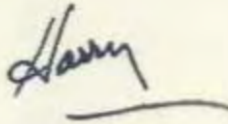
December 13, 1976

Re: No. 75-212 - United States v. Donovan

Dear Lewis:

Please join me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harry", with a horizontal line underneath it.

Mr. Justice Powell

cc: The Conference

Gene - I prefer to omit this.
The explanation seems unnecessary.
I'll talk to H A B, but go ahead with

A/ The Government carries a greater administrative
change on p 16 (i.e. "B")

burden under this holding than would be the case under the principal target interpretation, a fact which has prompted some to suggest that Congress did not intend to require the probable cause standard. Preferring a middle ground between principal target and probable cause, Judge Godbold, for example, takes the position that the statute requires the naming of all those individuals "against whom the interception was directed," as that phrase is used in the definition of aggrieved person in 18 U.S.C. § 2510(11). United States v. Doolittle, 518 F.2d 500, 501, 503 (CA 5 1975)(en banc) (concurring opinion). Under this interpretation, a suspect as to whom the probable cause standard is satisfied would not have to be identified in a wiretap application if, in light of the information the Government has already collected, it can reasonably be said that the Government is not investigating that suspect. Although this interpretation might ease the Government's administrative burden, we see that

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART



December 14, 1976

75-212 - U. S. v. Donovan

Dear Lewis,

Although I was tentatively of the other view with respect to one of the issues involved in this case, I think you have written a most persuasive opinion. Accordingly, I do not plan to write in dissent. I shall look carefully at whatever is written by anyone else, but, subject to that condition subsequent, I acquiesce for now in your opinion for the Court.

Sincerely yours,

P.S.
12/14

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

2nd DRAFT

From: Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

Circulated: DEC 27 1976

Recirculated: _____

No. 75-212

United States, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Thomas W. Donovan et al. | peals for the Sixth Circuit.

[January —, 1977]

MR. JUSTICE MARSHALL, dissenting.

The Court today holds that an application for a warrant to authorize a wiretap under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520, must name all individuals whom the Government has probable cause to believe are committing the offense being investigated and will be overheard. See 18 U. S. C. § 2518 (1)(b)(iv). It also holds that the Government must provide sufficient information to the issuing judge to allow him to exercise the discretion provided by 18 U. S. C. § 2518 (8)(d). I fully agree with both of these holdings. The Court concludes, however, that if the Government violates these statutory commands, it is nevertheless free to use the intercepted communications as evidence in a criminal proceeding. I cannot agree.

I continue to adhere to the position, expressed for four Members of the Court by Mr. Justice Douglas in his dissent in *United States v. Chavez*, 416 U. S. 562, 584 (1974), that Title III, does not authorize "the courts to pick and choose among various statutory provisions, suppressing evidence only when they determine that a provision is 'substantive,' 'central,' or 'directly and substantially' related to the congressional scheme." The Court has rejected that argument, however, see *United States v. Chavez*, *supra*; *United States v. Giordano*, 416 U. S. 505 (1974), and nothing is to be gained by renewing it here. But even under the standard set forth

Reviewed

*A well
& fairly
written
dissent.*

Probably

*no
"answer"*

*is
indicated.*

*We might add a note to effect that the
the ^{per se} rule of exclusion ~~applied by~~ used
by the dissent would impose ~~upon~~ society
the consequence of aborting ~~of~~ ^{of} merited
prosecutions or overturning deserved convictions*

in *Giordano* and *Chavez* and reaffirmed by the Court today, *ante*, at 18-19, the evidence at issue here should be suppressed.

I

Title III requires that an application for a warrant to authorize wiretapping disclose "the identity of the person, if known, committing the offense and whose communications are to be intercepted." 18 U. S. C. § 2518 (1)(b)(iv). The Court properly rejects the Government's contention that this provision requires it to name only the "principal target" of an investigation. In doing so, the Court relies both on the plain language and legislative history of the section, which do not support the Government's position, and on the statutory context. *Ante*, at 8-13. Part of that context is the obvious assumption of other portions of Title III that wiretap applications will name more than one target. See 18 U. S. C. §§ 2518 (1)(e), (8)(d). Another part is

"the fact that identification of an individual in an application triggers other statutory provisions. First, § 2518 (1)(e) requires an intercept application to disclose all previous applications 'involving any of the same persons . . . specified in the application.' . . . Second, § 2518 (8)(d) mandates that an inventory notice be served upon 'the persons named in the order or the application.'" *Ante*, at 10-11, n. 14 (emphasis added).

Yet in determining whether the identification requirement "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures," *United States v. Giordano*, *supra*, 416 U. S., at 527, or plays a "substantive role" in the "regulatory system" established by Congress, *United States v. Chavez*, *supra*, 416 U. S., at 578, the Court ignores the requirement's function as a statutory "trigger." In its analysis, the Court focuses solely on whether a list of additional names would affect a judge who must decide whether to issue a warrant. The Court reasons that once the judge has concluded that the specific requirements

of § 2518 (3)¹ have been met, the presence of additional names in the warrant application could not change his decision. *Ante*, at 19-21. Failure to provide those names is, therefore, insignificant.

The Court's reasoning is doubly flawed. First, a judge is not required to issue a warrant if the prerequisites of § 2518 (3) are satisfied; he *may* do so. Once he determines that the § 2518 (3) requirements have been met, he still must decide whether the invasion of privacy by the proposed wiretap is justified under the circumstances.² Second, what is at issue here is more than a simple list of names. Section 2518 (1)(e) requires that the Government disclose to the court the history of all prior applications to intercept the communications of anyone named in a warrant application. A history of recent applications would at the least cause a judge to consider whether the application before him was an attempt to circumvent the restrictive rulings of another

¹ 18 U. S. C. § 2518 (3) provides, in pertinent part:

"Upon such application the judge may enter an ex parte order . . . if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

² The information which the applicant is required to provide to the District Court by §§ 2518 (1)(d)-(i) would be superfluous if the decision whether to issue a warrant depended only on the findings specified in § 2518 (3).

judge or to continue an unjustified invasion of privacy.³ The decision whether to issue the warrant would certainly be affected by such consideration.⁴

It is true, as the Court notes, *ante*, at 20 n. 23,⁵ that there is no allegation in this case that had the District Court been informed that the Government expected to overhear respondents Donovan, Buzzaco, and Robbins discussing illegal gambling activities it would not have issued a warrant. But that fact is irrelevant to an analysis of the role of the naming requirement in the regulatory system established by Congress. In *Giordano*, the Court rejected the argument that the Attorney General's failure to authorize the application for a warrant could be disregarded because the Attorney General had later ratified the application, thus demonstrating that he would have approved it originally. 416 U. S., at 523-524, n. 12. The important consideration was whether the requirement of high-level authorization was designed to play an important role, not whether it would have mattered in the particular case. The same analysis should be used here.

Moreover, even where there is no prior interception or application to disclose, as is apparently the case here, the naming requirement plays a vital role in the system designed by Congress. For unless that requirement is complied with

³ Cf. *United States v. Belloni*, 163 U. S. App. D. C. 273, 501 F. 2d 833 (1974).

⁴ Thus, this case is unlike *United States v. Chavez*, *supra*. There, the Court concluded that the misidentification of the authorizing official as an Assistant Attorney General when the Attorney General had actually authorized the warrant application could not have affected the judge's decision to issue the warrant. 416 U. S., at 572.

⁵ The Court actually states only that there is no suggestion that the failure to name respondents kept from the judge information "that might have prompted the court to conclude that probable cause was lacking." As I have shown, that formulation understates the District Court's role.

from the first interception, no judge will know that a later interception is not the first. In addition, the naming requirement triggers the mandatory notification provision of § 2518 (8)(d), another important component of the congressional design.^a

Thus, I conclude that the naming requirement recognized by the majority does play a "substantive role" in the system designed by Congress to limit the use of electronic surveillance. Failure to comply with that requirement, therefore, should lead to suppression on the ground that "the communication was unlawfully intercepted." 18 U. S. C. § 2518 (10)(a)(i).

II

The Court's discussion of the consequences of the Government's failure to comply with the notice provision of § 2518 (8)(d) parallels its discussion of the naming requirement, and is similarly flawed. The Court does recognize that the notice provision was designed to assure the community that the wiretap technique is reasonably employed and that "Congress placed considerable emphasis on that aspect of the overall statutory scheme." *Ante*, at 23-24. But because notice occurs after the intercept is completed, and because notice is not itself "an independent restraint on resort to the wiretap procedure," the Court concludes that failure to notify does not render an interception "unlawful" under § 2518 (10)(a)(i). *Ibid*.

Again, the Court takes too narrow a view of the provision at issue, ignoring its place in the system Congress has created to restrain wiretapping. That system involves not only direct restraints on applying for a warrant, but also restraints which reduce wiretaps by providing sanctions for misuse of surveillance techniques. Those sanctions are both criminal, 18 U. S. C. § 2511 (1), and civil, 18 U. S. C. § 2520. Congress

^a See Part II, *infra*.

designed the notice provisions of § 2518 (8)(d) to provide the information necessary to make the civil sanctions of § 2520 meaningful. The congressional analysis of § 2520 states:

"Injunctive relief, with its attendant discovery proceedings, is not intended to be available. . . . It is expected that civil suits, if any, will instead grow out of the filing of inventories under section 2518 (8)(d)." S. Rep. No. 1097, 90th Cong., 2d Sess., 107 (1968).

See also *id.*, at 105.

The Court's conclusion that the notice provision is not central dismantles this carefully designed congressional structure.

III

The Court's opinion implies that if the violations of Title III considered here had been intentional, the result would be different. *Ante*, at 20 n. 23, 23 n. 26. This must be so, for surely this Court would not tolerate the Government's intentional disregard of duties imposed on it by Congress. I also assume that if the Government fails to establish procedures which offer reasonable assurance that it will strictly adhere to the statutory requirements, see *ante*, at 24, resulting failures to comply will be recognized as intentional. There is, therefore, reason to hope that the Court's admonition that the Government should obey the law will have some effect in the future.

But that hope is a poor substitute for certainty that the Government will make every effort to fulfill its responsibilities under Title III. We can obtain that certainty only by according full recognition to the role of the naming and notice requirements in the statutory scheme created by Congress. I respectfully dissent from the Court's failure to do so.

Do not add fr The time bin. gene.

The per se rule of exclusion urged by the dissenting opinion, infra, would impose upon society the consequences of aborting merited prosecutions ^{and} ~~or~~ overturning deserved convictions merely because of the omission of the name of a person who was known to someone on the government's side as a possible target. Such omissions may occur even when the utmost care is exercised to avoid them. For example, in a major bookmaking or narcotics case, involving extensive interstate operations and a ~~n~~ multiplicity of parties ~~often~~ often operating under aliases, investigating government agents would be confronted with difficult problems of identification and determination of probable cause as well as of coordination with the prosecutorial team. The SG therefore argues, ~~certainly~~ not without reason, that an inflexible exclusionary rule would "significantly impede the use of electronic surveillance as a law enforcement tool without safeguarding legitimate privacy interests or protecting against official abuses". Br. 27. In these circumstances, we are reluctant to impose a judicially created exclusionary rule where Congress has failed to do so in clear and explicit language.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 28, 1976



RE: No. 75-212 United States v. Donovan

Dear Thurgood:

Please join me in the dissenting opinion
you have prepared in the above.

Sincerely,

A handwritten signature, likely "Brennan", is written in ink below the word "Sincerely,".

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

✓

January 4, 1977

Re: No. 75-212, U. S. v. Donovan

Dear Lewis,

I have decided to join your opinion
for the Court in this case.

Sincerely yours,

P.S.
✓

Mr. Justice Powell

Copies to the Conference

Add to
fn 22 in
Donovan

~~Proposed footnote - suppression p. 18
Donovan
(Add to Note 22)~~

The concurring opinion of the CHIEF JUSTICE contends that respondents Donovan, Robbins, and Buzzaco ^(lack) ~~each~~ standing even to seek suppression. Post, at _____. This contention rests on the ground that Congress rejected an amendment proposed by Senators Long and Hart that would have added a fourth ground justifying suppression—namely, that the person against whom the government sought to introduce the evidence was not named in the court order. Since these three respondents would have been entitled to suppression under the rejected amendment, the concurring opinion concludes they cannot seek suppression here.

This view fails to recognize that § 2518(10)(a) establishing the suppression remedy provides alternative grounds on which one can seek suppression of evidence derived from a wiretap. Thus, the mere fact that Congress chose not to add a fourth alternative could not mean that it intended to prevent persons who would have been covered by that alternative from seeking

suppression on one of the other grounds. As the Justice Department commented, in the same statement cited in the concurring opinion: "The [Long and Hart] amendment is designed to limit the scope of electronic surveillance, but it accomplishes this objective in an artificial manner. So long as the court order is validly obtained, evidence obtained under the order should be admissible against any person not merely against the person named in the order." 114 Cong. Rec., at 14718 (1968) (emphasis added). Here, respondents Donovan, Robbins, and Buzzaco challenge the validity of the court order, and nothing in either Congress' rejection of the proposed amendment or the Justice Department's comment thereon suggests that § 2518(10)(a)(i) is unavailable to persons who might have had a remedy under a provision not enacted by Congress.

, here from the 6th Circuit, under

This case presents a number of issues ~~concerning the~~
~~construction of Title III of the Omnibus Crime Control and~~
~~Safe Streets Act of 1968~~ the federal wiretapping statute.

In an opinion filed today with the Clerk, the Court first holds/that applications for judicial authorization of wiretaps/must identify all persons whose relevant conversations/the Government has probable cause to believe it will intercept. The statutory requirements are not satisfied/when the government identifies only the principal target of the investigation.

Second, the Court holds that the Government must supply the issuing judge/with sufficient information, about the parties who were overheard,/to enable him to decide whether such parties must be notified of the interception.

Finally, we hold that under ^{*all of*} the circumstances ^{*for*} presented by this case, the failure of the Government to comply fully with these statutory obligations/did not make the intercept order unlawful.

We therefore conclude that it was error to suppress the evidence obtained by these interceptions. The order of the Court of Appeals is reversed, and the case is remanded to that court.

The Chief Justice filed a concurring opinion.
Stevens also concurs in part & dissents in part
Mr. Justice ~~Rehnquist~~ filed a concurring opinion, Mr.
Justice Marshall filed a dissenting opinion, in which Mr.
Justice Brennan joined.

February 16, 1977

Holds for No. 75-212 - U. S. v. Donovan

Dear Chief:

I would appreciate all of the holds for Donovan being taken off the list and carried over to the February 25th Conference.

These holds appear on pages 33 and 34, List 9, Sheets 2 and 3, of the February 18, 1977 Conference List. There are some 16 cases being held and I simply underestimated the complexity of some of them.

There is also a case on List 1, Sheet 2 of the February 18 Conference List, No. 76-597, U. S. v. Cabral, that I would like to take off the list. In my view, it is a hold for Donovan, and I will include it in my memorandum.

Sincerely,

The Chief Justice

LFP/lab

Copies to the Conference

cc: Mr. Michael Rodak, Jr.

9c copy! Heretofore held memo: United States v. Donovan.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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February 23, 1977

MEMORANDUM TO THE CONFERENCE

No. 74-1486 United States v. Bernstein. CA 4 rejected the Government's "principal target" interpretation of § 2518 (1)(b)(iv) and held instead that a wiretap application must identify an individual if the Government has probable cause to believe that the person will be overheard engaging in the criminal activity under investigation. CA 4 also held that failure to comply fully with the identification requirement triggers the statutory suppression remedy. Since Donovan reaches a contrary result with respect to suppression, I will vote to grant, vacate, and remand in light of Donovan.

No. 75-500 Anderson v. United States; No. 75-509 Malloway v. United States; No. 75-513 Doolittle v. United States. There are six petitioners in these three curve lined petitions. In addition to petitioners in 75-500 and 75-509, those in 75-513 are Doolittle, Sanders, Union, and Whited. CA 5, sitting en banc, held that suppression would be appropriate if the Government had procured the wiretap in bad faith or if the defendants could show that they were prejudiced by the omission of their names from the wiretap application.

Petitioners first contend that evidence derived from the wiretap should have been suppressed since the intercept

application did not name Sanders or Anderson. */ Doolittle was identified in both the application and order. Malloway, Union, and Whited do not contend that they should have been identified. I have doubts as to the standing of these four petitioners to seek suppression. See No. 76-232, Haina v. Maryland, discussed infra. In any event, under Donovan the failure to name Anderson and Sanders does not make the wiretap "unlawful" within the meaning of the suppression provision. I would note in this regard that the CA 5 panel concluded that there was "no indication of bad faith or attempted subterfuge by the Government in its wiretap application." I will vote to deny on this issue with respect to all six petitioners.

There is a second issue which is raised only by the petitioners in No. 75-513: should the monitored conversations have been suppressed because the intercept application failed to establish sufficiently the inadequacy of other investigative procedures. We recently denied certiorari on this same issue with respect to a different wiretap application. Green v. United States, No. 75-962, denied at the April 23, 1976, Conference. I will also vote to deny on this issue in the instant petition.

No. 75-611 Ganem v. United States. There are two petitioners: Ganem and Dick. Ganem argues that the Government's wiretap application should have identified him as a target, and that the failure to do so warranted suppression. CA 5, relying on its en banc decision in United States v. Doolittle, discussed supra, Nos. 75-500, 75-509, and 75-513, held that since Ganem had not shown that his rights were prejudiced by the failure to name him, suppression was not required. Under Donovan, this result is correct, and I will vote to deny on this issue.

*/ The Government contends that Sanders and Anderson were identified in the application since they were mentioned in the supporting affidavit incorporated by reference in the application. In my view, this does not meet the statutory identification requirement. In any event, after Donovan the Government is required to identify all targets in the application, and I for one am of the view that the targets should be identified together in one specific part of the application.

The second issue is unrelated to Donovan: Ganem and Dick contend that the evidence should have been suppressed on the ground that the order authorizing the wiretap was insufficient on its face. They contend that the wiretap had been approved by an Acting Assistant Attorney General whose authority had lapsed. CA 5 found that the Attorney General had in fact approved the application, and that introduction of the evidence was therefore permissible. We denied certiorari on this issue in Vigi v. United States, No. 75-101, October 17, 1975, and as to petitioners' co-defendants in Joseph v. United States, No. 75-600, February 20, 1976. I will vote to deny.

No. 75-963 Kilgore v. United States. Petitioner presents a "laundry-list" of claims, none of which seems cert-worthy to me. The factual situation is somewhat complicated. According to petitioner, the Government, by failing to name him as a known target in an application for a wiretap in GEORGIA, unlawfully seized his conversations and unlawfully used the evidence obtained in subsequent wiretap applications. The next wiretaps were placed on petitioner's telephones in CALIFORNIA. Among the conversations seized were talks between petitioner and Green, a Florida resident. Those conversations were used as a basis for obtaining a wiretap on Green's telephone in FLORIDA. Pursuant to that tap, a number of conversations between Kilgore and Green were seized. Kilgore was not named as a known target in the FLORIDA application.

Petitioner first contends that evidence derived from the FLORIDA wiretap should have been suppressed because the FLORIDA intercept application did not name him as a person "known" to be committing the offense although the Government had probable cause to believe that his conversations would be overheard. Relying on its en banc decision in United States v. Doolittle, Nos. 75-500, 75-509, 75-513, discussed supra, CA 5 upheld the District Court's refusal to suppress. At this first level of analysis, that is the correct result under Donovan. But the situation is complicated by petitioner Kilgore's next contention.

Kilgore contends (i) that the evidence derived from the FLORIDA tap on Green's phone should have been suppressed because the Government did not mention all of the previous wire interceptions of Kilgore's conversations in violation of 18 U.S.C. 2518(1)(e) and (ii) that he was entitled to an evidentiary hearing on this issue.*/ The FLORIDA application did reveal that a previous application had been made to tap Kilgore's phone in California, and that conversations with Green had been intercepted pursuant to that authorization. But nowhere did the application mention one prior GEORGIA tap and several prior CALIFORNIA taps in which Kilgore had been overheard. Kilgore argued that the Government's motive in failing to disclose these prior taps was to keep the issuing judge from concluding that the wiretap was unnecessary as to Kilgore.

The District Court refused to include within the scope of the suppression hearing any consideration of the prior taps on Kilgore. As a cautionary measure, given some question concerning the CALIFORNIA tap mentioned in the application, the District Court struck all references to the CALIFORNIA tap that went to the question of probable cause to tap Green. The District Court concluded that there was still sufficient information to justify the tap on Green's phone. CA 5 held that in light of these actions of the District Court, the FLORIDA application was valid on its face.

CA 5 then proceeded to determine whether suppression was required for failure to name Kilgore in the FLORIDA application. CA 5 noted that under its decision in United States v. Doolittle, suppression was required only if the

*/ Kilgore was not named in the applications for other interceptions in Georgia and California during which conversations of his were overheard. His argument that he was improperly denied an evidentiary hearing on the legality of all previous interceptions apparently includes, in addition to his third contention, discussed infra, with respect to the CALIFORNIA interception mentioned in the application, the complaint that he was thereby precluded from proving that "he was a known but unnamed target in Georgia."

Government acted in bad faith in failing to name Kilgore, or if Kilgore were prejudiced by the omission. With respect to bad faith, CA 5 noted that the District Court "must have found implicitly that the Government was not in bad faith when it omitted Kilgore's name. Surely if he had agreed that the Government was deliberately disobeying the statute, he would have delved further into the question." As to prejudice, CA 5 concluded that the District Court who approved the FLORIDA application would not have placed any additional limitations on the use of the evidence or on the surveillance conducted if Kilgore's name and prior taps had been disclosed. Although Kilgore argues that the tap was not necessary with respect to himself, the tap was still necessary for the investigation of Green, and minimization would not have required the Government to stop listening to criminal conversations between Green and Kilgore. CA 5 also concluded that Kilgore received a timely inventory.

Given CA 5's analysis of the case, I will vote to deny as to this second issue. Under Donovan, mere failure to name Kilgore does not justify suppression. Here, however, there were allegations that that failure to name Kilgore was in bad faith and that disclosure of the prior applications would have prompted the District Court to deny the FLORIDA application. These allegations, if supported, might have justified suppression. See Donovan, slip opinion at 21 n.23. But given CA 5's discussion of bad faith, prejudice, and provision of inventory notice, I see no reason to grant, vacate, and remand in light of Donovan.

Kilgore's final contention is that he should have been given an evidentiary hearing with respect to the legality of the CALIFORNIA tap that was mentioned in the FLORIDA application. See note * supra. At our April 23, 1976, Conference, we denied certiorari on this issue presented in a petition by Green, No. 75-962. There is no reason to take a different view now.

I'll vote to deny on all issues.

No. 75-1393 Principie v. United States; No. 75-1394 Labriola and Slomka v. United States. The three petitioners raise a number of Donovan related issues. Labriola (No. 1394), contends that once a suspect is identified in the course of an electronic interception, the government (here, state officials) must obtain an amended order naming that suspect before continuing to intercept his conversations. Donovan requires the government to name all "known"

individuals, but the opinion says nothing about when the identification of the suspect must be accomplished. CA 2 interpreted Title III as requiring the identification of "known" individuals only at the time of initial application or upon any extension. I think that is the proper interpretation.

Principie (No. 1393) makes a similar argument. He points out that he was identified only as "Ralph" in intercept orders of July 5, July 27, and September 11, despite the fact that his full identity was known to the government by August 17 or perhaps by late July. With respect to the September 11 order, any error would seem harmless since no conversations were intercepted pursuant to that order. And it does not appear that petitioner Principie seriously contends that he should have been named fully in the July 27 order.

Labriola (No. 75-1394) contends that there was insufficient probable cause to name him in the order of July 27 and that it was accordingly improper to intercept his conversations pursuant to that order. CA 2 concluded that there was probable cause to name him, and I see no reason to review that determination. In any event, there apparently was probable cause to issue the intercept order to seize the conversations of others, and petitioner's criminal conversations were properly intercepted under that order.

Labriola and Slomka (No. 74-1394) seek suppression of all conversations seized pursuant to the July 27 order as well as those seized pursuant to subsequent orders on the ground that the Government failed to honor a time restriction imposed by the District Court. The court had directed that certain interceptions were not to take place after 7:30 p.m. on any day, and the Government violated this condition. The court accordingly suppressed all conversations that were seized in violation of the time restriction. Petitioners seek suppression of all evidence seized during the taps. CA 2 properly rejected that argument.

Finally, all three petitioners contend that they were not served with inventory notice within 90 days of the termination of the interception. Labriola was notified within 90 days of the final extension of the initial order. At one point there was a change of location, and Labriola contends that the 90-day period should commence to run

whenever the original interception is changed in any significant degree, as with a change in location. The argument is frivolous. Principe was named in the extension orders, but he was not given inventory notice as required by the statute. Labriola was never named in an order and he did not receive inventory notice. Since there is no allegation that the Government knowingly sought to keep petitioners from receiving notice, and since CA 2 found that no prejudice resulted from the failure to provide notice, suppression would have been inappropriate under Donovan. See slip opinion at 24 n.26.

I will vote to deny these petitions.

No. 75-1813 Civella v. United States. There are three petitioners in this case: Tousa, Nicholas Civella, and Anthony Civella. CA 8 found that the Government had probable cause to name Tousa and both Civellas in its wiretap application, and consequently that identifying only Tousa constituted technical noncompliance with § 2518(1)(b)(iv). CA 8 held, however, that under the circumstances of this case suppression of evidence was not warranted for non-compliance with the statute.

Petitioners raise two issues of possible substance. They first contend that a wiretap application must identify all persons as to whom the Government has probable cause, and that failure triggers the statutory suppression remedy. Since Tousa was named, I doubt his standing to raise the issue. See Haina v. Maryland, No. 76-232, discussed infra. CA 8 found "nothing to suggest that the government acted in bad faith or with deceptive intent." Under Donovan suppression was not required.

The other issue is not directly related to Donovan: whether the late service of inventories warrants suppression. The inventory question in Donovan concerned the nature of the Government's obligation adequately to inform the court concerning those to whom inventory notice might be served. At issue here is the statutory provision requiring service of inventory notice within 90 days after the termination of an interception order. Petr Tousa was served five days after the expiration of the 90-day period, and the Civellas were served 13 days late. Petitioners do not contend they were

prejudiced by the delay. In my view, suppression is no more warranted here for late service of notice than it was in Donovan for the negligent failure of the Government to provide the issuing judge with the names of all those on whom such service might be made.

I will vote to deny this petition.

No. 76-169 United States v. Barletta. This case is curve-lined with No. 75-1813, Civella v. United States, discussed supra. The two petitioners in this case - Barletta and Fontanello - were overheard during the course of a wiretap. The SG notes that the District Court did not request, and no attempt was made to provide him with, a comprehensive list of all the identifiable "sub-agents" overheard during the course of the wiretap. As a result these petitioners were not served with inventory notice. They were indicted about a year and a half later, and during pretrial discovery were informed of the interceptions and allowed to listen to the tapes. CA 8 nevertheless held that the evidence should have been suppressed with respect to these two petitioners, and reversed their convictions. Since Donovan indicates that CA 8 erred with respect to suppression, I will vote to grant, vacate, and remand in light of Donovan.

No. 75-1838 Green v. United States; No. 75-6957 Hill v. United States; No. 75-7001 Kirk v. United States. This is a massive drug conspiracy case; nine petitioners have raised numerous issues in three separate petitions.

The petitions were held for United States v. Donovan because petitioners contend that evidence should have been suppressed on the ground that the wiretap application failed to identify petitioner Deborah Barnett. I have serious doubt as to the standing of the eight petitioners other than Barnett to seek suppression on the ground that the application failed to name someone else, see Haina v. Maryland, No. 76-232, discussed infra, but it is unnecessary to rest on that consideration. CA 8 found that "the fact that some of the appellants (mainly Deborah Barnett) were not named in the application does not mean that the authorization order was invalid. The application named all the individuals whom the government had probable cause to suspect would be involved in telephone communications with the principal, Eugene Kirk." CA 8's assessment of the existence of probable

cause is uncertworthy. Moreover, even if we were to disagree with CA 8's conclusion in that regard, Donovan makes it clear that suppression is not required. I will vote to deny on this issue. I am also not inclined to vote to grant with respect to the other issues.*/ I will, however, vote to hold No. 75-7001 for Jeffers v. United States, No. 75-1805, cert. granted at the September 27, 1976, Conference. One of the petitioners in No. 75-7001 -- Eugene Kirk -- was convicted of conspiracy and continuing criminal enterprise. In Jeffers, CA 7 concluded that conspiracy was a lesser included offense of continuing criminal enterprise, but that a defendant could constitutionally be convicted of both offenses. I recognize that petitioner Kirk attacks the continuing criminal enterprise statute on vagueness grounds and makes no mention of either the Double Jeopardy Clause or the decision of CA 7 in Jeffers, but I think it advisable to hold No. 75-7001.

In sum, I will vote to deny 75-1838 and 75-6957, but to hold 75-7001 for Jeffers v. United States, 75-1805, on the possible double jeopardy issue.

No. 75-1816 Labriola v. New York. The contentions raised by petitioner Labriola with respect to his state conviction are, with one exception, identical to those presented by Labriola with respect to his federal conviction

*/ (1) Whether the evidence at trial established the existence of multiple conspiracies or the single conspiracy charged in the indictment. (2) Whether evidence of recorded telephone conversations between certain petitioners and a government informant should have been excluded because the informant was not available to testify. (3) Whether the application for the wire interception order in this case sufficiently established that other investigative procedures were inadequate. (4) Whether the trial court abused its discretion in allowing the jury to use transcripts while listening to the recorded conversations at trial. (5) Whether the continuing criminal enterprise statute, 21 U.S.C. 848, is unconstitutionally vague. (6) Whether the jury selection plan of the Eastern District of Missouri is improper because it compiles the names of potential jurors from voting lists at four-year intervals. (7) Whether the court erred in admitting the expert testimony of government chemists who identified certain substances as heroin.

in No. 75-1394, discussed supra. The one difference concerns the failure of the police to honor the time restrictions established on the July 27 bugging order. Counsel for petitioner failed to raise that point at the initial suppression hearing, and the state court subsequently denied as untimely a motion to reopen the suppression hearing. Regardless of the propriety of applying the state procedural rule in these circumstances, the case does not warrant full review. I will vote to deny.

No. 76-232 Haina v. Maryland. Petitioner Haina and one Strawbridge lived in the same house. The police obtained a wiretap order authorizing interception of calls over two telephones located in the house. The order identified "Peter Xavier Haina [petr] and others as yet unknown." The state court concluded that the police had probable cause to name, and should have named, petitioner's housemate (Strawbridge), and petitioner now argues that the wiretap order was invalid since it named only petitioner. Relying on Alderman v. United States, 394 U.S. 164, the state court held that petitioner lacked standing to object to the failure to name Strawbridge. I think the state court ruled correctly on the basis of standing, but in any event Donovan makes clear that the failure to identify in the application a person as to whom the Government had probable cause does not make the wiretap "unlawful" within the meaning of the suppression provision.

There are two other issues in the case which are not related to Donovan. One issue is whether the wiretap application sufficiently detailed the nonfeasibility of other investigative techniques, and the other concerns the warrantless seizure of petitioner's goods from under the porch of petitioner's neighbor.

I consider none of these issues certworthy and will vote to deny.

No. 76-720 United States v. Billy Ray Lee. Petitioner was mentioned in the affidavit submitted in support of the Government's wiretap application, but his name was omitted

from the list of individuals whose communications were to be intercepted. CA 6, relying on its earlier decision in United States v. Donovan, reversed a conviction based on certain evidence derived from the court-approved wiretap. Our decision in Donovan mandates a different result with respect to suppression, and I will vote to grant, vacate, and remand in light of Donovan.

No. 75-6944 Schwartz v. United States. Petitioner raises three issues in this case, two of which are related to Donovan. Petitioner first contends that the failure to name him in a wiretap application was error requiring suppression. CA 2 found insufficient evidence of probable cause with respect to petitioner, and that it was therefore unnecessary to name him in the application.

Petitioner next contends that the failure to provide the issuing judge with information as to petitioner's involvement in the conspiracy precluded the judge from properly exercising his 18 U.S.C. § 2518(8)(d) discretion as to whether inventory notice should be served on petitioner. The Government points out that the issuing judge was provided with a complete list of names of the persons who had been overheard, and that petitioner's name was included on the list. It seems to me that such a list is permissible under Donovan, see slip opinion page 17, and upon submission of the list, the District Court could have requested additional information from the Government. I do not read Donovan as holding that the Government must initially supply the issuing judge with both a list of names and additional information as to each named individual. In any event suppression would be an inappropriate remedy under these circumstances.

The final issue raised by petitioner concerns the seizure which CA 2 upheld under the plain view doctrine. Although there may be some doubt as to the correctness of that ruling, I do not consider the issue certworthy.

I will vote to deny this petition.

No. 76-597 United States v. Cabral. This case, which is relisted from the January 7, 1977, Conference, is not listed as a "heretofore held for United States v. Donovan." Since my vote on January 7, 1977, would have been to hold the case for Donovan, I thought it would be convenient if I took this opportunity to recommend a disposition in light of Donovan.

CA 9 held that the Government had probable cause to believe that respondent would be overheard, and therefore that respondent should have been named in two relevant wiretap applications. CA 9 also concluded that violation of 18 U.S.C. § 2518(1)(b)(iv) required suppression. The SG filed this petition, noting that the questions were at that time pending before the Court in Donovan. Since Donovan mandates a different result with respect to suppression, I will vote to grant, vacate, and remand in light of Donovan.

Sincerely,

Levin

2 copies to Mr Putzel

[illegible]

~~Draft #2 11/20/76~~

This went to printer.

Chambers Draft

LFP reviewed this to compare to Chambers printed draft on 12/4/76 E/K

No. 75-212 UNITED STATES v. DONOVAN

MR. JUSTICE POWELL delivered the opinion of the Court.

~~This case presents issues concerning In this case we are once again called upon to resolve~~

~~important issues in~~ the construction of Title III of the

Omnibus Crime Control and Safe Streets Act of 1968, 18

U.S.C. ^{§§} 2510-2520. Specifically, we must decide whether

18 U.S.C. § 2518(1)(b)(iv), which requires the government

to include in its wiretap applications "the identity of

the person, if known, committing the offense, and whose

conversations are to be intercepted", is satisfied when

the government identifies only the "principal targets"

of the intercept. Second, we must decide whether the

government has a statutory responsibility to inform the

issuing judge of the identities of persons whose conversa-

tions were overheard in the course of the interception, thus

enabling ^{him} ~~the issuing judge~~ to exercise his discretion

~~pursuant to 18 U.S.C. § 2518(8)(d) to order that such~~ ^{with respect to}

~~persons be served with notice of the fact of interception~~

And finally, we must determine whether ~~it is appropriate to~~

~~18 U.S.C. § 2518(10)(a) requires suppression of evidence derived from wiretaps~~

to decide whether they should be served with notice of the interception pursuant to 18 U.S.C. § 2518(8)(d).

✓
requires
suppression of
evidence under
provision of
18 U.S.C. § 2518(10)(a).

~~require suppression of evidence for~~ ^{fully} failure to comply with
these statutory ^{provisions} responsibilities

I.

On November 28, 1972, a special agent of the Federal
Bureau of Investigation ^{applied} ~~submitted an application~~ to the
United States District Court for the Northern District of

Ohio for an order authorizing a wiretap interception ~~pursuant~~
^{in accordance with}

~~to~~ Title III of the Omnibus Crime Control and Safe Streets

Act of 1968, 18 U.S.C. ^{§§} 2510-2520. ¹ The application requested

authorization to intercept ^{gambling-related} ~~communications involving an~~

~~illegal gambling operation conducted over two telephones~~
^{at one address}

in North Olmstead, Ohio, ~~which was listed under an alias~~

of Joseph Anthony Spenganlo at an apartment used by Albert

^{at a home} ~~Kotoch~~ and two other telephones in Canton, Ohio ^{at the}

~~home of George Florea~~ The accompanying affidavit recited

that the telephones were being used by ^{Albert} Kotoch, ^{Joseph} Spaganlo,

^{George} and Florea to conduct an illegal gambling business, and

that in conducting that business they would place telephone
calls to and receive telephone calls from various persons,

three of whom ^{were} ~~are~~ also named in the wiretap application. ²

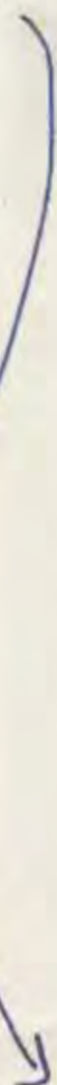
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The affiant also stated that the government's informants would refuse to testify against the persons named in the application, that telephone records alone would be ⁱⁿ sufficient to support a gambling conviction, and that normal investigative techniques were unlikely to be fruitful. ^{Pursuant to 1} The government's

² ~~request~~ ¹ ~~and that same day obtained, authorization to~~ ¹⁵ ~~intercept~~ ² ~~for a period of~~ ¹⁵ ~~days~~ ² ~~the interception of~~ ¹⁵ ~~intercept~~ ² ~~gambling-related wire communications of Kotoch,~~

Spaganlo, Florea, three named individuals other than the respondents, and "others as yet unknown," to and from the ³ four listed telephones. ~~The District Court's order~~ ³ ~~authorized the interception of a maximum of 15 days~~

During the course of the wiretap, the government ³ learned that respondents Donovan, Robbins, and Buzzaco were discussing illegal gambling activities with the named



subjects. ^{On} Nevertheless, ^{the Government} in its December 26, 1972, application ^{4.} applied for an extension of the initial intercept order. ^{the} This time it government sought authorization to intercept gambling-related conversations of Kotoch, Spaganlo, Florea, two other named individuals, and "others as yet unknown", ^{but} ^{the} Donovan, Buzzaco, and Robbins respondents ~~were not~~ identified in this second ^{5.} application. The District Court again authorized interception of gambling-related conversations for a maximum of ¹⁵ ~~fifteen~~ days.

On February 21, 1973, the government submitted to the District Court a proposed order giving notice of the interceptions to ³⁷ ~~thirty~~ seven persons, a group which the government

it did not identify



apparently thought included all individuals who could be identified as having discussed gambling over the monitored telephones. ^{6.} The District Court signed the proposed order, and an inventory notice was ~~thereafter~~² served on the listed persons, including respondents Donovan, Buzzaco, and Robbins. On September 11, 1973, after the government submitte³ the names of two additional persons whose identities had allegedly been inadvertently omitted from the initial list, the District Court entered an amended order giving notice to those individuals. As a result of what the government ³ labels "administrative oversight," respondents Merlo and Lauer were not included in either list of names and ⁷ ~~therefore~~² were never served with inventory notice.

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Kotoch, Spaganlo, the five respondents, and ¹⁰ ~~ten~~ other individuals with and conducting conspiracy to conduct and a gambling business in violation of 18 U.S.C. §§ 371, ² 1955. The five respondents filed motions to suppress evidence

derived from the wire interception. After an evidentiary hearing on the motions, the District Court suppressed as to respondents Donovan, Robbins, and Buzzaco all evidence derived from the December 26 intercept order on the ground that failure to identify them by name in the application and order of that date violated 18 U.S.C. ^{§§} 2518(1)(b)(iv) and 2518(4)(a). With respect to Merlo and Lauer, who were not known to the government until after the December 26 application, the District Court suppressed all evidence derived from both intercept orders on the ground that they had not been served with inventory notice.

513F.2d 337 (1975).

The Court of Appeals for the Sixth Circuit affirmed.

On the identification issue, the ~~Court of Appeals~~ held that the wiretap application must identify every person whose conversations relating to the subject criminal activity the government has probable cause to believe it will intercept. Agreeing with the District Court that at the time of the December 26 application the government had probable cause to believe that it would overhear Donovan, Robbins, and Buzzaco "committing the offense," the Court

of Appeals affirmed the suppression of evidence derived from the December 26 order. On the notice question, ~~the~~ ^{it} ~~Court of Appeals~~ held that the government has an implied statutory duty to inform the issuing judge of the identities of the parties whose conversations were overheard so that he can ~~the judge could~~ determine whether discretionary inventory notice should be required. Because the government had failed to perform this duty with respect to Marlo and Lauer, the Court of Appeals affirmed the District Court's order suppressing evidence derived from both intercept orders. The ~~Court of Appeals~~ found it unnecessary to determine whether the failure to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application and to name respondents Merlo and Lauer in the proposed inventory notice orders was "inadvertent or purposeful," since the mere fact of omission was sufficient to require suppression. under 18 U.S.C. § 2518(10(a)). ¹⁰

We granted certiorari to resolve ~~these~~ ^{these} ~~seemingly important~~ ^{which concern} issue, ~~involving~~ ^{and now} the construction of a major federal statute, ⁴²¹ U.S. ⁹⁰⁷ ² to reverse.

II.

The United States contends that § 2518(1)(b)(iv) requires that a wiretap application identify ^{only} the principal target of the interception, ^{and} that § 2518(8)(d) does not require the government to provide the issuing judge with a list of all identifiable persons who were overheard in the course of an authorized interception.

think neither contention is sound.
We disagree with both contentions.

A.

We turn first to the identification requirements of § 2518(1)(b)(iv). That provision requires a wiretap application to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." In construing that language, this Court has already ruled that the government is not required to identify an individual in the application unless ^{it} ~~the government~~ has probable cause to believe ⁱ (1) that the individual is engaged in the criminal activity under investigation and ^{it} (2) that the individual's conversations will be intercepted over the target telephone. United States v. Kahn, 415 U.S. 143 (1974). The question

at issue here is whether the government is required to name all such individuals. ~~///~~

The United States argues that the most reasonable interpretation of the "plain language" of the statute is that the application must identify only the "principal target" of the investigation, who "will almost always be is monitored. 12. Brief for the United States, the individual whose phone is monitored. Brief at 18. Under this interpretation, if the

~~The United States does not suggest that regardless of the factual circumstances a wiretap application need identify only a single individual. To the contrary, the United States concedes that if two or more persons are using the target telephone "equally" targets of the investigation, "all must be named." Brief at 18 n. 13. Recognizing that § 2518(1)(b)(iv) may require a wiretap application to identify more than one person, the relevant question is which persons must be named. Under the "principal target" interpretation suggested by the United States, the answer is relatively straightforward. If the~~

~~government has reason to believe that an individual will use the target telephone to place or receive calls, and the government has probable cause to believe that the~~

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Footnote

individual is engaged in the criminal activity under investigation, the individual qualifies as a "principal target" ^{and} ~~who~~ must be named in the wiretap application.

On the other hand, an individual who uses a different telephone to place calls to or receive calls from the target telephone is not a principal target even if the government has probable cause to believe that the individual is engaged in the criminal activity under investigation. In other words, whether one is a "principal target" of the investigation depends on whether one operates the target telephone to place or receive calls. 13.

Whatever the merits of such a statutory scheme, we ^{little} ~~are unable to find~~ support for it in the language and structure of Title III or in the legislative history. ~~To begin with,~~ the statutory language itself refers only to the person, if known, committing the offense and whose communications are to be intercepted." That description is as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from the target telephone. It is true, as the United States suggests, that when read in the context of the other

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~~18 U.S.C.~~
subdivisions of § 2518(1)(b), an argument can be made that Congress focused in subdivision (iv) on the primary user of the target telephone. But it is also clear from other sections of the statute that Congress expected that wiretap applications would name more than one individual. For example, Title III requires that inventory notice be served upon "the persons named in the order of the application." 18 U.S.C. § 2518(8)(d) (emphasis added). And ~~§ 2518(1)(e)~~ § 2518(1)(e) requires that an intercept application disclose all previous intercept applications "involving any of the same persons . . . specified in the application." (Emphasis added). It may well be that Congress anticipated that a given application would cover more than one telephone or that several suspects would use one telephone, and that an application ~~would~~ ^{would} for those reasons alone require identification of more than one individual. But ~~there is~~ ^{there} nothing on the face of the statute ~~itself~~ ^{that} suggests that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application. ~~14.~~

Nor can we find support for the principal target interpretation in the legislative history. Title III originated as a combination of S. 675, the Federal Wire Interception Act, which was introduced by Senator McClellan several months prior to this Court's decision in Berger v. New York, 388 U.S. 41 (1967), and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska a few days after the Berger decision. Both bills required that wiretap applications include a full and complete statement of the facts and circumstances relied upon by the applicant and specification of the nature and location of the communication facilities involved. ~~And~~ although neither bill contained an express identification requirement such as that at issue here, both bills required the application to include "a full and complete statement of the facts concerning all previous applications . . . involving any person named in the application as committing, having committed, or ~~about~~ being about to commit an offense." Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcommittee on Criminal Laws and

Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., at 77, § 8(a)(3) and 1006, § 2518(a)(4) (emphasis added).

(1967) Thus, even at this early stage, it was recognized that an application could identify several individuals, and there is ~~absolutely~~ no indication that the identification would be limited to "principal targets."

the bill that combined the major provisions of S. 675 and S. 2050, and that eventually was enacted,

While S. 971, the ~~"combination" bill~~ was pending before the Senate Judiciary Committee, this Court decided Katz v. United States, 389 U.S. 347 (1967). S. 971 was then redrafted to conform to Katz as well as Berger, and the identification provision was added at that time. ~~And in~~ that regard the Senate Report states that the requirements set forth in the various subdivisions of § 2518(1)(b), (at issue here,) including the identification requirement "[were] intended to reflect the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968), citing Berger v. New York, 388 U.S. 41, 58-60, and Katz v. United States, 389 U.S. 347, 354-56 (1967).

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The United States now contends that although it may be that Congress read Berger and Katz to require, as a constitutional matter, that the "subject" of the surveillance

be named if known, Congress "would hardly have read those cases as requiring the naming of all parties likely to be overheard. . . ." ^{15.} Brief, at 25-26. The difficulty with the legislative history fails to indicate that argument is that ~~it is not clear~~ that Congress was ^{Congress} thinking in terms of "subjects" of surveillance, or that ~~it~~ considered "subjects" of surveillance to be the principal users of the target telephone.

Moreover, to the extent that Congress thought it was meeting the constitutional commands of particularization established in Berger and Katz, ~~it is entirely possible~~ ~~that~~ Congress may have read those cases as mandating a broad identification requirement. The statute that we confronted in Berger require^d identification of "the person or persons" whose communications ~~are~~ ^{were} to be overheard.

388 U.S.,
at 59.

^{to} And we expressly noted that that provision "[did] no more than identify the person whose constitutionally protected area is to be invaded. . . ." ^{Ibid.} Given the statute at issue in Berger and our comment upon it, Congress may have concluded that as a constitutional matter a wiretap application would have to name all suspects rather than just the primary user. ^{16.}

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In any event, for our present purposes it is unnecessary speculate as to ~~to undertake the impossible task of determining exactly how~~

Congress interpreted Berger and Katz with respect to the

It is sufficient to note that in identification issue. ~~the~~ response to those decisions Congress

included an identification requirement which on its face

draws no distinction based on the telephone one uses, and

the United States ~~has been unable to point~~ ^a ^{no} to evidence in

the legislative history that supports such a distinction.

Indeed, ~~in reading the~~ ^{the} legislative materials ~~we have failed~~ ^{apparently}

contain no ~~to uncover any~~ use of the term "principal target" or any

discussion of ~~the potential for differential~~ ^a treatment based

on the telephone from which a suspect speaks. ^{17.1} We therefore

conclude that a wiretap application must name an individual

if the government has probable cause to believe that the

individual is engaged in the criminal activity under

investigation and ~~if the government~~ expects to intercept the

individual's conversations over the target telephone.

B. 12

The other statutory provision at issue in this case is 18 U.S.C. [§] 2518(8)(d), which provides that the judge shall cause to be served on the persons ^{order on} named in the application ^{an inventory,} ~~or the order an inventory~~ which must ^{give} include notice of the entry of the order or application, ^{state} the disposition of the application, and ^{indicate} ~~the fact that~~ ^{whether} ~~communications were or were not~~ intercepted. ^{18.} Although the statute mandates the provision of that inventory ^{only} notice to persons named in the application or the order, the statute also provides that the judge ^{may} ~~can~~ provide similar notice to other parties to intercepted communications if ~~the judge~~ ^{he} concludes that such action is in the interest of justice. ^{19. Observing} ~~The United States contends~~ that this notice provision does not ~~contain an~~ ^{by} express requirement ~~that the~~ law enforcement authorities routinely ^{to} provide the judge with any specific information upon which to exercise his ^{The United States contends that} discretion, ~~and that~~ it would be inappropriate to read such a requirement into the statute ^{since} ~~given the fact that~~ the judge has the option of asking the law enforcement authorities for whatever information he requires.

Our reading of the legislative history of the discretionary notice provision in light of the purposes of Title III leads us to reject the government's interpretation. As reported from the Judiciary Committee, ^{section} 2518(8)(d) contained only a provision mandating notice to the persons named in the application or the order; the discretionary notice provision was added by amendment on the floor of the Senate. In introducing that amendment, Senator Hart explained its purpose:

① "The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted conversations, even though such parties are not specifically named in the court order. The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute. It may be that the required notice must be served on all parties to intercepted communications. Since legitimate interests of privacy may make such notice to all parties undesirable, the amendment leaves the final determination to the judge." 114 Cong. Rec. 14485-14486 (1968). ~~to~~ ~~20~~

In deciding whether legitimate privacy interests justify ~~a decision to~~ ^{ing} withhold inventory notice from parties to intercepted conversations, a judge ^{is likely to} ~~will almost always~~ require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities.

No purpose is served by holding that those authorities have no routine duty to supply the judge with relevant

information ^{18 U.S.C.} to the contrary, the purposes of § 2518(8)(d) are best served if it is recognized that both the judge and the law enforcement authorities share statutory responsibilities in this regard. The Court of Appeals

for the Ninth Circuit recently confronted this problem of dual responsibility, and we adopt the balanced construction that court placed on § 2518(8)(d):

① [A]lthough the judicial officer has the duty to cause the filing of the inventory [notice], it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his statutory § 2518(8)(d) discretion, . . . the government is also required to furnish such information as is available to it."

United States
v. Chun, 503
F.2d 533, 540
(1974) ^{2k}

We agree with the Ninth Circuit that this allocation of responsibility best serves the purposes of Title III. ^{22/}

"To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted conversation is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although

III. *e*

We turn now to the question whether the District Court properly suppressed evidence derived from the wiretaps at issue solely because of the failure of the law enforcement authorities to comply fully with the provisions of §§ 2518(1)(b)(iv) and 2518(8)(d). Section 2515 ~~Title III~~ expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." ~~and~~ the circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518(10)(a):

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

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~~It should be apparent that the only relevant category possibly justifying suppression with respect to the five respondents is~~

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~~§ 2518(10)(a)(i)~~ There is ~~simply~~ no basis on the facts of ~~the~~ ^{this} case to suggest that the authorization orders are facially insufficient, or that the interception was not

conducted in conformity with the orders. Thus, ~~the~~ only

§ 2518(10)(a)(i) is relevant: were

question is whether the communications ~~were~~ ["]unlawfully

intercepted given the violations of ~~§§~~ ^{18 U.S.C.} 2518(1)(b)(iv) and

~~2518(8)(a)~~

Resolution of that question must begin with United

States v. Giordano, 416 U.S. 505 (1974), and United States

v. Chavez, 416 U.S. 562 (1974). Those cases hold that

"[not] every failure to comply fully with any requirement

provided in Title III would render the interception of

wire or oral communications 'unlawful.'" United States v.

Chavez, 416 U.S., at ^{574-575.} ~~1~~. To the contrary, suppression is

required only for a "failure to satisfy any of those

statutory requirements that directly and substantially

implement the congressional intention to limit the use of

intercept procedures to those situations clearly calling

United States v. Giordano, 416 U.S., at ~~11~~ ¹² for the employment of this extraordinary device." ~~11~~ ¹² at

527

~~11~~ ¹² Giordano concerned the provision in Title III requiring

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that an application for an intercept order be approved by the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Concluding that Congress intended to condition the use of wiretap procedures based on the judgment of senior officials in the Department of Justice, the Court required suppression for failure to comply with the approval provision. Chavez concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application. The problem in Chavez was one of misidentification; although the application had in fact been authorized by the Attorney General, the application ^{erroneously} identified an Assistant Attorney General as the official authorizing the application. The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of ~~18 U.S.C.~~ § 2518(10)(a) ⁽ⁱ⁾ since that identification requirement did not play a "substantive role" in the regulatory system.

416 U.S.,
at 578.

In the instant case, the Court of Appeals concluded that both the identification requirement of ~~18 U.S.C.~~ § 2518 ⁸ (1)(b)(iv)

and the notice requirement of 18 U.S.C. § 2515(8)(d) played a "central role" in the statutory framework, and for that reason affirmed the District Court's order suppressing relevant evidence. Although both statutory requirements are undoubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements.

As to

~~With respect to 18 U.S.C. § 2518(1)(b)(iv), the~~

issue is whether the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a ^{substantive} "central role"

with respect to judicial authorization of intercept orders and a consequent ^{reg.} ~~limitation~~ ^{provides a} ~~on~~ ^{the use of intercept} procedures. The statute provides that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to

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believe that: (i) an individual is engaged in criminal activity, (ii) particular communications concerning ~~that~~ ^{the} offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities. If, after evaluating the statutorily enumerated factors in light of the information contained in the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. The intercept order ~~could have~~ ^{may} issued only if the issuing judge determined ^a that the statutory factors ~~were~~ ^{are} ~~satisfied~~ ^{present,} and the failure to name additional targets in no way detracts from the sufficiency of those factors.

This case is therefore unlike Giordano, ~~supra~~ ² where failure to satisfy the statutory requirement of prior approval by specified Justice Department officials bypassed a congressionally imposed limitation on the use of the

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intercept procedure. The Court there noted that it was reasonable to believe that requiring prior approval from senior officials in the Justice Department "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." 416 U.S., at 528. Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the ^{presence} ~~lack~~ of that information as to additional targets would have precluded judicial authorization ^{of} ~~to~~ the intercept. ²⁴ ~~If anything,~~ ^{Rather,} this case resembles Chavez, where we held that a wiretap was not unlawful simply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The Chavez intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to

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enable the issuing judge to determine that the statutory
preconditions were satisfied. ²⁵

Finally, we note that ^{nothing} ~~there is~~ no evidence in the
legislative history ~~that~~ suggests that Congress intended
this broad identification requirement to ^{play} ~~play~~ "a central,
or even functional, role in guarding against unwarranted
use of wiretapping or electronic surveillance." United
States v. Chavez, 416 U.S., at 578. Neither S. 675 nor
S. 2050, the predecessor bills of S. 971, contained ~~this~~
^{an} ~~broad~~ identification provision. See page ¹¹ ~~8~~ supra.

~~And~~ The only explanation given in the Senate Report for
the inclusion of the broad identification provision was
what Congress perceived to be
that it was intended to reflect the constitutional command
of particularization. ^{This} ~~an~~ explanation ~~which~~ was offered
^{all the} with respect to ~~the other items of~~ information required
by § 2518 ^{(1) (6)} ~~(1) (1)~~ to be set out in an intercept application.

No additional guidance can be gleaned from the floor
debates, since they contain no substantive discussion of
the identification provision. ^{26.}

B. 2

We reach the same conclusion with respect to the government's duty to inform the judge of all identifiable persons whose conversations were intercepted. As noted earlier, the version of Title III that emerged from the Senate Judiciary Committee provided only for mandatory notice to the "persons named in the order of the applica-

tion." The Senate Report detailed the purpose of that provision; ~~was detailed in~~

~~the Senate Report~~

"[T]he

intention of the provision is that the principle of postuse notice will be retained. This provision alone should assure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress, for example, under 2520 . . . if he feels that his privacy has been unlawfully invaded."

The floor discussion concerning the amendment adding the provision for discretionary notice merely indicates an intent to provide notice to such additional persons as may be constitutionally required.

Nothing in the structure of the Act or this legislative history suggests that incriminating conversations are

"unlawfully intercepted" whenever parties to those conversations ~~fail to~~ ^{do not} receive ~~the~~ discretionary inventory

S. Rep. No. 107,
90th Cong.,
2d Sess., 105
(1968).

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notice as a result of the failure of the Government to inform the District Court of their identities. At the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order. The fact that discretionary notice reached ³⁹thirty-nine rather than ~~forty~~⁴¹one identifiable persons does not in itself mean that the conversations were unlawfully intercepted. ^{27.1}

The legislative history indicates that postintercept notice was designed instead to assure the community that the wiretap technique is reasonably employed. But even recognizing that Congress placed considerable emphasis on that aspect of the overall statutory scheme, we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure. ^{28.}

IV

Although the government was required to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application for an extension of the initial intercept, failure to do so in the circumstances here presented did

not warrant suppression under ~~16 U.S.C.~~ § 2518(10)(a)(i).

Nor was suppression justified ~~under the provision~~ with

respect to respondents Merlo and Lauer simply because the

government inadvertently ~~deleted~~ ^{omitted} their names from the

comprehensive list of all identifiable persons whose

conversations had been overheard. We ~~are constrained to~~

hold that this is the correct result under the provisions

of Title III, but we reemphasize the suggestion we made

in United States v. Chavez that "strict adherence by the

Government to the provisions of Title III would nonetheless

be more in keeping with the responsibilities Congress has

imposed upon it when authority to engage in wiretapping

or electronic surveillance is sought." 416 U.S., at 580.

9 The order of the Court for further proceedings ^{in accord} ~~not~~

~~inconsistent~~ with this opinion..

It is so ordered.

Appeals is ~~therefore~~ reversed and
the case is remanded to that court

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FOOTNOTES

1. The wiretap application procedure is set forth at 18 U.S.C. § 2518(1), which provides:

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (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 where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) 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;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

The issuing judge is free to require the applicant to furnish additional information. 18 U.S.C. § 2518(2).

2. The affidavit set forth extensive information indicating that the named individuals were conducting a gambling operation. This information was derived from physical surveillance by agents of the F. B. I., an examination of telephone company toll records, and the personal observations of six informants, whose past reliability was also detailed in the affidavit.

3. The District Court's order was issued pursuant
§ 5
18 U.S.C. 2518(3), (4) which provides:

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

//(a) the identity of the person, if known, whose communications are to be intercepted;

//(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

//(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

//(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

//(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained. ✓

4. In addition to the December 26 application requesting an extension of the initial intercept order, the government also filed on that date a separate application seeking authorization to monitor a third telephone

discovered at the same North Olmstead address. ~~The existence of,~~

~~this third telephone was discovered during the course of monitoring the other two telephones at that address under the November 28 intercept order.~~

Both applications were accompanied by another affidavit setting forth the results of the initial monitoring, the manner in which the third phone was discovered, the facts indicating that the newly discovered telephone was being used to conduct a gambling business, and reasons why continued interception was necessary. A copy of the affidavit filed on November 28 was also attached to the December 26 applications. For the sake of clarity, the two applications filed on December 26 will be treated as a single application.

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The United States conceded in the Court of Appeals that respondents Donovan and Robbins were "known" within the meaning of the statute at the time of the December 26 application, but challenged as clearly erroneous the District Court's finding that respondent Buzzaco was "known" at that time. The Court of Appeals upheld the District Court's finding, and the United States has not sought review of that disposition. Thus, for our purposes, all three respondents were "known" on December 26.


6.

An inventory notice must be served within a designated period of time to "the persons named in the order or the application." 18 U.S.C. § 2518(8)(d).

The inventory must ^{give} ~~include~~ notice of the entry of the intercept order or application, ^{state} the disposition of the application, and ^{indicate whether} ~~the fact that~~ communications were or were not intercepted. Id. Upon the filing of a motion, the judge has discretion to make available the intercepted communications, the applications, and the orders. Id.

Title III also authorizes the District Court to cause an inventory notice to be served on "other parties to intercepted communications" if the judge determines that such notice is in the interest of justice. Id. Those other parties may also be given access to the intercepted communications, the applications, and the orders. Id.

7. / Although respondents Merlo and Lauer were not served with inventory notice pursuant to § 2518(8)(d), the intercept orders, applications, and related papers were made available to all the defendants, including ~~the~~ Merlo and Lauer, on November 26, 1973. Thus, the ~~contents~~ introduction into evidence at trial of the contents of the intercepted conversations and evidence derived therefrom would not be ~~pro~~² prohibited by 18 U.S.C. § 2518(9). See note ^{19,}~~18a~~₂ infra.



^{its}
8. / The Government filed ~~this~~ ^{an} ~~interlocutory~~ ^{an} appeal from the
District Court's order ~~granting~~ suppressing evidence under
18 U.S.C. § 3731, ~~and~~ and there has as yet been no trial
on the charges, with respect to the respondents.

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5a. Although they were not served with inventory

notice pursuant to the provisions of 18 U.S.C. § 2518(8)(d),
the intercept orders, applications, and related papers
transcripts of the intercepted conversations were furnished

by the Government to the respondents in response to discovery

motions. Introduction into evidence of Thus, the contents of the intercepted conversations

and evidence derived therefrom would not be prohibited by

18 U.S.C. § 2518(9), see note 13A, infra.

9. See note 6, supra.

10. 18 U.S.C. § 2518(10)(a) provides in pertinent

part:

"(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

Filed after
Merlo and
Laver were
indicted.

//.

that has

Every Court of Appeals ~~to have~~ considered the issue ~~has~~ concluded that an individual ^{will} whose conversations ~~will~~ probably be intercepted by a wiretap must be identified in the wiretap application if the law enforcement authorities have probable cause to believe ~~that~~ the individual is committing the offense for which the wiretap is sought.

United States v. Chiarizio, 525 F.2d 289, 292 (CA2 1975);

United States v. Bernstein, 509 F.2d 996 (CA4 1975), petition

for cert. filed, No. 74-1486; United States v. Doolittle,

507 F.2d 1368, aff'd en banc, 518 F.2d 500 (CA5 1975),

petitions for cert. filed Nos. 75-500, 75-509, 75-513;

United States v. Kilgore, 518 F.2d 496 (CA5 1975), petition

for cert. filed, No. 75-963; United States v. Civella, 533

F.2d 1395 (CA8 1976); United States v. Kirk, 534 F.2d 1262

(CA8 1976); United States v. Russo, 527 F.2d 1150, 1156

(CA10 1975), petition for cert. filed, No. 75-1218. See

-U.S. App. D.C.-, 2

also, United States v. Moore, 513 F.2d 485, 493-494 (CA8

1975) (interpreting 23 D.C. Code 547(a)(2), which is almost

identical to the provision at issue here).

argue,

and respondents Donovan, Robbins, and Busacca

A number of these courts have concluded that our

decision in United States v. Kahn, 415 U.S. 143 (1974),

resolved this identification issue. See United States v.

Chairizio, supra; United States v. Moore, supra. And

respondent Donovan argues that the Kahn decision leads "inescapably" to the conclusion that intercept applications must identify all persons whose conversations relating to the criminal activity the government has probable cause to believe it will intercept. Brief at 7. Although there is

language in Kahn suggesting that wiretap applications must identify all such individuals, the identification question

presented here was not before us in Kahn. The question in

that case Kahn was whether wiretap application had to identify a

known user of the target telephone whose complicity in the

criminal activity under investigation was not known at


the time of the application. Kahn is a relevant, though

not controlling, precedent.

12. / The United States does not suggest that regardless of the factual circumstances a wiretap application must identify only a single individual. To the contrary, it concedes that if two or more persons are using the ~~telephone~~² target telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief for the United States, at 18 n.13.

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used to be text.

13. 2 Counsel for the United States explained this position ~~quite~~ succinctly at oral argument: "The critical distinction . . . is one between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other^{*}hand." Transcript of Oral Argument, at 13.



14. ~~10~~ Indeed, the contrary conclusion is suggested by the fact that identification of an individual in an application for an intercept order triggers other statutory provisions. First, ~~section~~ [§] 2518(1)(e) requires an intercept application to disclose all previous applications "involving any of the same persons . . . specified in the application." To the extent that Congress thought it necessary to provide the issuing judge with such information, ~~we can discern~~ ^{there is no} ~~indication of~~ ^{no} congressional intent to require provision of such information only if a suspect operated from one end of a telephone line. Second, ~~section~~ [§] 2518(8)(d) mandates that an inventory notice be served upon "the persons named in the order or the application." As with § 2518(1)(e), ~~we fail~~ ^{would not be served} ~~to see~~ the congressional purpose ~~served~~ by limiting that notice on the basis of the telephone from which one speaks.

15. ~~11~~ At the time of the enactment of Title III, Congress ~~obviously~~ did not have before it the view we expressed on this issue in United States v. Kahn, ~~supra~~

~~415~~ 415 U.S., at 155 n. 15. The Fourth Amendment requires specification of "the place to be searched, and the

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persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized."

In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized.

It is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named.

~~Specification of those likely to be overheard engaging in criminal conversations~~ ^{this sort} "identif[ies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." Berger v. New York, 388 U.S. 41, 59 (1967).

16. That Congress may have so understood the constitutional requirement is also suggested by the portion of the Senate Report dealing with that provision of S. 971 that required the intercept order to identify "the person, if known, whose conversations are to be intercepted." The Senate Report merely cites West v. Cabell, 153 U.S. 78 (1894), which concerns the need for proper identification of the subject of an arrest warrant.

90th Cong., 2d Sess., (1968).
S. Rep. No. 1097, ~~supra~~ at 102 To the extent that Congress may have considered West to apply to wiretap orders, we have no reason to believe that Congress considered its applicability to extend^d only to those suspects using the target telephone.

17. / At least one Senator read the identification requirement in S. 971 to parallel the identification requirement contained in the statute at issue in Berger v. New York: "Specificity is required as to the person or persons whose communications are to be intercepted." 114 Cong. Rec., at 14763 (1968) (remarks of Senator Percy).

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18. ~~The~~ The inventory notice must be served within a reasonable time but not later than 90 days after the date the application for an intercept order was filed. On an ex parte showing of good cause, service of the inventory may be postponed.

19. ~~The~~ In addition to these provisions for mandatory and discretionary inventory notice, Title III prohibits the introduction into evidence at trials and certain other proceedings ^{of} the contents of an intercept and evidence derived therefrom unless each party has been furnished with copies of the application and order under which the interception was authorized. 18 U.S.C. § 2518(9). Moreover, at the expiration of any intercept the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions. 18 U.S.C. § 2518(8)(a). ~~The failure to include. The failure to include such provisions was among the criticism specified by the Court with respect to the New York statute held unconstitutional in Berger v. New York, 308 U.S. 40, 60 (1962) was criticized by this Court for its failure to include provisions of this sort. 388 U.S., at 60.~~

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It is worth noting that shortly before Senator

Hart proposed this amendment to S. 971, Senator Long had

read to the Senate portions of ^{a report} ~~the New York Bar Association's report~~ on federal wiretap legislation ~~which were~~

~~relevant to the Hart amendment~~ That report noted that

parties to intercepted conversations other than those named

in the application or order should probably be served with

inventory notice, but it also recognized that under some

circumstances the provision of such notice could be harmful

and gave the following example:

"A, a businessman, talks to his customers, and the latter are served with papers showing that A is being bugged[.] [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory."
114 Cong. Rec. 14476 (1968).

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21. / The current policy of the Department of Justice is to provide the issuing judge with the ~~names~~ name of every person who has been overheard as to whom there is any reasonable possibility of indictment. 3 Brief for the ~~United~~ United States, at 39. This policy does not meet the test ~~speci-~~ specified above. Moreover, where, as here, the Government ~~purports to~~ ~~supply~~ it chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete.

9 / ? The Government

9 / Counsel for the United States suggested at oral argument that the procedure specified in United States v. Chun that

22. / At oral argument, counsel for the United States

practically conceded ~~that the CHUN Chun approach was test~~
the merit of the approach specified in United States v.

Chun:

"Perhaps the approach of the Court of Appeals for the Ninth Circuit, which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, ~~and~~ would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this regard." Transcript of Oral Argument, at 6-7.

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23.
~~14.~~ The availability of the suppression remedy
as opposed to constitutional,
for these statutory violations, see notes ~~15~~ and ~~19~~
supra, turns on the provisions of Title III rather than
the judicially fashioned exclusionary rule aimed at
detering violations of Fourth Amendment rights. United
States v. Giordano, supra, 416 U.S., at 524.

24. ~~15.~~ There is no suggestion in this case that the
government agents knowingly failed to identify respondents
Donovan, Robbins and Buzzaco for the purpose of keeping
relevant information from the District Court that might
have prompted the court to conclude that probable cause
was lacking. If such a showing had been made, we would
have a different case. Nor is there any suggestion that
as a result of the failure to name these three respondents
they were denied the mandatory inventory notice supplied
to persons named in the application. 18 U.S.C. ⁸ 2518(8)(d).

25.
~~16.~~ No one suggests that the failure to identify
in a wiretap application individuals who are "unknown"
within the meaning of the statute, see Kahn v. United
States, 415 U.S. 143 (1974), conversations
supra, requires suppression of intercepted
Though recognizing that
to which those individuals were parties. The failure to

Respondents Donovan, Robbins, and Buzzaco
were among the ³⁷ ~~thirty~~ persons
served with the initial inventory.

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identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, Respondents Donovan, Robbins, and Buzzaco suggest, ~~however~~ that the opposite is true with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified analogy to warrantless searches or arrests. Transcript of by ~~the fact that although law enforcement can often take~~ without a warrant, ~~warrantless action~~ when they have been unable to foresee the circumstances, they still must obtain that eventually confronted them, ~~this does not believe~~ ~~them of their obligation to obtain~~ a search or arrest warrant when their prior knowledge is sufficient to establish probable cause. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

Oral Argument, at 40. Although law enforcement officials can often take

but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. complete
~~The fact~~ That the complete absence of prior judicial authorization

thought

if we assume

26.] Even ~~assuming~~ that Congress ~~thought~~ that a broad

identification requirement was constitutionally mandated, imposed statutory suppression under §§ 2515 and 2518 (10), it does not follow that Congress ~~intended that provision~~ (a)(i) as a sanction for non compliance.

~~to function as a restraint on unwarranted use of the~~ ~~intercept procedure~~ ^{intercept} In limiting use of the ~~wiretap~~

procedure to "the most precise and discriminate circumstances" S. Rep. No. 107, 90th Cong., 2d Sess. 102 (1968), Congress required law enforcement authorities to convince

a District Court that probable cause existed to believe

that a specific person was committing a specific offense

~~from~~ ^{using} a specific telephone ^{This} a requirement ~~which~~ was satisfied

here when the application set forth sufficient information

to indicate that the ²primary targets ²were conducting a

gambling business over four particular telephones. Nothing

in the legislative history indicates that Congress intended

to declare ~~unlawful~~ for failure to name additional targets.

an otherwise constitutional intercept order ~~Simply~~

stated, the fact that Congress may have sought to avoid ~~possible~~ a holding of unconstitutionality by inserting a broad identification requirement should not lead us to conclude without more that Congress intended compliance with that requirement to be a necessary condition for a lawful intercept order.

under §
2518(10)(a)(i) --
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Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional, and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties. Nor does this case present an opportunity to comment upon the suggestion, recognized by the United States, Brief at 49, n.40, that suppression might be required if the agents knew before the interception that no inventory would be served.

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Moreover, ~~we note that~~ respondents Merlo and Lauer were ~~in no sense~~ ^{not} prejudiced by their failure to receive postintercept notice under either of the District Court's

As noted earlier, inventory orders. ~~In response to pretrial discovery~~

~~motions,~~ the Government made available to all defendants

See note 5A, supra. ~~the contents of the intercepted conversations,~~ And in

~~As a~~ response to pretrial discovery motions, the result, introduction of this evidence at trial would Government produced transcripts of the not be barred by 18 U.S.C. § 2518(9), see note 13A supra, intercepted conversations.

intercept orders, applications, and related papers.

28.
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Although the possibility of subsequent civil suits to redress unwarranted invasions of privacy functions in a broad sense to check excessive use of intercepts, that role is at best minor and indirect.

failure to comply fully with these statutory provisions requires suppression of evidence under 18 U.S.C. § 2518(10)(a).

I, *[signature]*

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520.¹ The application requested authorization to intercept gambling-related communications over two telephones at one address in North Olmstead, Ohio, and two other telephones at a home in Canton, Ohio. The accompanying affidavit recited that the telephones were being used by Albert Kotoch, Joseph Spaganlo, and George Florea to conduct an illegal gambling business, and that in conducting that business they would place telephone calls to and receive telephone calls from various persons, three of whom were also named in the wiretap application.²

identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, respondents Donovan, Robbins, and Buzzaco suggest that the opposite is true with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified by analogy to warrantless searches or arrest. ^a Transcript of Oral Argument, at 40. Although law enforcement officials can often take action without a warrant when they have been unable to foresee the circumstances that eventually confronted them, they still must obtain a search or arrest warrant when their prior knowledge is sufficient to establish probable cause. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

26/

Even if we assume that Congress thought that a broad identification requirement was constitutionally mandated, it does not follow that Congress imposed statutory suppression under §§ 2515 and 2518 (10)(a)(i) as a sanction for noncompliance. | In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No. 107, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a District Court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone. This requirement was satisfied here when the application set forth sufficient information to indicate that the primary targets were conducting a gambling business over four particular telephones. Nothing in the legislative history indicates that Congress intended to declare an otherwise constitutional intercept order "unlawful" under § 2518 (10)(a)(i) -- resulting in suppression under § 2515 -- for failure to name additional targets.

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A few minor
suggestions
in the margins

- Dave

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Thomas W. Donovan et al. | peals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of

1968, 18 U. S. C. §§ 2510-2520.¹ The application requested authorization to intercept gambling-related communications over two telephones at one address in North Olmstead, Ohio,

¹ The wiretap application procedure is set forth at 18 U. S. C. § 2518 (f), which provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (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 where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) 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;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

The issuing judge is free to require the applicant to furnish additional information. 18 U. S. C. § 2518 (2).

and two other telephones at a home in Canton, Ohio. The accompanying affidavit recited that the telephones were being used by Albert Kotoch, Joseph Spaganlo, and George Florea to conduct an illegal gambling business, and that in conducting that business they would place telephone calls to and receive telephone calls from various persons, three of whom were also named in the wiretap application.² The affiant also stated that the Government's informants would refuse to testify against the persons named in the application, that telephone records alone would be insufficient to support a gambling conviction, and that normal investigative techniques were unlikely to be fruitful. Pursuant to the Government's request, the District Court authorized for a period of 15 days the interception of gambling-related wire communications of Kotoch, Spaganlo, Florea, three named individuals other than the respondents, and "others as yet unknown," to and from the four listed telephones.³

² The affidavit set forth extensive information indicating that the named individuals were conducting a gambling operation. This information was derived from physical surveillance by agents of the FBI, an examination of telephone company toll records, and the personal observations of six informants, whose past reliability also was detailed in the affidavit.

³ The District Court's order was issued pursuant 18 U. S. C. §§ 2518 (3), (4) which provide:

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2518 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted

During the course of the wiretap, the Government learned that respondents Donovan, Robbins, and Buzzaco were discussing illegal gambling activities with the named subjects. On December 26, 1972, the Government applied for an extension of the initial intercept order.⁴ This time it sought authorization to intercept gambling-related conversations of Kotoch, Spaganlo, Flores, two other named individuals, and "others as yet unknown," but it did not identify respondents

are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

⁴In addition to the December 26 application requesting an extension of the initial intercept order, the Government also filed on that date a separate application seeking authorization to monitor a third telephone discovered at the same North Olmstead address. Both applications were accompanied by another affidavit setting forth the results of the initial monitoring, the manner in which the third phone was discovered, the facts indicating that the newly discovered telephone was being used to conduct a gambling business, and reasons why continued interception was necessary. A copy of the affidavit filed on November 28 was also attached to the December 26 applications. For the sake of clarity, the two applications filed on December 26 will be treated as a single application.

Donovan, Buzzaco, and Robbins in this second application.⁵ The District Court again authorized interception of gambling-related conversations for a maximum of 15 days.

On February 21, 1973, the Government submitted to the District Court a proposed order giving notice of the interceptions to 37 persons, a group which the Government apparently thought included all individuals who could be identified as having discussed gambling over the monitored telephones.⁶ The District Court signed the proposed order, and an inventory notice was served on the listed persons, including respondents Donovan, Buzzaco, and Robbins. On September 11, 1973, after the Government submitted the names of two additional persons whose identities had allegedly been inadvertently omitted from the initial list, the District Court entered an amended order giving notice to those individuals. As a result of what the Government labels "administrative oversight," respondents Merlo and Lauer

⁵ The United States conceded in the Court of Appeals that respondents Donovan and Robbins were "known" within the meaning of the statute at the time of the December 28 application, but challenged as clearly erroneous the District Court's finding that respondent Buzzaco was "known" at that time. The Court of Appeals upheld the District Court's finding, and the United States has not sought review of that disposition. Thus, for our purposes, all three respondents were "known" on December 28.

⁶ An inventory notice must be served within a designated period of time to "the persons named in the order or the application." 18 U. S. C. § 2518 (8) (d). The inventory must give notice of the entry of the intercept order or application, state the disposition of the application, and indicate whether communications were or were not intercepted. *Ibid.*

Upon the filing of a motion, the judge has discretion to make available the intercepted communications, the applications, and the orders. *Ibid.*

Title III also authorizes the District Court to cause an inventory notice to be served on "other parties to intercepted communications" if the judge determines that such notice is in the interest of justice. *Ibid.* Those other parties may also be given access to the intercepted communications, the applications, and the orders. *Ibid.*

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were not included in either list of names and were never served with inventory notice.⁷

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Kotoch, Spaganlo, the five respondents, and 10 other individuals with conspiracy to conduct and conducting a gambling business in violation of 18 U. S. C. §§ 371 and 1955. The five respondents filed motions to suppress evidence derived from the wire interception. After an evidentiary hearing on the motions, the District Court suppressed as to respondents Donovan, Robbins, and Buzzaco all evidence derived from the December 26 intercept order on the ground that failure to identify them by name in the application and order of that date violated 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a). With respect to Merlo and Lauer, who were not known to the Government until after the December 26 application, the District Court suppressed all evidence derived from both intercept orders on the ground that they had not been served with inventory notice.

The Court of Appeals for the Sixth Circuit affirmed. 513 F. 2d 337 (1975).⁸ On the identification issue, the court held that the wiretap application must identify every person whose conversations relating to the subject criminal activity the Government has probable cause to believe it will intercept. Agreeing with the District Court that at the time of the December 26 application the Government had

⁷ Although respondents Merlo and Lauer were not served with inventory notice pursuant to § 2518 (8)(d), the intercept orders, applications, and related papers were made available to all the defendants, including Merlo and Lauer, on November 26, 1973. Thus, the introduction into evidence at trial of the contents of the intercepted conversations and evidence derived therefrom would not be prohibited by 18 U. S. C. § 2518 (9). See n. 10, *infra*.

⁸ The Government filed its appeal from the District Court's order suppressing evidence under 18 U. S. C. § 3731, and there has as yet been no trial on the charges with respect to the respondents.

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probable cause to believe that it would overhear Donovan, Robbins, and Buzzaco "committing the offense," the Court of Appeals affirmed the suppression of evidence derived from the December 26 order. On the notice question, it held that the Government has an implied statutory duty to inform the issuing judge of the identities of the parties whose conversations were overheard so that he can determine whether discretionary inventory notice should be required.⁹ Because the Government had failed to perform this duty with respect to Merlo and Lauer, the Court of Appeals affirmed the District Court's order suppressing evidence derived from both intercept orders. The court found it unnecessary to determine whether the failure to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application and to name respondents Merlo and Lauer in the proposed inventory notice orders was inadvertent or purposeful, since the mere fact of omission was sufficient to require suppression under 18 U. S. C. § 2518 (10)(a).¹⁰

We granted certiorari to resolve these issues, which concern the construction of a major federal statute, 421 U. S. 907, and now reverse.

II

The United States contends that § 2518 (1)(b)(iv) requires that a wiretap application identify only the principal

⁹ See n. 6, *supra*.

¹⁰ 18 U. S. C. § 2518 (10)(a) provides in pertinent part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

target of the interception, and that § 2518 (8)(d) does not require the Government to provide the issuing judge with a list of all identifiable persons who were overheard in the course of an authorized interception. We think neither contention is sound.

A

We turn first to the identification requirements of § 2518 (1)(b)(iv). That provision requires a wiretap application to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." In construing that language, this Court already has ruled that the Government is not required to identify an individual in the application unless it has probable cause to believe (i) that the individual is engaged in the criminal activity under investigation and (ii) that the individual's conversations will be intercepted over the target telephone. *United States v. Kahn*, 415 U. S. 143 (1974). The question at issue here is whether the Government is required to name *all* such individuals.¹²

The United States argues that the most reasonable in-

¹² Every Court of Appeals that has considered the issue concluded that an individual whose conversations probably will be intercepted by a wiretap must be identified in the wiretap application if the law enforcement authorities have probable cause to believe the individual is committing the offense for which the wiretap is sought. *United States v. Chiarizio*, 525 F. 2d 289, 292 (CA2 1975); *United States v. Berenstein*, 509 F. 2d 996 (CA4 1975), petition for cert. filed, No. 74-1486; *United States v. Doolittle*, 507 F. 2d 1368, aff'd en banc, 518 F. 2d 500 (CA5 1975), petitions for cert. filed Nos. 75-500, 75-509, 75-513; *United States v. Kilgore*, 518 F. 2d 496 (CA5 1975), petition for cert. filed, No. 75-963; *United States v. Civella*, 533 F. 2d 1395 (CA8 1976); *United States v. Kirk*, 534 F. 2d 1262 (CA8 1976); *United States v. Russo*, 527 F. 2d 1150, 1156 (CA10 1975), petition for cert. filed, No. 75-1218. See also *United States v. Moore*, — U. S. App. D. C. —, 513 F. 2d 485, 493-494 (1975) (interpreting 23 D. C. Code 547 (a)(2), which is almost identical to the provision at issue here).

A number of these courts have concluded, and respondents Donovan, Robbins, and Buzzaco argue, that our decision in *United States v. Kahn*,

terpretation of the plain language of the statute is that the application must identify only the principal target of the investigation, who "will almost always be the individual whose phone is monitored."¹² Brief for the United States, at 18. Under this interpretation, if the Government has reason to believe that an individual will use the target telephone to place or receive calls, and the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation, the individual qualifies as a principal target and must be named in the wiretap application. On the other hand, an individual who uses a different telephone to place calls to or receive calls from the target telephone is not a principal target even if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation. In other words, whether one is a principal target of the investigation depends on whether one operates the target telephone to place or receive calls.¹³

415 U. S. 143 (1974), resolved this identification issue. See *United States v. Charizio*, *supra*; *United States v. Moore*, *supra*. Although there is language in *Kahn* suggesting that wiretap applications must identify all such individuals, the identification question presented here was not before us in *Kahn*. The question in that case was whether a wiretap application had to identify a known user of the target telephone whose complicity in the criminal activity under investigation was not known at the time of the application. *Kahn* is a relevant, though not controlling, precedent.

¹² The United States does not suggest that regardless of the factual circumstances a wiretap application must identify only a single individual. To the contrary, it concedes that if two or more persons are using the target telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief for the United States, at 18 n. 13.

¹³ Counsel for the United States explained this position succinctly at oral argument: "The critical distinction . . . is one between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other hand." Tr. of Oral Arg., at 13.

Whatever the merits of such a statutory scheme, we find little support for it in the language and structure of Title III or in the legislative history. The statutory language itself refers only to "the person, if known, committing the offense and whose communications are to be intercepted." That description is as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from the target telephone. It is true, as the United States suggests, that when read in the context of the other subdivisions of § 2518 (1)(b), an argument can be made that Congress focused in subdivision (iv) on the primary user of the target telephone. But it is also clear from other sections of the statute that Congress expected that wiretap applications would name more than one individual. For example, Title III requires that inventory notice be served upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d) (emphasis added). And § 2518 (1)(e) requires that an intercept application disclose all previous intercept applications "involving any of the same persons . . . specified in the application" (emphasis added). It may well be that Congress anticipated that a given application would cover more than one telephone or that several suspects would use one telephone, and that an application for those reasons alone would require identification of more than one individual. But nothing on the face of the statute suggests that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application.¹⁴

¹⁴ Indeed, the contrary conclusion is suggested by the fact that identification of an individual in an application for an intercept order triggers other statutory provisions. First § 2518 (1)(e) requires an intercept application to disclose all previous applications "involving any of the same persons . . . specified in the application." To the extent that Congress thought it necessary to provide the issuing judge with

Nor can we find support for the "principal target" interpretation in the legislative history. Title III originated as a combination of S. 675, the Federal Wire Interception Act, which was introduced by Senator McClellan several months prior to this Court's decision in *Berger v. New York*, 388 U. S. 41 (1967), and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska a few days after the *Berger* decision. Both bills required that wiretap applications include a full and complete statement of the facts and circumstances relied upon by the applicant and specification of the nature and location of the communication facilities involved. Although neither bill contained an express identification requirement such as that at issue here, both bills required the application to include "a full and complete statement of the facts concerning all previous applications . . . involving any person named in the application as committing, having committed, or being about to commit an offense." Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., at 77, § 8 (a)(3) and 1066, § 2518 (a)(4) (1967) (emphasis added). Thus, even at this early stage, it was recognized that an application could identify several individuals, and there is no indication that the identification would be limited to principal targets.

While S. 971, the bill that combined the major provisions of S. 675 and S. 2050, and that eventually was enacted, was pending before the Senate Judiciary Committee, this Court de-

while it

such information, there is no indication of congressional intent to require provision of such information only if a suspect operated from one end of a telephone line. Second, § 2518 (8)(d) mandates that an inventory notice be served upon "the persons named in the order or the application." As with § 2518 (1)(e), the congressional purpose would not be served by limiting that notice on the basis of the telephone from which one speaks.

cided *Katz v. United States*, 389 U. S. 347 (1967). S. 971 was then redrafted to conform to *Katz* as well as *Berger*, and the identification provision was added at that time. The Senate Report states that the requirements set forth in the various subdivisions of § 2518 (1)(b), including the identification requirement at issue here, "[were] intended to reflect the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968), citing *Berger v. New York*, 388 U. S. 41, 58-60, and *Katz v. United States*, 389 U. S. 347, 354-356 (1967). The United States now contends that although it may be that Congress read *Berger* and *Katz* to require, as a constitutional matter, that the subject of the surveillance be named if known, Congress "would hardly have read those cases as requiring the naming of all parties likely to be overheard. . . ." Brief, at 25-26. The difficulty with that argument is that the legislative history fails to indicate that Congress was thinking in terms of "subjects" of surveillance, or that Congress considered "subjects" of surveillance to be the principal users of the target telephone.

Moreover, to the extent that Congress thought it was meeting the constitutional commands of particularization established in *Berger* and *Katz*, Congress may have read those cases as mandating a broad identification requirement. The statute that we confronted in *Berger* required identification

¹⁰ At the time of the enactment of Title III, Congress did not have before it the view we expressed on this issue in *United States v. Kahn*, 415 U. S., at 155 n. 15. The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized. It is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named. Specification of this sort "identif[ies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." *Berger v. New York*, 388 U. S. 41, 59 (1967).

of "the person or persons" whose communications were to be overheard. 388 U. S., at 59. And we expressly noted that that provision "[did] no more than identify the person whose constitutionally protected area is to be invaded" *Ibid.* Given the statute at issue in *Berger* and our comment upon it, Congress may have concluded that as a constitutional matter a wiretap application would have to name all suspects rather than just the primary user.¹⁶

In any event, for our present purposes it is unnecessary to speculate as to exactly how Congress interpreted *Berger* and *Katz* with respect to the identification issue. It is sufficient to note that in response to those decisions Congress included an identification requirement which on its face draws no distinction based on the telephone one uses, and the United States points to no evidence in the legislative history that supports such a distinction. Indeed, the legislative materials apparently contain no use of the term "principal target" or any discussion of a different treatment based on the telephone from which a suspect speaks.¹⁷ We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the

¹⁶ That Congress may have so understood the constitutional requirement is also suggested by the portion of the Senate Report dealing with that provision of S. 971 that required the intercept order to identify "the person, if known, whose conversations are to be intercepted." The Senate Report merely cites *West v. Cabell*, 153 U. S. 78 (1894), which concerns the need for proper identification of the subject of an arrest warrant. S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968). To the extent that Congress may have considered *West* to apply to wiretap orders, we have no reason to believe that Congress considered its applicability to extend only to those suspects using the target telephone.

¹⁷ At least one Senator read the identification requirement in S. 971 to parallel the identification requirement contained in the statute at issue in *Berger v. New York*: "Specificity is required as to the person or persons whose communications are to be intercepted." 114 Cong. Rec., at 14763 (1968) (remarks of Sen. Percy).

individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone.

B

The other statutory provision at issue in this case is 18 U. S. C. § 2518 (8)(d), which provides that the judge shall cause to be served on the persons named in the order or application an inventory, which must give notice of the entry of the order or application, state the disposition of the application, and indicate whether communications were intercepted.¹⁸ Although the statute mandates ~~the provision of that~~ inventory notice only ^{for} to persons named in the application or the order, the statute also provides that the judge may ~~provide~~ ^{give} similar notice to other parties to intercepted communications if he concludes that such action is in the interest of justice.¹⁹ Observing that this notice provision does not expressly require law enforcement authorities ^{supply} routinely to ~~provide~~ the judge with any specific information upon which to exercise his discretion, the United States contends that it would be inappropriate to read such a require-

¹⁸ The inventory notice must be served within a reasonable time but not later than 90 days after the date the application for an intercept order was filed. On an *ex parte* showing of good cause, service of the inventory may be postponed.

¹⁹ In addition to these provisions for mandatory and discretionary inventory notice, Title III prohibits the introduction into evidence at trials and certain other proceedings of the contents of an intercept and evidence derived therefrom unless each party has been furnished with copies of the application and order under which the interception was authorized. 18 U. S. C. § 2518 (9). Moreover, at the expiration of any intercept the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions. 18 U. S. C. § 2518 (9)(a). The New York statute held unconstitutional in *Berger v. New York*, was criticized by this Court for its failure to include provisions of this sort. 358 U. S., at 60.

ment into the statute since the judge has the option of asking the law enforcement authorities for whatever information he requires.

Our reading of the legislative history of the discretionary notice provision in light of the purposes of Title III leads us to reject the Government's interpretation. As reported from the Judiciary Committee, section 2518 (8)(d) contained only a provision mandating notice to the persons named in the application or the order; the discretionary notice provision was added by amendment on the floor of the Senate. In introducing that amendment, Senator Hart explained its purpose:

"The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted conversations, even though such parties are not specifically named in the court order. The *Berger* and *Katz* decisions established that notice of surveillance is a constitutional requirement of any surveillance statute. It may be that the required notice must be served on all parties to intercepted communications. Since legitimate interests of privacy may make such notice to all parties undesirable, the amendment leaves the final determination to the judge." 114 Cong. Rec. 14485-14486 (1968).²⁰

²⁰ It is worth noting that shortly before Senator Hart proposed this amendment to S. 971, Senator Long had read to the Senate portions of a report prepared by the Association of the Bar of the City of New York on federal wiretap legislation. That report noted that parties to intercepted conversations other than those named in the application or order should probably be served with inventory notices, but it also recognized that under some circumstances the provision of such notice could be harmful and gave the following example:

"A, a businessman, talks to his customers, and the latter are served with papers showing that A is being bugged[.] [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory." 114 Cong. Rec. 14476 (1968).

97.

In deciding whether legitimate privacy interests justify withholding inventory notice from parties to intercepted conversations, a judge is likely to require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities. No purpose is served by holding that those authorities have no routine duty to supply the judge with relevant information. The Court of Appeals for the Ninth Circuit recently confronted this problem of dual responsibility, and we adopt the balanced construction that court placed on § 2518 (8)(d):

"To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted conversation is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although the judicial officer has the duty to cause the filing of the inventory [notice], it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his statutory § 2518 (8)(d) discretion, . . . the government is also required to furnish such information as is available to it." *United States v. Chun*, 503 F. 2d 533, 540 (1974).²¹

²¹ The current policy of the Department of Justice is to provide the issuing judge with the name of every person who has been over-

We agree with the Ninth Circuit that this allocation of responsibility best serves the purposes of Title III.²²

III

We turn now to the question whether the District Court properly suppressed evidence derived from the wiretaps at issue solely because of the failure of the law enforcement authorities to comply fully with the provisions of §§ 2518 (1) (b)(iv) and 2518 (8)(d). Section 2515 expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518 (10)(a):

- "(i) the communication was unlawfully intercepted;
- "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- "(iii) the interception was not made in conformity with the order of authorization or approval."

There is no basis on the facts of this case to suggest that

heard as to whom there is any reasonable possibility of indictment. Brief for the United States, at 39. This policy does not meet the test specified above. Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete.

²² At oral argument, counsel for the United States practically conceded the merit of the approach specified in *United States v. Chun*:

"Perhaps the approach of the Court of Appeals for the Ninth Circuit, which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this regard." Tr. of Oral Arg., at 6-7.

the authorization orders are facially insufficient, or that the interception was not conducted in conformity with the orders. Thus, only § 2518 (10)(a)(i) is relevant: were the communications "unlawfully intercepted" given the violations of §§ 2518 (1)(b)(iv) and 2518 (8)(d)²³

Resolution of that question must begin with *United States v. Giordano*, 416 U. S. 505 (1974), and *United States v. Chavez*, 416 U. S. 562 (1974). Those cases hold that "[not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" *United States v. Chavez*, 416 U. S., at 574-575. To the contrary, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States v. Giordano*, 416 U. S., at 527.

Giordano concerned the provision in Title III requiring that an application for an intercept order be approved by the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Concluding that Congress intended to condition the use of wiretap procedures based on the judgment of senior officials in the Department of Justice, the Court required suppression for failure to comply with the approval provision. *Chavez* concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application. The problem in *Chavez* was one of misidentification; although the application had in fact been authorized by the Attorney General, the application erroneously identified an

²³ The availability of the suppression remedy for these statutory, as opposed to constitutional, violations, see n. 15 and 19, *supra*, turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. *United States v. Giordano*, *supra*, 416 U. S., at 524.

Assistant Attorney General as the official authorizing the application. The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of § 2518 (10) (a)(i) since that identification requirement did not play a "substantive role" in the regulatory system. 416 U. S., at 578.

In the instant case, the Court of Appeals concluded that both the identification requirement of § 2518 (1)(b)(iv) and the notice requirement of § 2515 (8)(d) played a "central role" in the statutory framework, and for that reason affirmed the District Court's order suppressing relevant evidence. Although both statutory requirements are undoubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements.

A

As to § 2518 (1)(b)(iv), the issue is whether the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a "substantive role" with respect to judicial authorization of intercept orders and it consequently provides a limitation on the use of intercept procedures. The statute provides that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities. If, after evaluating the statutorily enumerated factors in light of the information contained in

the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. The intercept order may issue only if the issuing judge determines that the statutory factors are present, and the failure to name additional targets in no way detracts from the sufficiency of those factors.

This case is therefore unlike *Giordano*, where failure to satisfy the statutory requirement of prior approval by specified Justice Department officials bypassed a congressionally imposed limitation on the use of the intercept procedure. The Court there noted that it was reasonable to believe that requiring prior approval from senior officials in the Justice Department "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." 416 U. S., at 528. Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept.²⁴ Rather, this case resembles *Chavez*, where we held that a wiretap was not unlawful sim-

²⁴ There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzzaco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. Nor is there any suggestion that as a result of the failure to name these three respondents they were denied the mandatory inventory notice supplied to persons named in the application. 18 U. S. C. § 2518 (8) (d). Respondents Donovan, Robbins, and Buzzaco were among the 37 persons served with the initial inventory.

ply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The *Chavez* intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied.²⁵

Finally, we note that nothing in the legislative history suggests that Congress intended this broad identification requirement to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *United States v. Chavez*, 416 U. S., at 578. Neither S. 675 nor S. 2050, the predecessor bills of S. 971, contained an identification provision. See p. 11, *supra*. The only explanation given in the Senate Report for the in-

²⁵ No one suggests that the failure to identify in a wiretap application individuals who are "unknown" within the meaning of the statute, see *Kahn v. United States*, 415 U. S. 143 (1974), requires suppression of intercepted conversations to which those individuals were parties. Though recognizing that the failure to identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, respondents Donovan, Robbins, and Buzzaco suggest that the opposite is true with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified by analogy to warrantless searches or arrests. Tr. of Oral Arg., at 40. Although law enforcement officials can often take action without a warrant when they have been unable to foresee the circumstances that eventually confronted them, they still must obtain a search or arrest warrant when their prior knowledge is sufficient to establish probable cause. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

clusion of the broad identification provision was that it was intended to reflect what Congress perceived to be the constitutional command of particularization. This explanation was offered with respect to all the information required by § 2518 (1)(6) to be set out in an intercept application. No additional guidance can be gleaned from the floor debates, since they contain no substantive discussion of the identification provision.²⁶

B

We reach the same conclusion with respect to the Government's duty to inform the judge of all identifiable persons whose conversations were intercepted. As noted earlier, the version of Title III that emerged from the Senate Judiciary Committee provided only for mandatory notice to the "persons named in the order of the application." The Senate Report detailed the purpose of that provision:

"[T]he intent of the provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least

²⁶ Even if we assume that Congress thought that a broad identification requirement was constitutionally mandated, it does not follow that Congress imposed *statutory* suppression under §§ 2515 and 2518 (10) (a) (i) as a sanction for noncompliance. In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No. 107, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a District Court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone. This requirement was satisfied here when the application set forth sufficient information to indicate that the primary targets were conducting a gambling business over four particular telephones. Nothing in the legislative history indicates that Congress intended to declare an otherwise constitutional intercept order "unlawful" under § 2518 (10) (a) (i)—resulting in suppression under § 2515—for failure to name additional targets.

to the subject. He can then seek appropriate civil redress, for example, under section 2520 . . . if he feels that his privacy has been unlawfully invaded." S. Rep. No. 107, 90th Cong., 2d Sess., 105 (1968).

The floor discussion concerning the amendment adding the provision for discretionary notice merely indicates an intent to provide notice to such additional persons as may be constitutionally required.

Nothing in the structure of the Act or this legislative history suggests that incriminating conversations are "unlawfully intercepted" whenever parties to those conversations do not receive discretionary inventory notice as a result of the Government's failure to inform the District Court of their identities. At the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order. The fact that discretionary notice reached 39 rather than 41 identifiable persons does not in itself mean that the conversations were unlawfully intercepted.²⁷

The legislative history indicates that postintercept notice was designed instead to assure the community that the wiretap technique is reasonably employed. But even recog-

²⁷ Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional, and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties. Nor does this case present an opportunity to comment upon the suggestion, recognized by the United States, Brief, at 49 n. 40, that suppression might be required if the agents knew before the interception that no inventory would be served.

Moreover, respondents Merlo and Lauer were not prejudiced by their failure to receive postintercept notice under either of the District Court's inventory orders. As noted earlier, the Government made available to all defendants the intercept orders, applications, and related papers. See n. (5A), *supra*. And in response to pretrial discovery motions, the Government produced transcripts of the intercepted conversations.

nizing that Congress placed considerable emphasis on that aspect of the overall statutory scheme, we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure.²⁸

IV

Although the Government was required to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application for an extension of the initial intercept, failure to do so in the circumstances here presented did not warrant suppression under § 2518 (10)(a)(i). Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard. We hold that this is the correct result under the provisions of Title III, but we re-emphasize the suggestion we made in *United States v. Chavez*, that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." 416 U. S., at 580.

The order of the Court of Appeals is reversed and the case is remanded to that court for further proceedings in accord with this opinion.

It is so ordered.

²⁸ Although the possibility of subsequent civil suits to redress unwarranted invasions of privacy functions in a broad sense to check excessive use of intercepts, that role is at best minor and indirect.

LFP

P12

Gene - This reflects my editing - which is minor & largely stylistic. Your editing looks fine. Let's print a 1st draft & circulate on Mon.

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Thomas W. Donovan et al. | peals for the Sixth Circuit.

[December —, 1976]

(Title III).

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

Section

First, we must decide whether that section

I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of

1968, 18 U. S. C. §§ 2510-2520.¹ The application requested authorization to intercept gambling-related communications over two telephones at one address in North Olmstead, Ohio,

¹ The wiretap application procedure is set forth at 18 U. S. C. § 2518 (1), which provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (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 where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) 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;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

The issuing judge is free to require the applicant to furnish additional information. 18 U. S. C. § 2518 (2).

and two other telephones at a home in Canton, Ohio. The accompanying affidavit recited that the telephones were being used by Albert Kotoch, Joseph Spaganlo, and George Florea to conduct an illegal gambling business, and that in conducting that business they would place telephone calls to and receive telephone calls from various persons, three of whom were also named in the wiretap application.² The affiant also stated that the Government's informants would refuse to testify against the persons named in the application, that telephone records alone would be insufficient to support a gambling conviction, and that normal investigative techniques were unlikely to be fruitful. Pursuant to the Government's request, the District Court authorized for a period of 15 days the interception of gambling-related wire communications of Kotoch, Spaganlo, Florea, three named individuals other than the respondents, and "others as yet unknown," to and from the four listed telephones.³

² The affidavit set forth extensive information indicating that the named individuals were conducting a gambling operation. This information was derived from physical surveillance by agents of the FBI, an examination of telephone company toll records, and the personal observations of six informants, whose past reliability also was detailed in the affidavit.

³ The District Court's order was issued pursuant 18 U. S. C. §§ 2518 (3), (4) which provide:

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2518 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted

During the course of the wiretap, the Government learned that respondents Donovan, Robbins, and Buzzaco were discussing illegal gambling activities with the named subjects. On December 26, 1972, the Government applied for an extension of the initial intercept order.* This time it sought authorization to intercept gambling-related conversations of Kotoch, Spaganlo, Flores, two other named individuals, and "others as yet unknown," but it did not identify respondents

are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

*In addition to the December 26 application requesting an extension of the initial intercept order, the Government also filed on that date a separate application seeking authorization to monitor a third telephone discovered at the same North Olmstead address. Both applications were accompanied by another affidavit setting forth the results of the initial monitoring, the manner in which the third phone was discovered, the facts indicating that the newly discovered telephone was being used to conduct a gambling business, and reasons why continued interception was necessary. A copy of the affidavit filed on November 28 was also attached to the December 26 applications. For the sake of clarity, the two applications filed on December 26 will be treated as a single application.

Donovan, Buzzaco, and Robbins in this second application.⁵ The District Court again authorized interception of gambling-related conversations for a maximum of 15 days.

On February 21, 1973, the Government submitted to the District Court a proposed order giving notice of the interceptions to 37 persons, a group which the Government apparently thought included all individuals who could be identified as having discussed gambling over the monitored telephones.⁶ The District Court signed the proposed order, and an inventory notice was served on the listed persons, including respondents Donovan, Buzzaco, and Robbins. On September 11, 1973, after the Government submitted the names of two additional persons whose identities had allegedly been inadvertently omitted from the initial list, the District Court entered an amended order giving notice to those individuals. As a result of what the Government labels "administrative oversight," respondents Merlo and Lauer


⁵ The United States conceded in the Court of Appeals that respondents Donovan and Robbins were "known" within the meaning of the statute at the time of the December 26 application, but challenged as clearly erroneous the District Court's finding that respondent Buzzaco was "known" at that time. The Court of Appeals upheld the District Court's finding, and the United States has not sought review of that disposition. Thus, for our purposes, all three respondents were "known" on December 26.

⁶ An inventory notice must be served within a designated period of time to "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d). The inventory must give notice of the entry of the intercept order or application, state the disposition of the application, and indicate whether communications were or were not intercepted. *Ibid.*

Upon the filing of a motion, the judge has discretion to make available the intercepted communications, the applications, and the orders. *Ibid.*

Title III also authorizes the District Court to cause an inventory notice to be served on "other parties to intercepted communications" if the judge determines that such notice is in the interest of justice. *Ibid.* Those other parties may also be given access to the intercepted communications, the applications, and the orders. *Ibid.*

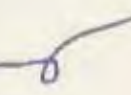
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 were not included in either list of names and were never served with inventory notice.⁷

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Kotoch, Spaganlo, the five respondents, and 10 other individuals with conspiracy to conduct and conducting a gambling business in violation of 18 U. S. C. §§ 371 and 1955. The five respondents filed motions to suppress evidence derived from the wire interception. After an evidentiary hearing on the motions, the District Court suppressed as to respondents Donovan, Robbins, and Buzzaco all evidence derived from the December 26 intercept order on the ground that failure to identify them by name in the application and order of that date violated 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a). With respect to Merlo and Lauer, who were not known to the Government until after the December 26 application, the District Court suppressed all evidence derived from both intercept orders on the ground that they had not been served with inventory notice.

The Court of Appeals for the Sixth Circuit affirmed. 513 F. 2d 337 (1975).⁸ On the identification issue, the court held that the wiretap application must identify every person whose conversations relating to the subject criminal activity the Government has probable cause to believe it will intercept. Agreeing with the District Court that at the time of the December 26 application the Government had

⁷ Although respondents Merlo and Lauer were not served with inventory notice pursuant to § 2518 (8)(d), the intercept orders, applications, and related papers were made available to all the defendants, including Merlo and Lauer, on November 26, 1973. Thus, the introduction into evidence at trial of the contents of the intercepted conversations and evidence derived therefrom would not be prohibited by 18 U. S. C. § 2518 (9). See n. 19, *infra*.

⁸ The Government filed its appeal from the District Court's order suppressing evidence under 18 U. S. C. § 3731, and there has ~~as yet~~ been no trial on the charges with respect to the respondents. 

probable cause to believe that it would overhear Donovan, Robbins, and Buzzaco "committing the offense," the Court of Appeals affirmed the suppression of evidence derived from the December 26 order. On the notice question, it held that the Government has an implied statutory duty to inform the issuing judge of the identities of the parties whose conversations were overheard so that he can determine whether discretionary inventory notice should be required.⁹ Because the Government had failed to perform this duty with respect to Merlo and Lauer, the Court of Appeals affirmed the District Court's order suppressing evidence derived from both intercept orders. The court found it unnecessary to determine whether the failure to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application and to name respondents Merlo and Lauer in the proposed inventory notice orders was inadvertent or purposeful, since the mere fact of omission was sufficient to require suppression under 18 U. S. C. § 2518 (10)(a).¹⁰

We granted certiorari to resolve these issues, which concern the construction of a major federal statute, 421 U. S. 907, and now reverse.

II

The United States contends that § 2518 (1)(b)(iv) requires that a wiretap application identify only the principal

⁹ See n. 6, *supra*.

¹⁰ 18 U. S. C. § 2518 (10)(a) provides in pertinent part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

target of the interception, and that § 2518 (8)(d) does not require the Government to provide the issuing judge with a list of all identifiable persons who were overheard in the course of an authorized interception. We think neither contention is sound.

A

We turn first to the identification requirements of § 2518 (1)(b)(iv). That provision requires a wiretap application to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." In construing that language, this Court already has ruled that the Government is not required to identify an individual in the application unless it has probable cause to believe (i) that the individual is engaged in the criminal activity under investigation and (ii) that the individual's conversations will be intercepted over the target telephone. *United States v. Kahn*, 415 U. S. 143 (1974). The question at issue here is whether the Government is required to name *all* such individuals.¹¹

The United States argues that the most reasonable in-

¹¹ Every Court of Appeals that has considered the issue concluded that an individual whose conversations probably will be intercepted by a wiretap must be identified in the wiretap application if the law enforcement authorities have probable cause to believe the individual is committing the offense for which the wiretap is sought. *United States v. Chiarizio*, 525 F. 2d 289, 292 (CA2 1975); *United States v. Bernstein*, 509 F. 2d 996 (CA4 1975), petition for cert. filed, No. 74-1486; *United States v. Doolittle*, 507 F. 2d 1368, aff'd en banc, 518 F. 2d 500 (CA5 1975), petitions for cert. filed Nos. 75-500, 75-509, 75-513; *United States v. Kilgore*, 518 F. 2d 496 (CA5 1975), petition for cert. filed, No. 75-963; *United States v. Civella*, 533 F. 2d 1395 (CA8 1976); *United States v. Kirk*, 534 F. 2d 1262 (CA8 1975); *United States v. Russo*, 527 F. 2d 1150, 1156 (CA10 1975), petition for cert. filed, No. 75-1218. See also *United States v. Moore*, — U. S. App. D. C. —, 513 F. 2d 485, 493-494 (1975) (interpreting 23 D. C. Code 547 (a)(2), which is almost identical to the provision at issue here).

A number of these courts have concluded, and respondents Donovan, Robbins, and Buzzaco argue, that our decision in *United States v. Kahn*,

terpretation of the plain language of the statute is that the application must identify only the principal target of the investigation, who "will almost always be the individual whose phone is monitored."¹² Brief for the United States, at 18. Under this interpretation, if the Government has reason to believe that an individual will use the target telephone to place or receive calls, and the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation, the individual qualifies as a principal target and must be named in the wiretap application. On the other hand, an individual who uses a different telephone to place calls to or receive calls from the target telephone is not a principal target even if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation. In other words, whether one is a principal target of the investigation depends on whether one operates the target telephone to place or receive calls.¹³

415 U. S. 143 (1974), resolved this identification issue. See *United States v. Chairzio*, *supra*; *United States v. Moore*, *supra*. Although there is language in *Kahn* suggesting that wiretap applications must identify all such individuals, the identification question presented here was not before us in *Kahn*. The question in that case was whether a wiretap application ~~had to~~ identify a known user of the target telephone whose complicity in the criminal activity under investigation was not known at the time of the application. *Kahn* is a relevant, though not controlling, precedent.

¹² The United States does not suggest that regardless of the factual circumstances a wiretap application must identify only a single individual. To the contrary, it concedes that if two or more persons are using the target telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief for the United States, at 18 n. 13.

¹³ Counsel for the United States explained this position succinctly at oral argument: "The critical distinction . . . is one between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other hand." Tr. of Oral Arg., at 13.

must

Whatever the merits of such a statutory scheme, we find little support for it in the language and structure of Title III or in the legislative history. The statutory language itself refers only to "the person, if known, committing the offense and whose communications are to be intercepted." That description is as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from the target telephone. It is true, as the United States suggests, that when read in the context of the other subdivisions of § 2518 (1)(b), an argument can be made that Congress focused in subdivision (iv) on the primary user of the target telephone. But it is also clear from other sections of the statute that Congress expected that wiretap applications would name more than one individual. For example, Title III requires that inventory notice be served upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d) (emphasis added). And § 2518 (1)(e) requires that an intercept application disclose all previous intercept applications "involving any of the same persons . . . specified in the application" (emphasis added). It may well be that Congress anticipated that a given application would cover more than one telephone or that several suspects would use one telephone, and that an application for those reasons alone would require identification of more than one individual. But nothing on the face of the statute suggests that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application.²⁴

²⁴ Indeed, the contrary conclusion is suggested by the fact that identification of an individual in an application for an intercept order triggers other statutory provisions. First, § 2518 (1)(e) requires an intercept application to disclose all previous applications "involving any of the same persons . . . specified in the application." To the extent that Congress thought it necessary to provide the issuing judge with

Nor can we find support for the "principal target" interpretation in the legislative history. Title III originated as a combination of S. 675, the Federal Wire Interception Act, which was introduced by Senator McClellan several months prior to this Court's decision in *Berger v. New York*, 388 U. S. 41 (1967), and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska a few days after the *Berger* decision. Both bills required that wiretap applications include a full and complete statement of the facts and circumstances relied upon by the applicant and specification of the nature and location of the communication facilities involved. Although neither bill contained an express identification requirement such as that at issue here, both bills required the application to include "a full and complete statement of the facts concerning all previous applications . . . involving any person named in the application as committing, having committed, or being about to commit an offense." Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., at 77, § 8 (a)(3) and 1066, § 2518 (a)(4) (1967) (emphasis added). Thus, even at this early stage, it was recognized that an application could identify several individuals, and there is no indication that the identification would be limited to principal targets.

While S. 971, the bill that combined the major provisions of S. 675 and S. 2050, and that eventually was enacted, was pending before the Senate Judiciary Committee, this Court de-

such information, there is no indication of congressional intent to require provision of such information only if a suspect operated from one end of a telephone line. Second, § 2518 (8)(d) mandates that an inventory notice be served upon "the persons named in the order or the application." As with § 2518 (1)(e), the congressional purpose would not be served by limiting that notice on the basis of the telephone from which one speaks.

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cided *Katz v. United States*, 389 U. S. 347 (1967). S. 971 was then redrafted to conform to *Katz* as well as *Berger*, and the identification provision was added at that time. The Senate Report states that the requirements set forth in the various subdivisions of § 2518 (1)(b), including the identification requirement at issue here, "[were] intended to reflect the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968), citing *Berger v. New York*, 388 U. S. 41, 58-60, and *Katz v. United States*, 389 U. S. 347, 354-356 (1967). The United States now contends that although it may be that Congress read *Berger* and *Katz* to require, as a constitutional matter, that the subject of the surveillance be named if known, Congress "would hardly have read those cases as requiring the naming of all parties likely to be overheard. . . ." Brief, at 25-26. The difficulty with that argument is that the legislative history fails to indicate that Congress was thinking in terms of "subjects" of surveillance, or that Congress considered "subjects" of surveillance to be the principal users of the target telephone.

Moreover, to the extent that Congress thought it was meeting the constitutional commands of particularization established in *Berger* and *Katz*, Congress may have read those cases as mandating a broad identification requirement. The statute that we confronted in *Berger* required identification

¹⁰ At the time of the enactment of Title III, Congress did not have before it the view we expressed on this issue in *United States v. Kahn*, 415 U. S., at 155 n. 15. The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized. It is not a constitutional requirement that all those likely to be overheard engaging in inculpatory conversations be named. Specification of this sort "identif[ies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." *Berger v. New York*, 388 U. S. 41, 59 (1967).

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UNITED STATES v. DONOVAN

of "the person or persons" whose communications were to be overheard. 388 U. S., at 59. And we expressly noted that that provision "[did] no more than identify the person whose constitutionally protected area is to be invaded . . ."

Ibid. Given the statute at issue in *Berger* and our comment upon it, Congress may have concluded that ~~as a constitutional matter a wiretap application would have to name~~ all suspects rather than just the primary user.¹⁶

In any event, for our present purposes it is unnecessary to speculate as to exactly how Congress interpreted *Berger* and *Katz* with respect to the identification issue. It is sufficient to note that in response to those decisions Congress included an identification requirement which on its face draws no distinction based on the telephone one uses, and the United States points to no evidence in the legislative history that supports such a distinction. Indeed, the legislative materials apparently contain no use of the term "principal target" or any discussion of a different treatment based on the telephone from which a suspect speaks.¹⁷ We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the

¹⁶ That Congress may have so understood the constitutional requirement is also suggested by the portion of the Senate Report dealing with that provision of S. 971 that required the intercept order to identify "the person, if known, whose conversations are to be intercepted." The Senate Report merely cites *West v. Cabell*, 153 U. S. 78 (1894), which concerns the need for proper identification of the subject of an arrest warrant. S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968). To the extent that Congress may have considered *West* to apply to wiretap orders, we have no reason to believe that Congress considered its applicability to extend only to those suspects using the target telephone.

¹⁷ At least one Senator read the identification requirement in S. 971 to parallel the identification requirement contained in the statute at issue in *Berger v. New York*: "Specificity is required as to the person or persons whose communications are to be intercepted." 114 Cong. Rec., at 14763 (1968) (remarks of Sen. Percy).

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individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone.

B

The other statutory provision at issue in this case is 18 U. S. C. §2518 (8)(d), which provides that the judge shall cause to be served on the persons named in the order or application an inventory, which must give notice of the entry of the order or application, state the disposition of the application, and indicate whether communications were intercepted.¹⁸ Although the statute mandates the provision of that inventory notice only to persons named in the application or the order, the statute also provides that the judge may provide similar notice to other parties to intercepted communications if he concludes that such action is in the interest of justice.¹⁹ Observing that this notice provision does not expressly require law enforcement authorities routinely to provide the judge with any specific information upon which to exercise his discretion, the United States contends that it would be inappropriate to read such a require-

¹⁸ The inventory notice must be served within a reasonable time but not later than 90 days after the date the application for an intercept order was filed. On an *ex parte* showing of good cause, service of the inventory may be postponed.

¹⁹ In addition to these provisions for mandatory and discretionary inventory notice, Title III prohibits the introduction into evidence at trials and certain other proceedings of the contents of an intercept and evidence derived therefrom unless each party has been furnished with copies of the application and order under which the interception was authorized. 18 U. S. C. §2518 (9). Moreover, at the expiration of any intercept the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions. 18 U. S. C. §2518 (8)(a). The New York statute held unconstitutional in *Berger v. New York*, was criticized by this Court for its failure to include provisions of this sort. 388 U. S., at 60.

ment into the statute since the judge has the option of asking the law enforcement authorities for whatever information he requires.

Our reading of the legislative history of the discretionary notice provision in light of the purposes of Title III leads us to reject the Government's interpretation. As reported from the Judiciary Committee, section 2518 (8)(d) contained only a provision mandating notice to the persons named in the application or the order; the discretionary notice provision was added by amendment on the floor of the Senate. In introducing that amendment, Senator Hart explained its purpose:

"The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted conversations, even though such parties are not specifically named in the court order. The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute. It may be that the required notice must be served on all parties to intercepted communications. Since legitimate interests of privacy may make such notice to all parties undesirable, the amendment leaves the final determination to the judge." 114 Cong. Rec. 14485-14486 (1968).²⁰

²⁰It is worth noting that shortly before Senator Hart proposed this amendment to S. 971, Senator Long had read to the Senate portions of a report prepared by the Association of the Bar of the City of New York on federal wiretap legislation. That report noted that parties to intercepted conversations other than those named in the application or order should probably be served with inventory notice, but it also recognized that under some circumstances the provision of such notice could be harmful and gave the following example:

"A, a businessman, talks to his customers, and the latter are served with papers showing that A is being bugged[.] [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory." 114 Cong. Rec. 14476 (1968).

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In deciding whether legitimate privacy interests justify withholding inventory notice from parties to intercepted conversations, a judge is likely to require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities. No purpose is served by holding that those authorities have no routine duty to supply the judge with revelant information. The Court of Appeals for the Ninth Circuit recently confronted this problem of dual responsibility, and we adopt the balanced construction that court placed on § 2518 (8)(d):

"To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted conversation is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although the judicial officer has the duty to cause the filing of the inventory [notice], it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his statutory § 2518 (8)(d) discretion, . . . the government is also required to furnish such information as is available to it." *United States v. Chun*, 503 F. 2d 533, 540 (1974).²¹

²¹ The current policy of the Department of Justice is to provide the issuing judge with the name of every person who has been over-

We agree with the Ninth Circuit that this allocation of responsibility best serves the purposes of Title III.²²

III

We turn now to the question whether the District Court properly suppressed evidence derived from the wiretaps at issue solely because of the failure of the law enforcement authorities to comply fully with the provisions of §§ 2518 (1) (b)(iv) and 2518 (8)(d). Section 2515 expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518 (10)(a):

- "(i) the communication was unlawfully intercepted;
- "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- "(iii) the interception was not made in conformity with the order of authorization or approval."

There is no basis on the facts of this case to suggest that

heard as to whom there is any reasonable possibility of indictment. Brief for the United States, at 39. This policy does not meet the test specified above. Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete.

²² At oral argument, counsel for the United States ~~practically conceded~~ the merit of the approach specified in *United States v. Chun*:

"Perhaps the approach of the Court of Appeals for the Ninth Circuit, which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this regard." Tr. of Oral Arg., at 6-7.

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the authorization orders are facially insufficient, or that the interception was not conducted in conformity with the orders. Thus, only § 2518 (10)(a)(i) is relevant: were the communications "unlawfully intercepted" given the violations of §§ 2518 (1)(b)(iv) and 2518 (8)(d).²²

Resolution of that question must begin with *United States v. Giordano*, 416 U. S. 505 (1974), and *United States v. Chavez*, 416 U. S. 562 (1974). Those cases hold that "[not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" *United States v. Chavez*, 416 U. S., at 574-575. To the contrary, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States v. Giordano*, 416 U. S., at 527.

Giordano concerned the provision in Title III requiring that an application for an intercept order be approved by the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Concluding that Congress intended to condition the use of wiretap procedures based on the judgment of senior officials in the Department of Justice, the Court required suppression for failure to comply with the approval provision. *Chavez* concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application. The problem in *Chavez* was one of misidentification; although the application had in fact been authorized by the Attorney General, the application erroneously identified an

²² The availability of the suppression remedy for these statutory, as opposed to constitutional, violations, see n. 15 and 19, *supra*, turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. *United States v. Giordano*, *supra*, 416 U. S., at 524.

Assistant Attorney General as the official authorizing the application. The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of § 2518 (10) (a)(i) since that identification requirement did not play a "substantive role" in the regulatory system. 416 U. S., at 578.

In the instant case, the Court of Appeals concluded that both the identification requirement of § 2518 (1)(b)(iv) and the notice requirement of § 2515 (8)(d) played a "central role" in the statutory framework, and for that reason affirmed the District Court's order suppressing relevant evidence. Although both statutory requirements are undoubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements.

A

As to § 2518 (1)(b)(iv), the issue is whether the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a "substantive role" with respect to judicial authorization of intercept orders and it consequently provides a limitation on the use of intercept procedures. The statute provides that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities. If, after evaluating the statutorily enumerated factors in light of the information contained in

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the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. The intercept order may issue only if the issuing judge determines that the statutory factors are present, and the failure to name additional targets in no way detracts from the sufficiency of those factors.

This case is therefore unlike *Giordano*, where failure to satisfy the statutory requirement of prior approval by specified Justice Department officials bypassed a congressionally imposed limitation on the use of the intercept procedure. The Court there noted that it was reasonable to believe that requiring prior approval from senior officials in the Justice Department "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." 416 U. S., at 528. Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept.²⁴ Rather, this case resembles *Chavez*, where we held that a wiretap was not unlawful sim-

²⁴ There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzsaco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. Nor is there any suggestion that as a result of the failure to name these three respondents they were denied the mandatory inventory notice supplied to persons named in the application. 18 U. S. C. § 2518 (8)(d). Respondents Donovan, Robbins, and Buzsaco were among the 37 persons served with the initial inventory.

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ply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The *Chavez* intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied.²⁵

Finally, we note that nothing in the legislative history suggests that Congress intended this broad identification requirement to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *United States v. Chavez*, 416 U. S., at 578. Neither S. 675 nor S. 2050, the predecessor bills of S. 971, contained an identification provision. See p. 11, *supra*. The only explanation given in the Senate Report for the in-

²⁵ No one suggests that the failure to identify in a wiretap application individuals who are "unknown" within the meaning of the statute, see *Kahn v. United States*, 415 U. S. 143 (1974), requires suppression of intercepted conversations to which those individuals were parties. Though recognizing that the failure to identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, respondents Donovan, Robbins, and Buzzaco suggest that the opposite is true with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified by analogy to warrantless searches or arrests. Tr. of Oral Arg., at 40. Although law enforcement officials can often take action without a warrant when they have been unable to foresee the circumstances that eventually confronted them, they still must obtain a search or arrest warrant when their prior knowledge is sufficient to establish probable cause. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

clusion of the broad identification provision was that it was intended to reflect what Congress perceived to be the constitutional command of particularization. This explanation was offered with respect to all the information required by § 2518 (1)(6) to be set out in an intercept application. No additional guidance can be gleaned from the floor debates, since they contain no substantive discussion of the identification provision.²⁰

B

We reach the same conclusion with respect to the Government's duty to inform the judge of all identifiable persons whose conversations were intercepted. As noted earlier, the version of Title III that emerged from the Senate Judiciary Committee provided only for mandatory notice to the "persons named in the order of the application." The Senate Report detailed the purpose of that provision:

"[T]he intent of the provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least

²⁰ Even if we assume that Congress thought that a broad identification requirement was constitutionally mandated, it does not follow that Congress imposed *statutory* suppression under §§ 2515 and 2518 (10)(a)(i) as a sanction for noncompliance. In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No. 107, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a District Court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone. This requirement was satisfied here when the application set forth sufficient information to indicate that the primary targets were conducting a gambling business over four particular telephones. Nothing in the legislative history indicates that Congress intended to declare an otherwise constitutional intercept order "unlawful" under § 2518 (10)(a)(i)—resulting in suppression under § 2515—for failure to name additional targets.

to the subject. He can then seek appropriate civil redress, for example, under section 2520 . . . if he feels that his privacy has been unlawfully invaded." S. Rep. No. 107, 90th Cong., 2d Sess., 105 (1968).

The floor discussion concerning the amendment adding the provision for discretionary notice merely indicates an intent to provide notice to such additional persons as may be constitutionally required.

Nothing in the structure of the Act or this legislative history suggests that incriminating conversations are "unlawfully intercepted" whenever parties to those conversations do not receive discretionary inventory notice as a result of the Government's failure to inform the District Court of their identities. At the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order. The fact that discretionary notice reached 39 rather than 41 identifiable persons does not in itself mean that the conversations were unlawfully intercepted.²⁷

The legislative history indicates that postintercept notice was designed instead to assure the community that the wiretap technique is reasonably employed. But even recog-

²⁷ Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional, and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties. Nor does this case present an opportunity to comment upon the suggestion, recognized by the United States, Brief, at 49 n. 40, that suppression might be required if the agents knew before the interception that no inventory would be served.

Moreover, respondents Merlo and Lauer were not prejudiced by their failure to receive postintercept notice under either of the District Court's inventory orders. As noted earlier, the Government made available to all defendants the intercept orders, applications, and related papers. See n. 5A, *supra*. And in response to pretrial discovery motions, the Government produced transcripts of the intercepted conversations.

nizing that Congress placed considerable emphasis on that aspect of the overall statutory scheme, we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure.²⁹

IV

Although the Government was required to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application for an extension of the initial intercept, failure to do so in the circumstances here presented did not warrant suppression under § 2518 (10)(a)(i). Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard. We hold that this is the correct result under the provisions of Title III, but we re-emphasize the suggestion we made in *United States v. Chavez*, that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." 416 U. S., at 580.

The order of the Court of Appeals is reversed and the case is remanded to that court for further proceedings in accord with this opinion.

It is so ordered.

²⁹ Although the possibility of subsequent civil suits to redress unwarranted invasions of privacy functions in a broad sense to check excessive use of intercepts, that role is at best minor and indirect.

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SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Appeals
Thomas W. Donovan et al. | for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

Printer: note that footnote call #1 has been moved from page 2 to page 1

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~~1968, 18 U. S. C. §§ 2510-2520~~ The application requested authorization to intercept gambling-related communications over two telephones at one address in North Olmstead, Ohio.

¹ The wiretap application procedure is set forth at 18 U. S. C. § 2518 (I), which provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (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 where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) 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;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

The issuing judge is free to require the applicant to furnish additional information. 18 U. S. C. § 2518 (2).

9 and two other telephones at a home in Canton, Ohio. The accompanying affidavit recited that the telephones were being used by Albert Kotoch, Joseph Spaganlo, and George Florea to conduct an illegal gambling business, and that in conducting that business they would place ~~telephone~~ calls to and receive ~~telephone~~ calls from various persons, three of whom were also named in the wiretap application.² The affiant also stated that the Government's informants would refuse to testify against the persons named in the application, that telephone records alone would be insufficient to support a gambling conviction, and that normal investigative techniques were unlikely to be fruitful. Pursuant to the Government's request, the District Court authorized for a period of 15 days the interception of gambling-related wire communications of Kotoch, Spaganlo, Florea, three named individuals other than the respondents, and "others as yet unknown," to and from the four listed telephones.³

² The affidavit set forth extensive information indicating that the named individuals were conducting a gambling operation. This information was derived from physical surveillance by agents of the FBI, an examination of telephone company toll records, and the personal observations of six informants, whose past reliability also was detailed in the affidavit.

³ The District Court's order was issued pursuant 18 U. S. C. §§ 2518 (3), (4) which provide

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted

in pertinent
part:

During the course of the wiretap, the Government learned that respondents Donovan, Robbins, and Buzzaco were discussing illegal gambling activities with the named subjects. On December 26, 1972, the Government applied for an extension of the initial intercept order.⁴ This time it sought authorization to intercept gambling-related conversations of Kotoch, Spaganlo, Flores, two other named individuals, and "others as yet unknown," but it did not identify respondents

are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

⁴In addition to the December 28 application requesting an extension of the initial intercept order, the Government also filed on that date a separate application seeking authorization to monitor a third telephone discovered at the same North Olmstead address. Both applications were accompanied by another affidavit setting forth the results of the initial monitoring, the manner in which the third phone was discovered, the facts indicating that the newly discovered telephone was being used to conduct a gambling business, and reasons why continued interception was necessary. A copy of the affidavit filed on November 28 was also attached to the December 26 applications. For the sake of clarity, the two applications filed on December 26 will be treated as a single application.

Donovan, Buzzaco, and Robbins in this second application.⁶ The District Court again authorized interception of gambling-related conversations for a maximum of 15 days.

On February 21, 1973, the Government submitted to the District Court a proposed order giving notice of the interceptions to 37 persons, a group which the Government apparently thought included all individuals who could be identified as having discussed gambling over the monitored telephones.⁶ The District Court signed the proposed order, and an inventory notice was served on the listed persons, including respondents Donovan, Buzzaco, and Robbins. On September 11, 1973, after the Government submitted the names of two additional persons whose identities had allegedly been inadvertently omitted from the initial list, the District Court entered an amended order giving notice to those individuals. As a result of what the Government labels "administrative oversight," respondents Merlo and Lauer

The United States conceded in the Court of Appeals that respondents Donovan and Robbins were "known" within the meaning of the statute at the time of the December 26 application, but challenged as clearly erroneous the District Court's finding that respondent Buzzaco was "known" at that time. The Court of Appeals upheld the District Court's finding, and the United States has not sought review of that disposition. Thus, for our purposes, all three respondents were "known" on December 26.

/upon/ — * An inventory notice must be served within a designated period of time ~~to~~ "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d). The inventory must give notice of the entry of the intercept order or application, state the disposition of the application, and indicate whether communications were or were not intercepted. *Ibid.* *not new IP* ← Upon the filing of a motion, the judge has discretion to make available the intercepted communications, the applications, and the orders. *Ibid.*

Title III also authorizes the District Court to cause an inventory notice to be served on "other parties to intercepted communications" if the judge determines that such notice is in the interest of justice. *Ibid.* Those other parties may also be given access to the intercepted communications, the applications, and the orders. *Ibid.*

were not included in either list of names and were never served with inventory notice.⁷

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Kotoch, Spaganlo, the five respondents, and 10 other individuals with conspiracy to conduct and conducting a gambling business in violation of 18 U. S. C. §§ 371 and 1955. The five respondents filed motions to suppress evidence derived from the wire interception. After an evidentiary hearing on the motions, the District Court suppressed as to respondents Donovan, Robbins, and Buzzaco all evidence derived from the December 26 intercept order on the ground that failure to identify them by name in the application and order of that date violated 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a). With respect to Merlo and Lauer, who were not known to the Government until after the December 26 application, the District Court suppressed all evidence derived from both intercept orders on the ground that they had not been served with inventory notice.

The Court of Appeals for the Sixth Circuit affirmed. 513 F. 2d 337 (1975).⁸ On the identification issue, the court held that the wiretap application must identify every person whose conversations relating to the subject criminal activity the Government has probable cause to believe it will intercept. Agreeing with the District Court that at the time of the December 26 application the Government had

⁷ Although respondents Merlo and Lauer were not served with inventory notice pursuant to § 2518 (8)(d), the intercept orders, applications, and related papers were made available to all the defendants, including Merlo and Lauer, on November 26, 1973. Thus, the introduction into evidence at trial of the contents of the intercepted conversations and evidence derived therefrom would not be prohibited by 18 U. S. C. § 2518 (9). *See n. 10, infra.*

⁸ The Government filed its appeal from the District Court's order suppressing evidence under 18 U. S. C. § 3731, and there has ~~not~~ been no trial on the charges with respect to the respondents.

(Ar) probable cause to believe that it would overhear Donovan, Robbins, and Buzzaco "committing the offense," the Court of Appeals affirmed the suppression of evidence derived from the December 26 order. On the notice question, it held that the Government has an implied statutory duty to inform the issuing judge of the identities of the parties whose conversations were overheard so that he can determine whether discretionary inventory notice should be required.⁹ Because the Government had failed to perform this duty with respect to Merlo and Lauer, the Court of Appeals affirmed the District Court's order suppressing evidence derived from both intercept orders. The court found it unnecessary to determine whether the failure to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application and to name respondents Merlo and Lauer in the proposed inventory notice orders was inadvertent or purposeful, since the mere fact of omission was sufficient to require suppression under 18 U. S. C. § 2518 (10)(a).¹⁰

We granted certiorari to resolve these issues, which concern the construction of a major federal statute, 421 U. S. 907, and now reverse.

II

The United States contends that § 2518 (1)(b)(iv) requires that a wiretap application identify only the principal

⁹ See n. 8, *supra*.

¹⁰ 18 U. S. C. § 2518 (10)(a) provides in pertinent part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

target of the interception, and that § 2518 (8)(d) does not require the Government to provide the issuing judge with a list of all identifiable persons who were overheard in the course of an authorized interception. We think neither contention is sound.

A

We turn first to the identification requirements of § 2518 (1)(b)(iv). That provision requires a wiretap application to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." In construing that language, this Court already has ruled that the Government is not required to identify an individual in the application unless it has probable cause to believe (i) that the individual is engaged in the criminal activity under investigation and (ii) that the individual's conversations will be intercepted over the target telephone. *United States v. Kahn*, 415 U. S. 143 (1974). The question at issue here is whether the Government is required to name all such individuals.²¹ align?

The United States argues that the most reasonable in-

²¹ Every Court of Appeals that has considered the issue /has/ concluded that an individual whose conversations probably will be intercepted by a wiretap must be identified in the wiretap application if the law enforcement authorities have probable cause to believe the individual is committing the offense for which the wiretap is sought. *United States v. Charizio*, 525 F. 2d 289, 292 (CA2 1975); *United States v. Bernstein*, 509 F. 2d 996 (CA4 1975), petition for cert. filed, No. 74-1486; *United States v. Doolittle*, 507 F. 2d 1368, aff'd en banc, 518 F. 2d 500 (CA5 1975), petitions for cert. filed Nos. 75-500, 75-509, 75-513; ~~*United States v. Kilgore*, 518 F. 2d 496 (CA5 1975), petition for cert. filed, No. 75-903;~~ *United States v. Civella*, 533 F. 2d 1395 (CA8 1976); ~~*United States v. K...*, 504 F. 2d 1262 (CA8 1973);~~ *United States v. Russo*, 527 F. 2d 1150, 1156 (CA10 1975), petition for cert. filed, No. 75-1218. See also *United States v. Moore*, — U. S. App. D. C. —, 513 F. 2d 485, 493-494 (1975) (interpreting 23 D. C. Code 547 (a)(2), which is almost identical to the provision at issue here).

A number of these courts have concluded, and respondents Donovan, Robbins, and Buzzaco argue, that our decision in *United States v. Kahn*,

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cert. filed, Nos.
75-1813, 76-169;

12/ interpretation of the plain language of the statute is that the application must identify only the principal target of the investigation, who "will almost always be the individual whose phone is monitored." Brief for the United States, at 18. Under this interpretation, if the Government has reason to believe that an individual will use the target telephone to place or receive calls, and the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation, the individual qualifies as a principal target and must be named in the wiretap application. On the other hand, an individual who uses a different telephone to place calls to or receive calls from the target telephone is not a principal target even if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation. In other words, whether one is a principal target of the investigation depends on whether one operates the target telephone to place or receive calls.¹²

415 U. S. 143 (1974), resolved this identification issue. See *United States v. Chafizio*, *supra*; *United States v. Moore*, *supra*. Although there is language in *Kahn* suggesting that wiretap applications must identify all such individuals, the identification question presented here was not before us in *Kahn*. The question in that case was whether a wiretap application ~~had to~~ identify a known user of the target telephone whose complicity in the criminal activity under investigation was not known at the time of the application. *Kahn* is a relevant, though not controlling, precedent.

¹² The United States does not suggest that regardless of the factual circumstances a wiretap application must identify only a single individual. To the contrary, it concedes that if two or more persons are using the target telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief for the United States, at 18 n. 13.

¹³ Counsel for the United States explained this position succinctly at oral argument: "The critical distinction . . . is one between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other hand." Tr. of Oral Arg., at 13.

Whatever the merits of such a statutory scheme, we find little support for it in the language and structure of Title III or in the legislative history. The statutory language itself refers only to "the person, if known, committing the offense and whose communications are to be intercepted." That description is as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from ~~the target~~ telephone. It is true, as the United States suggests, that when read in the context of the other subdivisions of § 2518 (1)(b), an argument can be made that Congress focused in subdivision (iv) on the primary user of the target telephone. But it is also clear from other sections of the statute that Congress expected that wiretap applications would name more than one individual. For example, Title III requires that inventory notice be served upon "the *persons* named in the order or the application." 18 U. S. C. § 2518 (8)(d) (emphasis added). And § 2518 (1)(e) requires that an intercept application disclose all previous intercept applications "involving *any of the same persons* . . . specified in the application" (emphasis added). It may well be that Congress anticipated that a given application would cover more than one telephone or that several suspects would use one telephone, and that an application for those reasons alone would require identification of more than one individual. But nothing on the face of the statute suggests that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application.²⁴

²⁴ Indeed, the contrary conclusion is suggested by the fact that identification of an individual in an application for an intercept order triggers other statutory provisions. First, § 2518 (1)(e) requires an intercept application to disclose all previous applications "involving any of the same persons . . . specified in the application." To the extent that Congress thought it necessary to provide the issuing judge with

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Nor can we find support for the "principal target" interpretation in the legislative history. Title III originated as a combination of S. 675, the Federal Wire Interception Act, which was introduced by Senator McClellan several months prior to this Court's decision in *Berger v. New York*, 388 U. S. 41 (1967), and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska a few days after the *Berger* decision. Both bills required that wiretap applications include a full and complete statement of the facts and circumstances relied upon by the applicant and specification of the nature and location of the communication facilities involved. Although neither bill contained an express identification requirement such as that at issue here, both bills required the application to include "a full and complete statement of the facts concerning all previous applications . . . involving any person named in the application as committing, having committed, or being about to commit an offense." Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., at 77, § 8 (a)(3) and 106, § 2518 (a)(4) (1967) (emphasis added). Thus, even at this early stage, it was recognized that an application could identify several individuals, and there is no indication that the identification would be limited to principal targets.

While S. 971, the bill that combined the major provisions of S. 675 and S. 2050 and that eventually was enacted, was pending before the Senate Judiciary Committee, this Court de-

such information, there is no indication of congressional intent to require provision of such information only if a suspect operated from one end of a telephone line. Second, § 2518 (8)(d) mandates that an inventory notice be served upon "the persons named in the order or the application." As with § 2518 (1)(e), the congressional purpose would not be served by limiting that notice on the basis of the telephone from which one speaks.

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ided *Katz v. United States*, 389 U. S. 347 (1967). S. 971 was then redrafted to conform to *Katz* as well as *Berger*, and the identification provision was added at that time. The Senate Report states that the requirements set forth in the various subdivisions of § 2518 (1)(b), including the identification requirement at issue here, "[were] intended to reflect the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968), citing *Berger v. New York*, 388 U. S. 41, 58-60, and *Katz v. United States*, 389 U. S. 347, 354-356 (1967). The United States now contends that although it may be that Congress read *Berger* and *Katz* to require, as a constitutional matter, that the subject of the surveillance be named if known, Congress "would hardly have read those cases as requiring the naming of all parties likely to be overheard." ¹⁸ Brief, at 25-26. The difficulty with that argument is that the legislative history fails to indicate that Congress was thinking in terms of "subjects" of surveillance, or that Congress considered "subjects" of surveillance to be the principal users of the target telephone. Moreover, to the extent that Congress thought it was meeting the constitutional commands of particularization established in *Berger* and *Katz*, Congress may have read those cases as mandating a broad identification requirement. The statute that we confronted in *Berger* required identification

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¹⁸ At the time of the enactment of Title III, Congress did not have before it the view we expressed on this issue in *United States v. Kahn*, 415 U. S., at 155 n. 15. The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized. It is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named. Specification of this sort "identif[ies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized."

¹⁹ *Berger v. New York*, 388 U. S. 41, 59 (1967).

the Constitution
required the
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of "the person or persons" whose communications were to be overheard. 388 U. S., at 59. And we expressly noted that that provision "[did] no more than identify the person whose constitutionally protected area is to be invaded" *Ibid.* Given the statute at issue in *Berger* and our comment upon it, Congress may have concluded that ~~as a constitutional matter a wiretap application would have to name~~ all suspects rather than just the primary user.¹⁶

In any event, for our present purposes it is unnecessary to speculate as to exactly how Congress interpreted *Berger* and *Katz* with respect to the identification issue. It is sufficient to note that in response to those decisions Congress included an identification requirement which on its face draws no distinction based on the telephone one uses, and the United States points to no evidence in the legislative history that supports such a distinction. Indeed, the legislative materials apparently contain no use of the term "principal target" or any discussion of a different treatment based on the telephone from which a suspect speaks.¹⁷ We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the

¹⁶ That Congress may have so understood the constitutional requirement is also suggested by the portion of the Senate Report dealing with that provision of S. 971 that required the intercept order to identify "the person, if known, whose conversations are to be intercepted." The Senate Report merely cites *West v. Cabell*, 153 U. S. 78 (1894), which concerns the need for proper identification of the subject of an arrest warrant. S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968). To the extent that Congress may have considered *West* to apply to wiretap orders, we have no reason to believe that Congress considered its applicability to extend only to those suspects using the target telephone.

¹⁷ At least one Senator read the identification requirement in S. 971 to parallel the identification requirement contained in the statute at issue in *Berger v. New York*: "Specificity is required as to the person or persons whose communications are to be intercepted." 114 Cong. Rec., at 14763 (1968) (remarks of Sen. Percy).

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individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone.

B

The other statutory provision at issue in this case is 18 U. S. C. § 2518 (8)(d), which provides that the judge shall cause to be served on the persons named in the order or application an inventory, which must give notice of the entry of the order or application, state the disposition of the application, and indicate whether communications were intercepted.¹⁸ Although the statute mandates the provision of that inventory notice only to persons named in the application or the order, the statute also provides that the judge may provide similar notice to other parties to intercepted communications if he concludes that such action is in the interest of justice.¹⁹ Observing that this notice provision does not expressly require law enforcement authorities routinely to provide the judge with any specific information upon which to exercise his discretion, the United States contends that it would be inappropriate to read such a require-

¹⁸ The inventory notice must be served within a reasonable time but not later than 90 days after the date the application for an intercept order was filed. On an *ex parte* showing of good cause, service of the inventory may be postponed.

¹⁹ In addition to these provisions for mandatory and discretionary inventory notice, Title III prohibits the introduction into evidence at trials and certain other proceedings of the contents of an intercept and evidence derived therefrom unless each party has been furnished with copies of the application and order under which the interception was authorized. 18 U. S. C. § 2518 (9). Moreover, at the expiration of any intercept the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions. 18 U. S. C. § 2518 (8)(a). The New York statute held unconstitutional in *Berger v. New York*, was criticized by this Court for its failure to include provisions of this sort. 388 U. S. at 60.

These notice and return provisions satisfy constitutional

requirements. See Katz v. United States, 389 U.S.

355-356 n. 16.

347, 356 (1967); Berger v. New York, 388 U.S. 41, 60 (1967).

ment into the statute since the judge has the option of asking the law enforcement authorities for whatever information he requires.

Our reading of the legislative history of the discretionary notice provision in light of the purposes of Title III leads us to reject the Government's interpretation. As reported from the Judiciary Committee, section 2518 (S)(d) contained only a provision mandating notice to the persons named in the application or the order; the discretionary notice provision was added by amendment on the floor of the Senate. In introducing that amendment, Senator Hart explained its purpose:

"The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted conversations, even though such parties are not specifically named in the court order. The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute. It may be that the required notice must be served on all parties to intercepted communications. Since legitimate interests of privacy may make such notice to all parties undesirable, the amendment leaves the final determination to the judge." 114 Cong. Rec. 14485-14486 (1968).²⁰

²⁰ It is worth noting that shortly before Senator Hart proposed this amendment to S. 971, Senator Long had read to the Senate portions of a report prepared by the Association of the Bar of the City of New York on federal wiretap legislation. That report noted that parties to intercepted conversations other than those named in the application or order should probably be served with inventory notice, but it also recognized that under some circumstances the provision of such notice could be harmful and gave the following example:

"A, a businessman, talks to his customers, and the latter are served with papers showing that A is being bugged[.] [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory." 114 Cong. Rec. 14476 (1968).

/commented/

H In deciding whether legitimate privacy interests justify withholding inventory notice from parties to intercepted conversations, a judge is likely to require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities. No purpose is served by holding that those authorities have no routine duty to supply the judge with relevant information. The Court of Appeals for the Ninth Circuit recently confronted this problem of dual responsibility, and we adopt the balanced construction that court placed on § 2518 (8)(d):

"To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted conversation is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although the judicial officer has the duty to cause the filing of the inventory [notice], it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his statutory § 2518 (8)(d) discretion, . . . the government is also required to furnish such information as is available to it." *United States v. Chun*, 503 F. 2d 533, 540 (1974).²¹

²¹ The current policy of the Department of Justice is to provide the issuing judge with the name of every person who has been over-

We agree with the Ninth Circuit that this allocation of responsibility best serves the purposes of Title III.²³

III

/-e-/
We turn now to the question whether the District Court properly suppressed evidence derived from the wiretaps at issue solely because of the failure of the law enforcement authorities to comply fully with the provisions of §§ 2518 (1) (b)(iv) and 2518 (8)(d). Section 2515 expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518 (10)(a):

- "(i) the communication was unlawfully intercepted;
- "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- "(iii) the interception was not made in conformity with the order of authorization or approval."

There is no basis on the facts of this case to suggest that

heard as to whom there is any reasonable possibility of indictment. Brief for the United States, at 39. This policy does not meet the test specified above. Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete.

²³ At oral argument, counsel for the United States ~~potentially conceded~~ the merit of the approach specified in *United States v. Chun*: 1-2 / recognized /

"Perhaps the approach of the Court of Appeals for the Ninth Circuit, which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this regard." Tr. of Oral Arg., at 6-7.

the authorization orders are facially insufficient, or that the interception was not conducted in conformity with the orders. Thus, only § 2518 (10)(a)(i) is relevant: were the communications "unlawfully intercepted" given the violations of §§ 2518 (1)(b)(iv) and 2518 (8)(d)²² 12/

Resolution of that question must begin with *United States v. Giordano*, 416 U. S. 505 (1974), and *United States v. Chavez*, 416 U. S. 562 (1974). Those cases hold that "[not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" *United States v. Chavez*, 416 U. S., at 574-575. To the contrary, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States v. Giordano*, 416 U. S., at 527.

19/ *Giordano* concerned the provision in Title III requiring that an application for an intercept order be approved by the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Concluding that Congress intended to condition the use of wiretap procedures based on the judgment of senior officials in the Department of Justice, the Court required suppression for failure to comply with the approval provision. *Chavez* concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application. The problem in *Chavez* was one of misidentification; although the application had in fact been authorized by the Attorney General, the application erroneously identified an

n1.) ²² The availability of the suppression remedy for these statutory, as opposed to constitutional, violations, see ¶ 15 and 19, *supra*, turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. *United States v. Giordano*, *supra*, 416 U. S., at 524.

Assistant Attorney General as the official authorizing the application. The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of § 2518 (10) (a)(i) since that identification requirement did not play a "substantive role" in the regulatory system. 416 U. S., at 578. 15/

In the instant case, the Court of Appeals concluded that both the identification requirement of § 2518 (1)(b)(iv) and the notice requirement of § 2515 (8)(d) played a "central role" in the statutory framework, and for that reason affirmed the District Court's order suppressing relevant evidence. Although both statutory requirements are undoubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements.

A

As to § 2518 (1)(b)(iv), the issue is whether the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a substantive role with respect to judicial authorization of intercept orders and it consequently ~~provides~~ a limitation on the use of intercept procedures. The statute provides that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities. If, after evaluating the statutorily enumerated factors in light of the information contained in 19/ ~~imposes~~ 1

the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. The intercept order may issue only if the issuing judge determines that the statutory factors are present, and the failure to name additional targets in no way detracts from the sufficiency of those factors.

This case is ~~therefore~~ unlike *Giordano*, where failure to satisfy the statutory requirement of prior approval by specified Justice Department officials bypassed a congressionally imposed limitation on the use of the intercept procedure. The Court there noted that it was reasonable to believe that requiring prior approval from senior officials in the Justice Department "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." 416 U. S., at 528. Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept.²⁴ Rather, this case resembles *Chavez*, where we held that a wiretap was not unlawful sim-

²⁴ There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzzaco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. Nor is there any suggestion that as a result of the failure to name these three respondents they were denied the mandatory inventory notice supplied to persons named in the application. 18 U. S. C. § 2518 (8)(d). Respondents Donovan, Robbins, and Buzzaco were among the 37 persons served with the initial inventory.

ply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The *Chavez* intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied.²⁵

Finally, we note that nothing in the legislative history suggests that Congress intended this broad identification requirement to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *United States v. Chavez*, 416 U. S., at 578. Neither S. 675 nor S. 2050, the predecessor bills of S. 971, contained an identification provision. See p. 11, *supra*. The only explanation given in the Senate Report for the in-

²⁵ No one suggests that the failure to identify in a wiretap application individuals who are "unknown" within the meaning of the statute, see *Kahn v. United States*, 415 U. S. 143 (1974), requires suppression of intercepted conversations to which those individuals were parties. Though recognizing that the failure to identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, respondents Donovan, Robbins, and Buzzaco suggest that the opposite is true with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified by analogy to warrantless searches or arrests. Tr. of Oral Arg., at 40. Although law enforcement officials can often take action without a warrant when they have been unable to foresee the circumstances that eventually confronted them, they still must obtain a search or arrest warrant when their prior knowledge is sufficient to establish probable cause. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

19/ v. Kahn,

and it is suggested that the same principle applies here.

clusion of the broad identification provision was that it was intended to reflect what Congress perceived to be the constitutional command of particularization. This explanation was offered with respect to all the information required by § 2518 (1)(6) to be set out in an intercept application. No additional guidance can be gleaned from the floor debates, since they contain no substantive discussion of the identification provision.²⁸

B

/ or / We reach the same conclusion with respect to the Government's duty to inform the judge of all identifiable persons whose conversations were intercepted. As noted earlier, the version of Title III that emerged from the Senate Judiciary Committee provided only for mandatory notice to the "persons named in the order ~~of~~ the application." The Senate Report detailed the purpose of that provision:

"[T]he intent of the provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least

/ + r / ²⁸ Even if we assume that Congress thought that a broad identification requirement was constitutionally mandated, it does not follow that Congress imposed *statutory* suppression under §§ 2515 and 2518 (10)(a) (i) as a sanction for noncompliance. In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No. 107, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a District Court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone. This requirement was satisfied here when the application set forth sufficient information to indicate that the primary targets were conducting a gambling business over four particular telephones. Nothing in the legislative history indicates that Congress intended to declare an otherwise constitutional intercept order "unlawful" under § 2518 (10)(a)(i)—resulting in suppression under § 2515—for failure to name additional targets.

to the subject. He can then seek appropriate civil redress, for example, under section 2520 . . . if he feels that his privacy has been unlawfully invaded." S. Rep. No. 1097, 90th Cong., 2d Sess., 105 (1968).

The floor discussion concerning the amendment adding the provision for discretionary notice merely indicates an intent to provide notice to such additional persons as may be constitutionally required.

Nothing in the structure of the Act or this legislative history suggests that incriminating conversations are "unlawfully intercepted" whenever parties to those conversations do not receive discretionary inventory notice as a result of the Government's failure to inform the District Court of their identities. At the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order. The fact that discretionary notice reached 39 rather than 41 identifiable persons does not in itself mean that the conversations were unlawfully intercepted.²⁷

The legislative history indicates that postintercept notice was designed instead to assure the community that the wiretap technique is reasonably employed. But even recog-

²⁷ Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional, and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties. Nor does this case present an opportunity to comment upon the suggestion, recognized by the United States, Brief, at 40 n. 40, that suppression might be required if the agents knew before the interception that no inventory would be served.

Moreover, respondents Merlo and Lauer were not prejudiced by their failure to receive postintercept notice under either of the District Court's inventory orders. As noted earlier, the Government made available to all defendants the intercept orders, applications, and related papers. See n. 35, *supra*. And in response to pretrial discovery motions, the Government produced transcripts of the intercepted conversations.

/Tr. of Oral Arg./
at 32,

7)

nizing that Congress placed considerable emphasis on that aspect of the overall statutory scheme, we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure. *g*

IV

Although the Government was required to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application for an extension of the initial intercept, failure to do so in the circumstances here presented did not warrant suppression under § 2518 (10)(a)(i). Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard. We hold that this is the correct result under the provisions of Title III, but we re-emphasize the suggestion we made in *United States v. Chavez*, that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." 416 U. S., at 580.

The order of the Court of Appeals is reversed and the case is remanded to that court for further proceedings in accord with this opinion.

It is so ordered.

g
g
²² Although the possibility of subsequent civil suits to redress unwarranted invasions of privacy functions in a broad sense to check excessive use of intercepts, that role is at best minor and indirect.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: DEC 7 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner,		On Writ of Certiorari to the
v.		United States Court of Ap-
Thomas W. Donovan et al.		peals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title

III.¹ The application requested authorization to intercept gambling-related communications over two telephones at one address in North Olmstead, Ohio, and two other telephones

¹ The wiretap application procedure is set forth at 18 U. S. C. § 2518 (1), which provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (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 where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) 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;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

The issuing judge is free to require the applicant to furnish additional information. 18 U. S. C. § 2518 (2).

at a home in Canton, Ohio. The accompanying affidavit recited that the telephones were being used by Albert Kotoch, Joseph Spaganlo, and George Florea to conduct an illegal gambling business, and that in conducting that business they would place calls to and receive calls from various persons, three of whom were also named in the wiretap application.² The affiant also stated that the Government's informants would refuse to testify against the persons named in the application, that telephone records alone would be insufficient to support a gambling conviction, and that normal investigative techniques were unlikely to be fruitful. Pursuant to the Government's request, the District Court authorized for a period of 15 days the interception of gambling-related wire communications of Kotoch, Spaganlo, Florea, three named individuals other than the respondents, and "others as yet unknown," to and from the four listed telephones.³

² The affidavit set forth extensive information indicating that the named individuals were conducting a gambling operation. This information was derived from physical surveillance by agents of the FBI, an examination of telephone company toll records, and the personal observations of six informants, whose past reliability also was detailed in the affidavit.

³ The District Court's order was issued pursuant 18 U. S. C. §§ 2518 (3), (4) which provide in pertinent part:

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2518 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted

During the course of the wiretap, the Government learned that respondents Donovan, Robbins, and Buzzaco were discussing illegal gambling activities with the named subjects. On December 26, 1972, the Government applied for an extension of the initial intercept order.⁴ This time it sought authorization to intercept gambling-related conversations of Kotoch, Spaganlo, Florea, two other named individuals, and "others as yet unknown," but it did not identify respondents

are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

⁴ In addition to the December 26 application requesting an extension of the initial intercept order, the Government also filed on that date a separate application seeking authorization to monitor a third telephone discovered at the same North Olmstead address. Both applications were accompanied by another affidavit setting forth the results of the initial monitoring, the manner in which the third phone was discovered, the facts indicating that the newly discovered telephone was being used to conduct a gambling business, and reasons why continued interception was necessary. A copy of the affidavit filed on November 28 was also attached to the December 26 applications. For the sake of clarity, the two applications filed on December 26 will be treated as a single application.

Donovan, Buzzaco, and Robbins in this second application.⁸ The District Court again authorized interception of gambling-related conversations for a maximum of 15 days.

On February 21, 1973, the Government submitted to the District Court a proposed order giving notice of the interceptions to 37 persons, a group which the Government apparently thought included all individuals who could be identified as having discussed gambling over the monitored telephones.⁹ The District Court signed the proposed order, and an inventory notice was served on the listed persons, including respondents Donovan, Buzzaco, and Robbins. On September 11, 1973, after the Government submitted the names of two additional persons whose identities allegedly had been omitted inadvertently from the initial list, the District Court entered an amended order giving notice to those individuals. As a result of what the Government labels "administrative oversight," respondents Merlo and Lauer

⁸ The United States conceded in the Court of Appeals that respondents Donovan and Robbins were "known" within the meaning of the statute at the time of the December 26 application, but challenged as clearly erroneous the District Court's finding that respondent Buzzaco was "known" at that time. The Court of Appeals upheld the District Court's finding, and the United States has not sought review of that disposition. Thus, for our purposes, all three respondents were "known" on December 26.

⁹ An inventory notice *must* be served within a designated period of time upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d). The inventory must give notice of the entry of the intercept order or application, state the disposition of the application, and indicate whether communications were or were not intercepted. *Ibid.* Upon the filing of a motion, the judge has discretion to make available the intercepted communications, the applications, and the orders. *Ibid.*

Title III also authorizes the District Court to cause an inventory notice to be served on "other parties to intercepted communications" if the judge determines that such notice is in the interest of justice. *Ibid.* Those other parties may also be given access to the intercepted communications, the applications, and the orders. *Ibid.*

were not included in either list of names and were never served with inventory notice.⁷

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Kotoch, Spaganlo, the five respondents, and 10 other individuals with conspiracy to conduct and conducting a gambling business in violation of 18 U. S. C. §§ 371 and 1955. The five respondents filed motions to suppress evidence derived from the wire interception. After an evidentiary hearing on the motions, the District Court suppressed as to respondents Donovan, Robbins, and Buzzaco all evidence derived from the December 26 intercept order on the ground that failure to identify them by name in the application and order of that date violated 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a). With respect to Merlo and Lauer, who were not known to the Government until after the December 26 application, the District Court suppressed all evidence derived from both intercept orders on the ground that they had not been served with inventory notice.

The Court of Appeals for the Sixth Circuit affirmed. 513 F. 2d 337 (1975).⁸ On the identification issue, the court held that the wiretap application must identify every person whose conversations relating to the subject criminal activity the Government has probable cause to believe it will intercept. Agreeing with the District Court that at the time of the December 26 application the Government had

⁷ Although respondents Merlo and Lauer were not served with inventory notice pursuant to § 2518 (8)(d), the intercept orders, applications, and related papers were made available to all the defendants, including Merlo and Lauer, on November 26, 1973. Thus, the introduction into evidence at trial of the contents of the intercepted conversations and evidence derived therefrom would not be prohibited by 18 U. S. C. § 2518 (9).

⁸ The Government filed its appeal from the District Court's order suppressing evidence under 18 U. S. C. § 3731, and there has been no trial on the charges with respect to the respondents.

probable cause to believe that it would overhear Donovan, Robbins, and Buzzaco "committing the offense," the Court of Appeals affirmed the suppression of evidence derived from the December 26 order. On the notice question, it held that the Government has an implied statutory duty to inform the issuing judge of the identities of the parties whose conversations were overheard so that he can determine whether discretionary inventory notice should be required.⁹ Because the Government had failed to perform this duty with respect to Merlo and Lauer, the Court of Appeals affirmed the District Court's order suppressing evidence derived from both intercept orders. The court found it unnecessary to determine whether the failure to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application and to name respondents Merlo and Lauer in the proposed inventory notice orders was inadvertent or purposeful, since the mere fact of omission was sufficient to require suppression under 18 U. S. C. § 2518 (10)(a).¹⁰

We granted certiorari to resolve these issues, which concern the construction of a major federal statute, 421 U. S. 907, and now reverse.

II

The United States contends that § 2518 (1)(b)(iv) requires that a wiretap application identify only the principal

⁹ See n. 6, *supra*.

¹⁰ 18 U. S. C. § 2518 (10)(a) provides in pertinent part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

target of the interception, and that § 2518 (8)(d) does not require the Government to provide the issuing judge with a list of all identifiable persons who were overheard in the course of an authorized interception. We think neither contention is sound.

A

We turn first to the identification requirements of § 2518 (1)(b)(iv). That provision requires a wiretap application to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." In construing that language, this Court already has ruled that the Government is not required to identify an individual in the application unless it has probable cause to believe (i) that the individual is engaged in the criminal activity under investigation and (ii) that the individual's conversations will be intercepted over the target telephone. *United States v. Kahn*, 415 U.S. 143 (1974). The question at issue here is whether the Government is required to name *all* such individuals.¹¹

The United States argues that the most reasonable in-

¹¹ Every Court of Appeals that has considered the issue has concluded that an individual whose conversations probably will be intercepted by a wiretap must be identified in the wiretap application if the law enforcement authorities have probable cause to believe the individual is committing the offense for which the wiretap is sought. *United States v. Chiarizio*, 525 F. 2d 289, 292 (CA2 1975); *United States v. Bernstein*, 509 F. 2d 996 (CA4 1975), petition for cert. filed, No. 74-1486; *United States v. Doolittle*, 507 F. 2d 1368, aff'd en banc, 518 F. 2d 500 (CA5 1975), petitions for cert. filed Nos. 75-500, 75-509, 75-513; *United States v. Civella*, 533 F. 2d 1395 (CA8 1976), petitions for cert. filed, Nos. 75-1813, 75-169; *United States v. Russo*, 527 F. 2d 1150, 1156 (CA10 1975), petition for cert. filed, No. 75-1218. See also *United States v. Moore*, — U. S. App. D. C. —, 513 F. 2d 485, 493-494 (1975) (interpreting 28 D. C. Code 547 (s)(2), which is almost identical to the provision at issue here).

A number of these courts have concluded, and respondents Donovan, Robbins, and Buzzaco argue, that our decision in *United States v. Kahn*,

12/1/75
 terpretation of the plain language of the statute is that the application must identify only the principal target of the investigation, who "will almost always be the individual whose phone is monitored." Brief for the United States, at 18. Under this interpretation, if the Government has reason to believe that an individual will use the target telephone to place or receive calls, and the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation, the individual qualifies as a principal target and must be named in the wiretap application. On the other hand, an individual who uses a different telephone to place calls to or receive calls from the target telephone is not a principal target even if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation. In other words, whether one is a principal target of the investigation depends on whether one operates the target telephone to place or receive calls.¹²

415 U. S. 143 (1974), resolved this identification issue. See *United States v. Chiarizio*, *supra*; *United States v. Moore*, *supra*. Although there is language in *Kahn* suggesting that wiretap applications must identify all such individuals, the identification question presented here was not before us in *Kahn*. The question in that case was whether a wiretap application must identify a known user of the target telephone whose complicity in the criminal activity under investigation was not known at the time of the application. *Kahn* is a relevant, though not controlling, precedent.

¹² The United States does not suggest that regardless of the factual circumstances a wiretap application must identify only a single individual. To the contrary, it concedes that if two or more persons are using the target telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief for the United States, at 18 n. 13.

¹³ Counsel for the United States explained this position succinctly at oral argument: "The critical distinction . . . is one between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other hand." Tr. of Oral Arg., at 13.

Whatever the merits of such a statutory scheme, we find little support for it in the language and structure of Title III or in the legislative history. The statutory language itself refers only to "the person, if known, committing the offense and whose communications are to be intercepted." That description is as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from that telephone. It is true, as the United States suggests, that when read in the context of the other subdivisions of § 2518 (1)(b), an argument can be made that Congress focused in subdivision (iv) on the primary user of the target telephone. But it is also clear from other sections of the statute that Congress expected that wiretap applications would name more than one individual. For example, Title III requires that inventory notice be served upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d) (emphasis added). And § 2518 (1)(e) requires that an intercept application disclose all previous intercept applications "involving *any of the same persons . . . specified in the application*" (emphasis added). It may well be that Congress anticipated that a given application would cover more than one telephone or that several suspects would use one telephone, and that an application for those reasons alone would require identification of more than one individual. But nothing on the face of the statute suggests that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application.²⁴

²⁴ Indeed, the contrary conclusion is suggested by the fact that identification of an individual in an application for an intercept order triggers other statutory provisions. First, § 2518 (1)(e) requires an intercept application to disclose all previous applications "involving any of the same persons . . . specified in the application." To the extent that Congress thought it necessary to provide the issuing judge with

Nor can we find support in the legislative history for the "principal target" interpretation. Title III originated as a combination of S. 675, the Federal Wire Interception Act, which was introduced by Senator McClellan several months prior to this Court's decision in *Berger v. New York*, 388 U. S. 41 (1967), and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska a few days after the *Berger* decision. S. Rep. No. 1067, 90th Cong., 2d Sess., 66 (1968). Both bills required that wiretap applications include a full and complete statement of the facts and circumstances relied upon by the applicant and specification of the nature and location of the communication facilities involved. Although neither bill contained an express identification requirement such as that at issue here, both bills required the application to include "a full and complete statement of the facts concerning all previous applications . . . involving any person named in the application as committing, having committed, or being about to commit an offense." Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., at 77, § 8 (a)(3) and 1006, § 2518 (a)(4) (1967) (emphasis added). Thus, even at this early stage, it was recognized that an application could identify several individuals, and there is no indication that the identification would be limited to principal targets.

S. 971 combined the major provisions of S. 675 and S. 2050 and eventually was enacted. While it was pending before the Senate Judiciary Committee, this Court decided *Katz*

such information, there is no indication of congressional intent to require provision of such information only if a suspect operated from one end of a telephone line. Second, § 2518 (8)(d) mandates that an inventory notice be served upon "the persons named in the order or the application." As with § 2518 (1)(e), the congressional purpose would not be served by limiting that notice on the basis of the telephone from which one speaks.

v. *United States*, 389 U. S. 347 (1967). S. 971 was then redrafted to conform to *Katz* as well as *Berger*, and the identification provision was added at that time. The Senate Report states that the requirements set forth in the various subdivisions of § 2518 (1)(b), including the identification requirement at issue here, "[were] intended to reflect the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968), citing *Berger v. New York*, 388 U. S. 41, 58-60, and *Katz v. United States*, 389 U. S. 347, 354-356 (1967). The United States now contends that although it may be that Congress read *Berger* and *Katz* to require, as a constitutional matter, that the subject of the surveillance be named if known, Congress would hardly have read those cases as requiring the naming of all parties likely to be overheard.¹⁴ Brief, at 25-26. But to the extent that Congress thought it was meeting the constitutional commands of particularization established *Berger* and *Katz*, Congress may have read those cases as mandating a broad identification requirement. The statute that we confronted in *Berger* required identification of "the person or persons" whose communications were to be overheard. 388 U. S., at 59. And we expressly noted that that provision "[did] no more than identify the person whose constitutionally protected area is to be invaded" *Ibid.* Given the statute at issue in *Berger* and our comment upon it,

¹⁴ At the time of the enactment of Title III, Congress did not have before it the view we expressed on this issue in *United States v. Kahn*, 415 U. S., at 155 n. 15. The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized. It is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named. Specification of this sort "identif[ies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." *Berger v. New York*, 388 U. S. 41, 59 (1967).

Congress may have concluded that the Constitution required the naming, in a wiretap application, of all suspects rather than just the primary user.¹⁶

In any event, for our present purposes it is unnecessary to speculate as to exactly how Congress interpreted *Berger* and *Katz* with respect to the identification issue. It is sufficient to note that in response to those decisions Congress included an identification requirement which on its face draws no distinction based on the telephone one uses, and the United States points to no evidence in the legislative history that supports such a distinction. Indeed, the legislative materials apparently contain no use of the term "principal target" or any discussion of a different treatment based on the telephone from which a suspect speaks.¹⁷ We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone.

B

The other statutory provision at issue in this case is

¹⁶ That Congress may have so understood the constitutional requirement is also suggested by the portion of the Senate Report dealing with that provision of S. 971 that required the intercept order to identify "the person, if known, whose conversations are to be intercepted." The Senate Report merely cites *West v. Cabell*, 153 U. S. 78 (1894), which concerns the need for proper identification of the subject of an arrest warrant. S. Rep. No. 1067, 90th Cong., 2d Sess., 102 (1968). To the extent that Congress may have considered *West* to apply to wiretap orders, we have no reason to believe that Congress considered its applicability to extend only to those suspects using the target telephone.

¹⁷ At least one Senator read the identification requirement in S. 971 to parallel the identification requirement contained in the statute at issue in *Berger v. New York*: "Specificity is required as to the person or persons whose communications are to be intercepted." 114 Cong. Rec., at 14763 (1968) (remarks of Sen. Percy).

18 U. S. C. § 2518 (8)(d), which provides that the judge shall cause to be served on the persons named in the order or application an inventory, which must give notice of the entry of the order or application, state the disposition of the application, and indicate whether communications were intercepted.¹⁸ Although the statute mandates inventory notice only for persons named in the application or the order, the statute also provides that the judge may order similar notice to other parties to intercepted communications if he concludes that such action is in the interest of justice.¹⁹ Observing that this notice provision does not expressly require law enforcement authorities routinely to supply the judge with specific information upon which to exercise his discretion, the United States contends that it would be inappropriate to read such a requirement into the statute since the judge has the option of asking the law enforcement authorities for whatever information he requires.

Our reading of the legislative history of the discretionary notice provision in light of the purposes of Title III leads us to reject the Government's interpretation. As reported from the Judiciary Committee, section 2518 (8)(d) contained only a provision mandating notice to the persons named in the application or the order; the discretionary notice provision was added by amendment on the floor of the Senate.

¹⁸ The inventory notice must be served within a reasonable time but not later than 90 days after the date the application for an intercept order was filed. On an *ex parte* showing of good cause, service of the inventory may be postponed.

¹⁹ In addition to these provisions for mandatory and discretionary inventory notice, the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions, 18 U. S. C. § 2518 (8)(a). These notice and return provisions satisfy constitutional requirements. See *Katz v. United States*, 389 U. S. 347, 355-356, and n. 16 (1967); *Berger v. New York*, 388 U. S. 41, 60 (1967).

In introducing that amendment, Senator Hart explained its purpose:

"The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted conversations, even though such parties are not specifically named in the court order. The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute. It may be that the required notice must be served on all parties to intercepted communications. Since legitimate interests of privacy may make such notice to all parties undesirable, the amendment leaves the final determination to the judge." 114 Cong. Rec. 14485-14486 (1968).²⁰

In deciding whether legitimate privacy interests justify withholding inventory notice from parties to intercepted conversations, a judge is likely to require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities. No purpose is served by holding that those authorities have no routine duty to supply the judge with revelant information. The Court of Appeals for the Ninth Circuit recently confronted this problem of

²⁰ It is worth noting that shortly before Senator Hart proposed this amendment to S. 971, Senator Long had read to the Senate portions of a report prepared by the Association of the Bar of the City of New York on federal wiretap legislation. That report commented that parties to intercepted conversations other than those named in the application or order probably should be served with inventory notice, but it also recognized that under some circumstances the provision of such notice could be harmful and gave the following example:

"A, a businessman, talks to his customers, and the latter are served with papers showing that A is being bugged[.] [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory." 114 Cong. Rec. 14476 (1968).

dual responsibility, and we adopt the balanced construction that court placed on § 2518 (8)(d):

"To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted conversation is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although the judicial officer has the duty to cause the filing of the inventory [notice], it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his statutory § 2518 (8)(d) discretion, . . . the government is also required to furnish such information as is available to it." *United States v. Chun*, 503 F. 2d 533, 540 (1974).²¹

We agree with the Ninth Circuit that this allocation of responsibility best serves the purposes of Title III.²²

²¹ The current policy of the Department of Justice is to provide the issuing judge with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment. Brief for the United States, at 39. This policy does not meet the test specified above. Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete.

²² At oral argument, counsel for the United States recognized the merit of the approach specified in *United States v. Chun*:

"Perhaps the approach of the Court of Appeals for the Ninth Circuit,

III

We turn now to the question whether the District Court properly suppressed evidence derived from the wiretaps at issue solely because of the failure of the law enforcement authorities to comply fully with the provisions of §§ 2518 (1) (b)(iv) and 2518 (8)(d). Section 2515 expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518 (10)(a):

- "(i) the communication was unlawfully intercepted;
- "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- "(iii) the interception was not made in conformity with the order of authorization or approval."

There is no basis on the facts of this case to suggest that the authorization orders are facially insufficient, or that the interception was not conducted in conformity with the orders. Thus, only § 2518 (10)(a)(i) is relevant: were the communications "unlawfully intercepted" given the violations of §§ 2518 (1)(b)(iv) and 2518 (8)(d)?³⁸

Resolution of that question must begin with *United States*

which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this regard." Tr. of Oral Arg., at 6-7.

³⁸ The availability of the suppression remedy for these statutory, as opposed to constitutional, violations, see nn. 15 and 19, *supra*, turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. *United States v. Giordano*, *supra*, 416 U. S., at 524.

v. *Giordano*, 416 U. S. 505 (1974), and *United States v. Chavez*, 416 U. S. 562 (1974). Those cases hold that "[not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" *United States v. Chavez*, 416 U. S., at 574-575. To the contrary, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States v. Giordano*, 416 U. S., at 527.

Giordano concerned the provision in Title III requiring that an application for an intercept order be approved by the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Concluding that Congress intended to condition the use of wiretap procedures on the judgment of senior officials in the Department of Justice, the Court required suppression for failure to comply with the approval provision. *Chavez* concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application. The problem in *Chavez* was one of misidentification; although the application had in fact been authorized by the Attorney General, the application erroneously identified an Assistant Attorney General as the official authorizing the application. The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of § 2518 (10) (a)(i) since that identification requirement did not play a "substantive role" in the regulatory system. 416 U. S., at 578.

In the instant case, the Court of Appeals concluded that both the identification requirement of § 2518 (1)(b)(iv) and the notice requirement of § 2515 (8)(d) played a "central

role" in the statutory framework, and for that reason affirmed the District Court's order suppressing relevant evidence. Although both statutory requirements are undoubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements.

A

As to § 2518 (1)(b)(iv), the issue is whether the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a "substantive role" with respect to judicial authorization of intercept orders and consequently imposes a limitation on the use of intercept procedures. The statute provides that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities. If, after evaluating the statutorily enumerated factors in light of the information contained in the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. The intercept order may issue only if the issuing judge determines that the statutory factors are present, and the failure to name additional targets in no way detracts from the sufficiency of those factors.

This case is unlike *Giordano*, where failure to satisfy the statutory requirement of prior approval by specified

Justice Department officials bypassed a congressionally imposed limitation on the use of the intercept procedure. The Court there noted that it was reasonable to believe that requiring prior approval from senior officials in the Justice Department "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." 416 U. S., at 528. Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept.²⁴ Rather, this case resembles *Chavez*, where we held that a wiretap was not unlawful simply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The *Chavez* intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied.²⁵

²⁴ There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzzaco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. Nor is there any suggestion that as a result of the failure to name these three respondents they were denied the mandatory inventory notice supplied to persons named in the application. 18 U. S. C. § 2518 (8)(d). Respondents Donovan, Robbins, and Buzzaco were among the 37 persons served with the initial inventory.

²⁵ No one suggests that the failure to identify in a wiretap application individuals who are "unknown" within the meaning of the statute, see *United States v. Kahn*, 415 U. S. 143 (1974), requires suppression of intercepted conversations to which those individuals were parties. Though

Finally, we note that nothing in the legislative history suggests that Congress intended this broad identification requirement to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *United States v. Chavez*, 416 U. S., at 578. Neither S. 675 nor S. 2050, the predecessor bills of S. 971, contained an identification provision. See p. 11, *supra*. The only explanation given in the Senate Report for the inclusion of the broad identification provision was that it was intended to reflect what Congress perceived to be the constitutional command of particularization. This explanation was offered with respect to all the information required by § 2518 (1)(6) to be set out in an intercept application. No additional guidance can be gleaned from the floor debates, since they contain no substantive discussion of the identification provision.²⁸

recognizing that the failure to identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, respondents Donovan, Robbins, and Buszaco suggest that the opposite is true with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified by analogy to warrantless searches or arrests. Tr. of Oral Arg., at 40. Although law enforcement officials can often take action without a warrant when they have been unable to foresee the circumstances that eventually confronted them, they still must obtain a search or arrest warrant when their prior knowledge is sufficient to establish probable cause, and it is suggested that the same principle applies here. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

²⁸ Even if we assume that Congress thought that a broad identification requirement was constitutionally mandated, it does not follow that

B

We reach the same conclusion with respect to the Government's duty to inform the judge of all identifiable persons whose conversations were intercepted. As noted earlier, the version of Title III that emerged from the Senate Judiciary Committee provided only for mandatory notice to the "persons named in the order or the application." The Senate Report detailed the purpose of that provision:

"[T]he intent of the provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress, for example, under section 2520 . . . if he feels that his privacy has been unlawfully invaded." S. Rep. No. 1097, 90th Cong., 2d Sess., 105 (1968).

The floor discussion concerning the amendment adding the provision for discretionary notice merely indicates an intent to provide notice to such additional persons as may be constitutionally required.

Nothing in the structure of the Act or this legislative history suggests that incriminating conversations are "unlaw-

Congress imposed statutory suppression under §§ 2515 and 2518 (10) (a) (i) as a sanction for noncompliance. In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No. 107, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a District Court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone. This requirement was satisfied here when the application set forth sufficient information to indicate that the primary targets were conducting a gambling business over four particular telephones. Nothing in the legislative history indicates that Congress intended to declare an otherwise constitutional intercept order "unlawful" under § 2518 (10) (a) (i)—resulting in suppression under § 2515—for failure to name additional targets.

fully intercepted" whenever parties to those conversations do not receive discretionary inventory notice as a result of the Government's failure to inform the District Court of their identities. At the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order. The fact that discretionary notice reached 39 rather than 41 identifiable persons does not in itself mean that the conversations were unlawfully intercepted."

The legislative history indicates that postintercept notice was designed instead to assure the community that the wiretap technique is reasonably employed. But even recognizing that Congress placed considerable emphasis on that aspect of the overall statutory scheme, we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure.

IV

Although the Government was required to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application for an extension of the initial intercept, failure

²⁷ Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional, Tr. of Oral Arg., at 32, and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notices on particular parties. Nor does this case present an opportunity to comment upon the suggestion, recognized by the United States, Brief, at 49 n. 40, that suppression might be required if the agents knew before the interception that no inventory would be served.

Moreover, respondents Merlo and Lauer were not prejudiced by their failure to receive postintercept notice under either of the District Court's inventory orders. As noted earlier, the Government made available to all defendants the intercept orders, applications, and related papers. See n. 7, *supra*. And in response to pretrial discovery motions, the Government produced transcripts of the intercepted conversations.

to do so in the circumstances here presented did not warrant suppression under § 2518 (10)(a)(i). Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard. We hold that this is the correct result under the provisions of Title III, but we re-emphasize the suggestion we made in *United States v. Chavez*, that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." 416 U. S., at 580.

The order of the Court of Appeals is reversed and the case is remanded to that court for further proceedings in accord with this opinion.

It is so ordered.

8, 9, 12, 16, 17, 20, 21, 23

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: DEC 7 1976

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SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Thomas W. Donovan et al. | peals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title

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III.¹ The application requested authorization to intercept gambling-related communications over two telephones at one address in North Olmstead, Ohio, and two other telephones

¹The wiretap application procedure is set forth at 18 U. S. C. § 2518 (1), which provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (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 where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) 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;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

The issuing judge is free to require the applicant to furnish additional information. 18 U. S. C. § 2518 (2).

at a home in Canton, Ohio. The accompanying affidavit recited that the telephones were being used by Albert Kotoch, Joseph Spaganlo, and George Florea to conduct an illegal gambling business, and that in conducting that business they would place calls to and receive calls from various persons, three of whom were also named in the wiretap application.² The affiant also stated that the Government's informants would refuse to testify against the persons named in the application, that telephone records alone would be insufficient to support a gambling conviction, and that normal investigative techniques were unlikely to be fruitful. Pursuant to the Government's request, the District Court authorized for a period of 15 days the interception of gambling-related wire communications of Kotoch, Spaganlo, Florea, three named individuals other than the respondents, and "others as yet unknown," to and from the four listed telephones.³

² The affidavit set forth extensive information indicating that the named individuals were conducting a gambling operation. This information was derived from physical surveillance by agents of the FBI, an examination of telephone company toll records, and the personal observations of six informants, whose past reliability also was detailed in the affidavit.

³ The District Court's order was issued pursuant 18 U. S. C. §§ 2518 (3), (4) which provide in pertinent part:

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted

During the course of the wiretap, the Government learned that respondents Donovan, Robbins, and Buzzaco were discussing illegal gambling activities with the named subjects. On December 26, 1972, the Government applied for an extension of the initial intercept order.⁴ This time it sought authorization to intercept gambling-related conversations of Kotoch, Spaganlo, Florea, two other named individuals, and "others as yet unknown," but it did not identify respondents

are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

⁴ In addition to the December 26 application requesting an extension of the initial intercept order, the Government also filed on that date a separate application seeking authorization to monitor a third telephone discovered at the same North Olmstead address. Both applications were accompanied by another affidavit setting forth the results of the initial monitoring, the manner in which the third phone was discovered, the facts indicating that the newly discovered telephone was being used to conduct a gambling business, and reasons why continued interception was necessary. A copy of the affidavit filed on November 28 was also attached to the December 26 applications. For the sake of clarity, the two applications filed on December 26 will be treated as a single application.

Donovan, Buzzaco, and Robbins in this second application.² The District Court again authorized interception of gambling-related conversations for a maximum of 15 days.

On February 21, 1973, the Government submitted to the District Court a proposed order giving notice of the interceptions to 37 persons, a group which the Government apparently thought included all individuals who could be identified as having discussed gambling over the monitored telephones.³ The District Court signed the proposed order, and an inventory notice was served on the listed persons, including respondents Donovan, Buzzaco, and Robbins. On September 11, 1973, after the Government submitted the names of two additional persons whose identities allegedly had been omitted inadvertently from the initial list, the District Court entered an amended order giving notice to those individuals. As a result of what the Government labels "administrative oversight," respondents Merlo and Lauer

² The United States conceded in the Court of Appeals that respondents Donovan and Robbins were "known" within the meaning of the statute at the time of the December 26 application, but challenged as clearly erroneous the District Court's finding that respondent Buzzaco was "known" at that time. The Court of Appeals upheld the District Court's finding, and the United States has not sought review of that disposition. Thus, for our purposes, all three respondents were "known" on December 26.

³ An inventory notice must be served within a designated period of time upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d). The inventory must give notice of the entry of the intercept order or application, state the disposition of the application, and indicate whether communications were or were not intercepted. *Ibid.* Upon the filing of a motion, the judge has discretion to make available the intercepted communications, the applications, and the orders. *Ibid.*

Title III also authorizes the District Court to cause an inventory notice to be served on "other parties to intercepted communications" if the judge determines that such notice is in the interest of justice. *Ibid.* Those other parties may also be given access to the intercepted communications, the applications, and the orders. *Ibid.*

were not included in either list of names and were never served with inventory notice.⁷

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Kotoch, Spaganlo, the five respondents, and 10 other individuals with conspiracy to conduct and conducting a gambling business in violation of 18 U. S. C. §§ 371 and 1955. The five respondents filed motions to suppress evidence derived from the wire interception. After an evidentiary hearing on the motions, the District Court suppressed as to respondents Donovan, Robbins, and Buzzaco all evidence derived from the December 26 intercept order on the ground that failure to identify them by name in the application and order of that date violated 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a). With respect to Merlo and Lauer, who were not known to the Government until after the December 26 application, the District Court suppressed all evidence derived from both intercept orders on the ground that they had not been served with inventory notice.

The Court of Appeals for the Sixth Circuit affirmed. 513 F. 2d 337 (1975).⁸ On the identification issue, the court held that the wiretap application must identify every person whose conversations relating to the subject criminal activity the Government has probable cause to believe it will intercept. Agreeing with the District Court that at the time of the December 26 application the Government had

⁷ Although respondents Merlo and Lauer were not served with inventory notice pursuant to § 2518 (8)(d), the intercept orders, applications, and related papers were made available to all the defendants, including Merlo and Lauer, on November 26, 1973. Thus, the introduction into evidence at trial of the contents of the intercepted conversations and evidence derived therefrom would not be prohibited by 18 U. S. C. § 2518 (9).

⁸ The Government filed its appeal from the District Court's order suppressing evidence under 18 U. S. C. § 3731, and there has been no trial on the charges with respect to the respondents.

probable cause to believe that it would overhear Donovan, Robbins, and Buzzaco "committing the offense," the Court of Appeals affirmed the suppression of evidence derived from the December 26 order. On the notice question, it held that the Government has an implied statutory duty to inform the issuing judge of the identities of the parties whose conversations were overheard so that he can determine whether discretionary inventory notice should be required.⁹ Because the Government had failed to perform this duty with respect to Merlo and Lauer, the Court of Appeals affirmed the District Court's order suppressing evidence derived from both intercept orders. The court found it unnecessary to determine whether the failure to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application and to name respondents Merlo and Lauer in the proposed inventory notice orders was inadvertent or purposeful, since the mere fact of omission was sufficient to require suppression under 18 U. S. C. § 2518 (10)(a).¹⁰

We granted certiorari to resolve these issues, which concern the construction of a major federal statute, 421 U. S. 907, and now reverse.

II

The United States contends that § 2518 (1)(b)(iv) requires that a wiretap application identify only the principal

⁹ See n. 6, *supra*.

¹⁰ 18 U. S. C. § 2518 (10)(a) provides in pertinent part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

target of the interception, and that § 2518 (8)(d) does not require the Government to provide the issuing judge with a list of all identifiable persons who were overheard in the course of an authorized interception. We think neither contention is sound.

A

We turn first to the identification requirements of § 2518 (1)(b)(iv). That provision requires a wiretap application to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." In construing that language, this Court already has ruled that the Government is not required to identify an individual in the application unless it has probable cause to believe (i) that the individual is engaged in the criminal activity under investigation and (ii) that the individual's conversations will be intercepted over the target telephone. *United States v. Kahn*, 415 U. S. 143 (1974). The question at issue here is whether the Government is required to name *all* such individuals.¹¹

The United States argues that the most reasonable in-

¹¹ Every Court of Appeals that has considered the issue has concluded that an individual whose conversations probably will be intercepted by a wiretap must be identified in the wiretap application if the law enforcement authorities have probable cause to believe the individual is committing the offense for which the wiretap is sought. *United States v. Chiarizio*, 525 F. 2d 259, 292 (CA2 1975); *United States v. Bernstein*, 509 F. 2d 996 (CA4 1975), petition for cert. filed, No. 74-1486; *United States v. Dookittle*, 507 F. 2d 1365, aff'd en banc, 518 F. 2d 600 (CA5 1975), petitions for cert. filed Nos. 75-500, 75-509, 75-513; *United States v. Civella*, 533 F. 2d 1395 (CA8 1976), petitions for cert. filed, Nos. 75-1813, 76-169; *United States v. Russo*, 527 F. 2d 1150, 1156 (CA10 1975), ~~petition for cert. filed, No. 75-1916~~. See also *United States v. Moore*, — U. S. App. D. C. —, 513 F. 2d 485, 493-494 (1975) (interpreting 23 D. C. Code 547 (a)(2), which is almost identical to the provision at issue here).

A number of these courts have concluded, and respondents Donovan, Robbins, and Buzzaco argue, that our decision in *United States v. Kahn*,

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(1976).

(u) interpretation of the plain language of the statute is that the application must identify only the principal target of the investigation, who "will almost always be the individual whose phone is monitored." Brief for the United States, at 18. Under this interpretation, if the Government has reason to believe that an individual will use the target telephone to place or receive calls, and the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation, the individual qualifies as a principal target and must be named in the wiretap application. On the other hand, an individual who uses a different telephone to place calls to or receive calls from the target telephone is not a principal target even if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation. In other words, whether one is a principal target of the investigation depends on whether one operates the target telephone to place or receive calls.¹²

415 U. S. 143 (1974), resolved this identification issue. See *United States v. Chiarizio*, *supra*; *United States v. Moore*, *supra*. Although there is language in *Kahn* suggesting that wiretap applications must identify all such individuals, the identification question presented here was not before us in *Kahn*. The question in that case was whether a wiretap application must identify a known user of the target telephone whose complicity in the criminal activity under investigation was not known at the time of the application. *Kahn* is a relevant, though not controlling, precedent.

¹² The United States does not suggest that regardless of the factual circumstances a wiretap application must identify only a single individual. To the contrary, it concedes that if two or more persons are using the target telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief for the United States, at 18 n. 13.

¹³ Counsel for the United States explained this position succinctly at oral argument: "The critical distinction . . . is one between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other hand." Tr. of Oral Arg., at 13.

Whatever the merits of such a statutory scheme, we find little support for it in the language and structure of Title III or in the legislative history. The statutory language itself refers only to "the person, if known, committing the offense and whose communications are to be intercepted." That description is as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from that telephone. It is true, as the United States suggests, that when read in the context of the other subdivisions of § 2518 (1)(b), an argument can be made that Congress focused in subdivision (iv) on the primary user of the target telephone. But it is also clear from other sections of the statute that Congress expected that wiretap applications would name more than one individual. For example, Title III requires that inventory notice be served upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d) (emphasis added). And § 2518 (1)(e) requires that an intercept application disclose all previous intercept applications "involving any of the same persons . . . specified in the application" (emphasis added). It may well be that Congress anticipated that a given application would cover more than one telephone or that several suspects would use one telephone, and that an application for those reasons alone would require identification of more than one individual. But nothing on the face of the statute suggests that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application.¹⁴

¹⁴ Indeed, the contrary conclusion is suggested by the fact that identification of an individual in an application for an intercept order triggers other statutory provisions. First, § 2518 (1)(e) requires an intercept application to disclose all previous applications "involving any of the same persons . . . specified in the application." To the extent that Congress thought it necessary to provide the issuing judge with

Nor can we find support in the legislative history for the "principal target" interpretation. Title III originated as a combination of S. 675, the Federal Wire Interception Act, which was introduced by Senator McClellan several months prior to this Court's decision in *Berger v. New York*, 388 U. S. 41 (1967), and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska a few days after the *Berger* decision. S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968). Both bills required that wiretap applications include a full and complete statement of the facts and circumstances relied upon by the applicant and specification of the nature and location of the communication facilities involved. Although neither bill contained an express identification requirement such as that at issue here, both bills required the application to include "a full and complete statement of the facts concerning all previous applications . . . involving any person named in the application as committing, having committed, or being about to commit an offense." Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., at 77, § 8 (a)(3) and 1006, § 2518 (a)(4) (1967) (emphasis added). Thus, even at this early stage, it was recognized that an application could identify several individuals, and there is no indication that the identification would be limited to principal targets.

S. 971 combined the major provisions of S. 675 and S. 2050 and eventually was enacted. While it was pending before the Senate Judiciary Committee, this Court decided *Katz*

such information, there is no indication of congressional intent to require provision of such information only if a suspect operated from one end of a telephone line. Second, § 2518 (8)(d) mandates that an inventory notice be served upon "the persons named in the order or the application." As with § 2518 (1)(e), the congressional purpose would not be served by limiting that notice on the basis of the telephone from which one speaks,

v. *United States*, 389 U. S. 347 (1967). S. 971 was then redrafted to conform to *Katz* as well as *Berger*, and the identification provision was added at that time. The Senate Report states that the requirements set forth in the various subdivisions of § 2518 (1)(b), including the identification requirement at issue here, "[were] intended to reflect the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968), citing *Berger v. New York*, 388 U. S. 41, 58-60, and *Katz v. United States*, 389 U. S. 347, 354-356 (1967). The United States now contends that although it may be that Congress read *Berger* and *Katz* to require, as a constitutional matter, that the subject of the surveillance be named if known, Congress would hardly have read those cases as requiring the naming of all parties likely to be overheard.¹⁵ Brief, at 25-26. But to the extent that Congress thought it was meeting the constitutional commands of particularization established in *Berger* and *Katz*, Congress may have read those cases as mandating a broad identification requirement. The statute that we confronted in *Berger* required identification of "the person or persons" whose communications were to be overheard. 388 U. S., at 59. And we expressly noted that that provision "[did] no more than identify the person whose constitutionally protected area is to be invaded" *Ibid.* Given the statute at issue in *Berger* and our comment upon it,

¹⁵ At the time of the enactment of Title III, Congress did not have before it the view we expressed on this issue in *United States v. Kahn*, 415 U. S., at 155 n. 15. The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized. It is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named. Specification of this sort "identif[ies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." *Berger v. New York*, 388 U. S. 41, 59 (1967).

Congress may have concluded that the Constitution required the naming, in a wiretap application, of all suspects rather than just the primary user.¹⁶

In any event, for our present purposes it is unnecessary to speculate as to exactly how Congress interpreted *Berger* and *Katz* with respect to the identification issue. It is sufficient to note that in response to those decisions Congress included an identification requirement which on its face draws no distinction based on the telephone one uses, and the United States points to no evidence in the legislative history that supports such a distinction. Indeed, the legislative materials apparently contain no use of the term "principal target" or any discussion of a different treatment based on the telephone from which a suspect speaks.¹⁷ We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone. ~~§~~

~~§~~ Stet

B

The other statutory provision at issue in this case is

¹⁶ That Congress may have so understood the constitutional requirement is also suggested by the portion of the Senate Report dealing with that provision of S. 971 that required the intercept order to identify "the person, if known, whose conversations are to be intercepted." The Senate Report merely cites *West v. Cabell*, 153 U. S. 78 (1894), which concerns the need for proper identification of the subject of an arrest warrant. S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968). To the extent that Congress may have considered *West* to apply to wiretap orders, we have no reason to believe that Congress considered its applicability to extend only to those suspects using the target telephone.

¹⁷ At least one Senator read the identification requirement in S. 971 to parallel the identification requirement contained in the statute at issue in *Berger v. New York*: "Specificity is required as to the person or persons whose communications are to be intercepted." 114 Cong. Rec., at 14763 (1968) (remarks of Sen. Percy).

~~§ 114 Cong. Rec., at 14763 (1968) (remarks of Sen. Percy).~~

18 U. S. C. § 2518 (8)(d), which provides that the judge shall cause to be served on the persons named in the order or application an inventory, which must give notice of the entry of the order or application, state the disposition of the application, and indicate whether communications were intercepted.¹⁸ Although the statute mandates inventory notice only for persons named in the application or the order, the statute also provides that the judge may order similar notice to other parties to intercepted communications if he concludes that such action is in the interest of justice.¹⁹ Observing that this notice provision does not expressly require law enforcement authorities routinely to supply the judge with specific information upon which to exercise his discretion, the United States contends that it would be inappropriate to read such a requirement into the statute since the judge has the option of asking the law enforcement authorities for whatever information he requires.

Our reading of the legislative history of the discretionary notice provision in light of the purposes of Title III leads us to reject the Government's interpretation. As reported from the Judiciary Committee, section 2518 (8)(d) contained only a provision mandating notice to the persons named in the application or the order; the discretionary notice provision was added by amendment on the floor of the Senate.

¹⁸ The inventory notice must be served within a reasonable time but not later than 90 days after the date the application for an intercept order was filed. On an *ex parte* showing of good cause, service of the inventory may be postponed.

¹⁹ In addition to these provisions for mandatory and discretionary inventory notice, the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions, 18 U. S. C. § 2518 (8)(a). These notice and return provisions satisfy constitutional requirements. See *Katz v. United States*, 389 U. S. 347, 355-356, and n. 16 (1967); *Berger v. New York*, 388 U. S. 41, 60 (1967).

In introducing that amendment, Senator Hart explained its purpose:

"The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted conversations, even though such parties are not specifically named in the court order. The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute. It may be that the required notice must be served on all parties to intercepted communications. Since legitimate interests of privacy may make such notice to all parties undesirable, the amendment leaves the final determination to the judge." 114 Cong. Rec. 14485-14486 (1968).²⁰

In deciding whether legitimate privacy interests justify withholding inventory notice from parties to intercepted conversations, a judge is likely to require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities. No purpose is served by holding that those authorities have no routine duty to supply the judge with relevant information. The Court of Appeals for the Ninth Circuit recently confronted this problem of

²⁰ It is worth noting that shortly before Senator Hart proposed this amendment to S. 971, Senator Long had read to the Senate portions of a report prepared by the Association of the Bar of the City of New York on federal wiretap legislation. That report commented that parties to intercepted conversations other than those named in the application or order probably should be served with inventory notice, but it also recognized that under some circumstances the provision of such notice could be harmful and gave the following example:

"A, a businessman, talks to his customers, and the latter are served with papers showing that A is being bugged[.] [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory." 114 Cong. Rec. 14476 (1968).

dual responsibility, and we adopt the balanced construction that court placed on § 2518 (8)(d):

"To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted conversation is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although the judicial officer has the duty to cause the filing of the inventory [notice], it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his statutory § 2518 (8)(d) discretion, . . . the government is also required to furnish such information as is available to it." *United States v. Chun*, 503 F.2d 533, 540 (1974). /9/

We agree with the Ninth Circuit that this allocation of responsibility best serves the purposes of Title III. (21)

²¹ The current policy of the Department of Justice is to provide the issuing judge with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment. Brief for the United States, at 39. This policy does not meet the test specified above. Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete.

21) At oral argument, counsel for the United States recognized the merit of the approach specified in *United States v. Chun*:

"Perhaps the approach of the Court of Appeals for the Ninth Circuit,

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Currently, the policy of the Justice Department is to provide the issuing judge with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment. Brief for the United States, at 39. Because it fails to assure that the necessary range of information will be before the issuing judge, this policy does not meet the test set out in Chun. Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete. Applying these principles, we find that the Government did not comply adequately with § 2518(8)(d), since the names of respondents Merlo and Lauer were not included on the purportedly complete list of identifiable persons submitted to the issuing judge. ~~[Footnote about the irrelevance of the Government's good or bad faith? The SG argues this point in both the violation section and the suppression section, I thought.]~~

v. *Giordano*, 416 U. S. 505 (1974), and *United States v. Chavez*, 416 U. S. 562 (1974). Those cases hold that "[not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" *United States v. Chavez*, 416 U. S., at 574-575. To the contrary, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States v. Giordano*, 416 U. S., at 527.

Giordano concerned the provision in Title III requiring that an application for an intercept order be approved by the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Concluding that Congress intended to condition the use of wiretap procedures on the judgment of senior officials in the Department of Justice, the Court required suppression for failure to comply with the approval provision. *Chavez* concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application. The problem in *Chavez* was one of misidentification; although the application had in fact been authorized by the Attorney General, the application erroneously identified an Assistant Attorney General as the official authorizing the application. The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of § 2518 (10) (a)(i) since that identification requirement did not play a "substantive role" in the regulatory system. 416 U. S., at 578.

In the instant case, the Court of Appeals concluded that both the identification requirement of § 2518 (1)(b)(iv) and the notice requirement of § 2515 (8)(d) played a "central

role" in the statutory framework, and for that reason affirmed the District Court's order suppressing relevant evidence. Although both statutory requirements are undoubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements.

A

As to § 2518 (1)(b)(iv), the issue is whether the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a "substantive role" with respect to judicial authorization of intercept orders and consequently imposes a limitation on the use of intercept procedures. The statute provides that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities. If, after evaluating the statutorily enumerated factors in light of the information contained in the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. The intercept order may issue only if the issuing judge determines that the statutory factors are present, and the failure to name additional targets in no way detracts from the sufficiency of those factors.

This case is unlike *Giordano*, where failure to satisfy the statutory requirement of prior approval by specified

Justice Department officials bypassed a congressionally imposed limitation on the use of the intercept procedure. The Court there noted that it was reasonable to believe that requiring prior approval from senior officials in the Justice Department "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." 416 U. S., at 528. Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept. ²² Rather, this case resembles *Chavez*, where we held that a wiretap was not unlawful simply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The *Chavez* intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied. ²³ (23)

²³) ²⁵ There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzzaco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. Nor is there any suggestion that as a result of the failure to name these three respondents they were denied the mandatory inventory notice supplied to persons named in the application. 18 U. S. C. § 2518 (8)(d). Respondents Donovan, Robbins, and Buzzaco were among the 37 persons served with the initial inventory. (24)

²⁴) ²⁶ No one suggests that the failure to identify in a wiretap application individuals who are "unknown" within the meaning of the statute, see *United States v. Kahn*, 415 U. S. 143 (1974), requires suppression of intercepted conversations to which those individuals were parties. Though

Finally, we note that nothing in the legislative history suggests that Congress intended this broad identification requirement to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *United States v. Chavez*, 416 U. S., at 578. Neither S. 675 nor S. 2050, the predecessor bills of S. 971, contained an identification provision. See p. 11, *supra*. The only explanation given in the Senate Report for the inclusion of the broad identification provision was that it was intended to reflect what Congress perceived to be the constitutional command of particularization. This explanation was offered with respect to all the information required by § 2518 (1)(6) to be set out in an intercept application. No additional guidance can be gleaned from the floor debates, since they contain no substantive discussion of the identification provision. ¹² (25)

recognizing that the failure to identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, respondents Donovan, Robbins, and Buzzaco suggest that the opposite is true with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified by analogy to warrantless searches or arrests. Tr. of Oral Arg., at 40. Although law enforcement officials can often take action without a warrant when they have been unable to foresee the circumstances that eventually confronted them, they still must obtain a search or arrest warrant when their prior knowledge is sufficient to establish probable cause, and it is suggested that the same principle applies here. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

25) ¹² Even if we assume that Congress thought that a broad identification requirement was constitutionally mandated, it does not follow that

B

We reach the same conclusion with respect to the Government's duty to inform the judge of all identifiable persons whose conversations were intercepted. As noted earlier, the version of Title III that emerged from the Senate Judiciary Committee provided only for mandatory notice to the "persons named in the order or the application." The Senate Report detailed the purpose of that provision:

"[T]he intent of the provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress, for example, under section 2520 . . . if he feels that his privacy has been unlawfully invaded." S. Rep. No. 1097, 90th Cong., 2d Sess., 105 (1968).

The floor discussion concerning the amendment adding the provision for discretionary notice merely indicates an intent to provide notice to such additional persons as may be constitutionally required.

Nothing in the structure of the Act or this legislative history suggests that incriminating conversations are "unlaw-

Congress imposed *statutory* suppression under §§ 2515 and 2518 (10) (a) (i) as a sanction for noncompliance. In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No. 107, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a District Court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone. This requirement was satisfied here when the application set forth sufficient information to indicate that the primary targets were conducting a gambling business over four particular telephones. Nothing in the legislative history indicates that Congress intended to declare an otherwise constitutional intercept order "unlawful" under § 2518 (10) (a) (i)—resulting in suppression under § 2515—for failure to name additional targets.

fully intercepted" whenever parties to those conversations do not receive discretionary inventory notice as a result of the Government's failure to inform the District Court of their identities. At the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order. The fact that discretionary notice reached 39 rather than 41 identifiable persons does not in itself mean that the conversations were unlawfully intercepted. (26)

The legislative history indicates that postintercept notice was designed instead to assure the community that the wiretap technique is reasonably employed. But even recognizing that Congress placed considerable emphasis on that aspect of the overall statutory scheme, we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure.

IV

Although the Government was required to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application for an extension of the initial intercept, failure

26) { Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional, Tr. of Oral Arg., at 32, and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties. Nor does this case present an opportunity to comment upon the suggestion, recognized by the United States, Brief, at 49 n. 40, that suppression might be required if the agents knew before the interception that no inventory would be served.

Moreover, respondents Merlo and Lauer were not prejudiced by their failure to receive postintercept notice under either of the District Court's inventory orders. As noted earlier, the Government made available to all defendants the intercept orders, applications, and related papers. See n. 7, *supra*. And in response to pretrial discovery motions, the Government produced transcripts of the intercepted conversations.

✓

to do so in the circumstances here presented did not warrant suppression under § 2518 (10)(a)(i). Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard. We hold that this is the correct result under the provisions of Title III, but we re-emphasize the suggestion we made in *United States v. Chavez*, that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." 416 U. S., at 580.

The order of the Court of Appeals is reversed and the case is remanded to that court for further proceedings in accord with this opinion.

It is so ordered.

III

We turn now to the question whether the District Court properly suppressed evidence derived from the wiretaps at issue solely because of the failure of the law enforcement authorities to comply fully with the provisions of §§ 2518 (1) (b)(iv) and 2518 (8)(d). Section 2515 expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518 (10)(a):

- "(i) the communication was unlawfully intercepted;
- "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- "(iii) the interception was not made in conformity with the order of authorization or approval."

There is no basis on the facts of this case to suggest that the authorization orders are facially insufficient, or that the interception was not conducted in conformity with the orders. Thus, only § 2518 (10)(a)(i) is relevant: were the communications "unlawfully intercepted" given the violations of §§ 2518 (1)(b)(iv) and 2518 (8)(d)? aa

Resolution of that question must begin with *United States*

which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this regard." Tr. of Oral Arg., at 8-7.

aa) — 1. The availability of the suppression remedy for these statutory, as opposed to constitutional, violations, see nn. 15 and 19, *supra*, turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. *United States v. Giordano, supra*, 416 U. S., at 524.

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner,	On Writ of Certiorari to the
v.	United States Court of Ap-
Thomas W. Donovan et al.	peals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title

III.¹ The application requested authorization to intercept gambling-related communications over two telephones at one address in North Olmstead, Ohio, and two other telephones

¹The wiretap application procedure is set forth at 18 U. S. C. § 2518 (1), which provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (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 where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) 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;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

The issuing judge is free to require the applicant to furnish additional information. 18 U. S. C. § 2518 (2).

at a home in Canton, Ohio. The accompanying affidavit recited that the telephones were being used by Albert Kotoch, Joseph Spaganlo, and George Florea to conduct an illegal gambling business, and that in conducting that business they would place calls to and receive calls from various persons, three of whom were also named in the wiretap application.² The affiant also stated that the Government's informants would refuse to testify against the persons named in the application, that telephone records alone would be insufficient to support a gambling conviction, and that normal investigative techniques were unlikely to be fruitful. Pursuant to the Government's request, the District Court authorized for a period of 15 days the interception of gambling-related wire communications of Kotoch, Spaganlo, Florea, three named individuals other than the respondents, and "others as yet unknown," to and from the four listed telephones.³

² The affidavit set forth extensive information indicating that the named individuals were conducting a gambling operation. This information was derived from physical surveillance by agents of the FBI, an examination of telephone company toll records, and the personal observations of six informants, whose past reliability also was detailed in the affidavit.

³ The District Court's order was issued pursuant 18 U. S. C. §§ 2513 (3), (4) which provide in pertinent part:

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted

During the course of the wiretap, the Government learned that respondents Donovan, Robbins, and Buzzaco were discussing illegal gambling activities with the named subjects. On December 26, 1972, the Government applied for an extension of the initial intercept order.⁴ This time it sought authorization to intercept gambling-related conversations of Kotoch, Spaganlo, Florea, two other named individuals, and "others as yet unknown," but it did not identify respondents

are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

⁴In addition to the December 26 application requesting an extension of the initial intercept order, the Government also filed on that date a separate application seeking authorization to monitor a third telephone discovered at the same North Olmstead address. Both applications were accompanied by another affidavit setting forth the results of the initial monitoring, the manner in which the third phone was discovered, the facts indicating that the newly discovered telephone was being used to conduct a gambling business, and reasons why continued interception was necessary. A copy of the affidavit filed on November 28 was also attached to the December 26 applications. For the sake of clarity, the two applications filed on December 26 will be treated as a single application.

Donovan, Buzzaco, and Robbins in this second application.⁵ The District Court again authorized interception of gambling-related conversations for a maximum of 15 days.

On February 21, 1973, the Government submitted to the District Court a proposed order giving notice of the interceptions to 37 persons, a group which the Government apparently thought included all individuals who could be identified as having discussed gambling over the monitored telephones.⁶ The District Court signed the proposed order, and an inventory notice was served on the listed persons, including respondents Donovan, Buzzaco, and Robbins. On September 11, 1973, after the Government submitted the names of two additional persons whose identities allegedly had been omitted inadvertently from the initial list, the District Court entered an amended order giving notice to those individuals. As a result of what the Government labels "administrative oversight," respondents Merlo and Lauer

⁵ The United States conceded in the Court of Appeals that respondents Donovan and Robbins were "known" within the meaning of the statute at the time of the December 26 application, but challenged as clearly erroneous the District Court's finding that respondent Buzzaco was "known" at that time. The Court of Appeals upheld the District Court's finding, and the United States has not sought review of that disposition. Thus, for our purposes, all three respondents were "known" on December 26.

⁶ An inventory notice must be served within a designated period of time upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d). The inventory must give notice of the entry of the intercept order or application, state the disposition of the application, and indicate whether communications were or were not intercepted. *Ibid.* Upon the filing of a motion, the judge has discretion to make available the intercepted communications, the applications, and the orders. *Ibid.*

Title III also authorizes the District Court to cause an inventory notice to be served on "other parties to intercepted communications" if the judge determines that such notice is in the interest of justice. *Ibid.* Those other parties may also be given access to the intercepted communications, the applications, and the orders. *Ibid.*

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were not included in either list of names and were never served with inventory notice.⁷

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Kotoch, Spaganlo, the five respondents, and 10 other individuals with conspiracy to conduct and conducting a gambling business in violation of 18 U. S. C. §§ 371 and 1955. The five respondents filed motions to suppress evidence derived from the wire interception. After an evidentiary hearing on the motions, the District Court suppressed as to respondents Donovan, Robbins, and Buzzaco all evidence derived from the December 26 intercept order on the ground that failure to identify them by name in the application and order of that date violated 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a). With respect to Merlo and Lauer, who were not known to the Government until after the December 26 application, the District Court suppressed all evidence derived from both intercept orders on the ground that they had not been served with inventory notice.

The Court of Appeals for the Sixth Circuit affirmed, 513 F. 2d 337 (1975).⁸ On the identification issue, the court held that the wiretap application must identify every person whose conversations relating to the subject criminal activity the Government has probable cause to believe it will intercept. Agreeing with the District Court that at the time of the December 26 application the Government had

⁷ Although respondents Merlo and Lauer were not served with inventory notice pursuant to § 2518 (8)(d), the intercept orders, applications, and related papers were made available to all the defendants, including Merlo and Lauer, on November 26, 1973. Thus, the introduction into evidence at trial of the contents of the intercepted conversations and evidence derived therefrom would not be prohibited by 18 U. S. C. § 2518 (9).

⁸ The Government filed its appeal from the District Court's order suppressing evidence under 18 U. S. C. § 3731, and there has been no trial on the charges with respect to the respondents.

probable cause to believe that it would overhear Donovan, Robbins, and Buzzaco "committing the offense," the Court of Appeals affirmed the suppression of evidence derived from the December 26 order. On the notice question, it held that the Government has an implied statutory duty to inform the issuing judge of the identities of the parties whose conversations were overheard so that he can determine whether discretionary inventory notice should be required.⁹ Because the Government had failed to perform this duty with respect to Merlo and Lauer, the Court of Appeals affirmed the District Court's order suppressing evidence derived from both intercept orders. The court found it unnecessary to determine whether the failure to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application and to name respondents Merlo and Lauer in the proposed inventory notice orders was inadvertent or purposeful, since the mere fact of omission was sufficient to require suppression under 18 U. S. C. § 2518 (10)(a).¹⁰

We granted certiorari to resolve these issues, which concern the construction of a major federal statute, 421 U. S. 907, and now reverse.

II

The United States contends that § 2518 (1)(b)(iv) requires that a wiretap application identify only the principal

⁹ See n. 8, *supra*.

¹⁰ 18 U. S. C. § 2518 (10)(a) provides in pertinent part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

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target of the interception, and that § 2518 (8)(d) does not require the Government to provide the issuing judge with a list of all identifiable persons who were overheard in the course of an authorized interception. We think neither contention is sound.

A

We turn first to the identification requirements of § 2518 (1)(b)(iv). That provision requires a wiretap application to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." In construing that language, this Court already has ruled that the Government is not required to identify an individual in the application unless it has probable cause to believe (i) that the individual is engaged in the criminal activity under investigation and (ii) that the individual's conversations will be intercepted over the target telephone. *United States v. Kahn*, 415 U. S. 143 (1974). The question at issue here is whether the Government is required to name *all* such individuals.²¹

The United States argues that the most reasonable in-

²¹ Every Court of Appeals that has considered the issue has concluded that an individual whose conversations probably will be intercepted by a wiretap must be identified in the wiretap application if the law enforcement authorities have probable cause to believe the individual is committing the offense for which the wiretap is sought. *United States v. Chiarizio*, 525 F. 2d 289, 292 (CA2 1975); *United States v. Bernstein*, 509 F. 2d 896 (CA4 1975), petition for cert. filed, No. 74-1486; *United States v. Doolittle*, 507 F. 2d 1368, *aff'd en banc*, 518 F. 2d 500 (CA5 1975), petitions for cert. filed Nos. 75-500, 75-509, 75-513; *United States v. Civella*, 533 F. 2d 1395 (CA8 1976), petitions for cert. filed, Nos. 75-1813, 76-189; *United States v. Russo*, 527 F. 2d 1150, 1156 (CA10 1975), cert. denied, — U. S. — (1976). See also *United States v. Moore*, — U. S. App. D. C. —, 513 F. 2d 485, 493-494 (1975) (interpreting 23 D. C. Code 547 (a)(2), which is almost identical to the provision at issue here).

A number of these courts have concluded, and respondents Donovan, Robbins, and Buzzsco argue, that our decision in *United States v. Kahn*,

terpretation of the plain language of the statute is that the application must identify only the principal target of the investigation, who "will almost always be the individual whose phone is monitored."¹² Brief for the United States, at 18. Under this interpretation, if the Government has reason to believe that an individual will use the target telephone to place or receive calls, and the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation, the individual qualifies as a principal target and must be named in the wiretap application. On the other hand, an individual who uses a different telephone to place calls to or receive calls from the target telephone is not a principal target even if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation. In other words, whether one is a principal target of the investigation depends on whether one operates the target telephone to place or receive calls.¹³

415 U. S. 143 (1974), resolved this identification issue. See *United States v. Chiarizio*, *supra*; *United States v. Moore*, *supra*. Although there is language in *Kahn* suggesting that wiretap applications must identify all such individuals, the identification question presented here was not before us in *Kahn*. The question in that case was whether a wiretap application must identify a known user of the target telephone whose complicity in the criminal activity under investigation was not known at the time of the application. *Kahn* is a relevant, though not controlling, precedent.

¹² The United States does not suggest that regardless of the factual circumstances a wiretap application must identify only a single individual. To the contrary, it concedes that if two or more persons are using the target telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief for the United States, at 18 n. 13.

¹³ Counsel for the United States explained this position succinctly at oral argument: "The critical distinction . . . is one between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other hand." Tr. of Oral Arg., at 13.

Whatever the merits of such a statutory scheme, we find little support for it in the language and structure of Title III or in the legislative history. The statutory language itself refers only to "the person, if known, committing the offense and whose communications are to be intercepted." That description is as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from that telephone. It is true, as the United States suggests, that when read in the context of the other subdivisions of § 2518 (1)(b), an argument can be made that Congress focused in subdivision (iv) on the primary user of the target telephone. But it is also clear from other sections of the statute that Congress expected that wiretap applications would name more than one individual. For example, Title III requires that inventory notice be served upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d) (emphasis added). And § 2518 (1)(e) requires that an intercept application disclose all previous intercept applications "involving any of the same persons . . . specified in the application" (emphasis added). It may well be that Congress anticipated that a given application would cover more than one telephone or that several suspects would use one telephone, and that an application for those reasons alone would require identification of more than one individual. But nothing on the face of the statute suggests that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application.¹⁴

¹⁴ Indeed, the contrary conclusion is suggested by the fact that identification of an individual in an application for an intercept order triggers other statutory provisions. First, § 2518 (1)(e) requires an intercept application to disclose all previous applications "involving any of the same persons . . . specified in the application." To the extent that Congress thought it necessary to provide the issuing judge with

Nor can we find support in the legislative history for the "principal target" interpretation. Title III originated as a combination of S. 675, the Federal Wire Interception Act, which was introduced by Senator McClellan several months prior to this Court's decision in *Berger v. New York*, 388 U. S. 41 (1967), and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska a few days after the *Berger* decision. S. Rep. No. 1097, 90th Cong., 2d Sess., 86 (1968). Both bills required that wiretap applications include a full and complete statement of the facts and circumstances relied upon by the applicant and specification of the nature and location of the communication facilities involved. Although neither bill contained an express identification requirement such as that at issue here, both bills required the application to include "a full and complete statement of the facts concerning all previous applications . . . involving any person named in the application as committing, having committed, or being about to commit an offense." Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., at 77, § 8 (a)(3) and 1006, § 2518 (a)(4) (1967) (emphasis added). Thus, even at this early stage, it was recognized that an application could identify several individuals, and there is no indication that the identification would be limited to principal targets.

S. 971 combined the major provisions of S. 675 and S. 2050 and eventually was enacted. While it was pending before the Senate Judiciary Committee, this Court decided *Katz*

such information, there is no indication of congressional intent to require provision of such information only if a suspect operated from one end of a telephone line. Second, § 2518 (8)(d) mandates that an inventory notice be served upon "the persons named in the order or the application." As with § 2518 (1)(e), the congressional purpose would not be served by limiting that notice on the basis of the telephone from which one speaks,

v. *United States*, 389 U. S. 347 (1967). S. 971 was then redrafted to conform to *Katz* as well as *Berger*, and the identification provision was added at that time. The Senate Report states that the requirements set forth in the various subdivisions of § 2518 (1)(b), including the identification requirement at issue here, "[were] intended to reflect the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968), citing *Berger v. New York*, 388 U. S. 41, 58-60, and *Katz v. United States*, 389 U. S. 347, 354-356 (1967). The United States now contends that although it may be that Congress read *Berger* and *Katz* to require, as a constitutional matter, that the subject of the surveillance be named if known, Congress would hardly have read those cases as requiring the naming of all parties likely to be overheard.¹⁵ Brief, at 25-26. But to the extent that Congress thought it was meeting the constitutional commands of particularization established in *Burger* and *Katz*, Congress may have read those cases as mandating a broad identification requirement. The statute that we confronted in *Berger* required identification of "the person or persons" whose communications were to be overheard. 388 U. S., at 59. And we expressly noted that that provision "[did] no more than identify the person whose constitutionally protected area is to be invaded" *Ibid.* Given the statute at issue in *Berger* and our comment upon it,

¹⁵ At the time of the enactment of Title III, Congress did not have before it the view we expressed on this issue in *United States v. Kahn*, 415 U. S., at 155 n. 15. The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized. It is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named. Specification of this sort "identifies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." *Berger v. New York*, 388 U. S. 41, 59 (1967).

Congress may have concluded that the Constitution required the naming, in a wiretap application, of all suspects rather than just the primary user.¹⁶

In any event, for our present purposes it is unnecessary to speculate as to exactly how Congress interpreted *Berger* and *Katz* with respect to the identification issue. It is sufficient to note that in response to those decisions Congress included an identification requirement which on its face draws no distinction based on the telephone one uses, and the United States points to no evidence in the legislative history that supports such a distinction. Indeed, the legislative materials apparently contain no use of the term "principal target" or any discussion of a different treatment based on the telephone from which a suspect speaks.¹⁷ We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone.

B

The other statutory provision at issue in this case is

¹⁶ That Congress may have so understood the constitutional requirement is also suggested by the portion of the Senate Report dealing with that provision of S. 971 that required the intercept order to identify "the person, if known, whose conversations are to be intercepted." The Senate Report merely cites *West v. Cabell*, 153 U. S. 78 (1894), which concerns the need for proper identification of the subject of an arrest warrant. S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968). To the extent that Congress may have considered *West* to apply to wiretap orders, we have no reason to believe that Congress considered its applicability to extend only to those suspects using the target telephone.

¹⁷ At least one Senator read the identification requirement in S. 971 to parallel the identification requirement contained in the statute at issue in *Berger v. New York*: "Specificity is required as to the person or persons whose communications are to be intercepted." 114 Cong. Rec., at 14763 (1968) (remarks of Sen. Percy).

18 U. S. C. § 2518 (8)(d), which provides that the judge shall cause to be served on the persons named in the order or application an inventory, which must give notice of the entry of the order or application, state the disposition of the application, and indicate whether communications were intercepted.¹⁸ Although the statute mandates inventory notice only for persons named in the application or the order, the statute also provides that the judge may order similar notice to other parties to intercepted communications if he concludes that such action is in the interest of justice.¹⁹ Observing that this notice provision does not expressly require law enforcement authorities routinely to supply the judge with specific information upon which to exercise his discretion, the United States contends that it would be inappropriate to read such a requirement into the statute since the judge has the option of asking the law enforcement authorities for whatever information he requires.

Our reading of the legislative history of the discretionary notice provision in light of the purposes of Title III leads us to reject the Government's interpretation. As reported from the Judiciary Committee, section 2518 (8)(d) contained only a provision mandating notice to the persons named in the application or the order; the discretionary notice provision was added by amendment on the floor of the Senate.

¹⁸ The inventory notice must be served within a reasonable time but not later than 90 days after the date the application for an intercept order was filed. On an *ex parte* showing of good cause, service of the inventory may be postponed.

¹⁹ In addition to these provisions for mandatory and discretionary inventory notice, the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions. 18 U. S. C. § 2518 (8)(a). These notice and return provisions satisfy constitutional requirements. See *Katz v. United States*, 389 U. S. 347, 355-356, and n. 16 (1967); *Berger v. New York*, 388 U. S. 41, 60 (1967).

In introducing that amendment, Senator Hart explained its purpose:

"The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted conversations, even though such parties are not specifically named in the court order. The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute. It may be that the required notice must be served on all parties to intercepted communications. Since legitimate interests of privacy may make such notice to all parties undesirable, the amendment leaves the final determination to the judge." 114 Cong. Rec. 14485-14486 (1968).²⁰

In deciding whether legitimate privacy interests justify withholding inventory notice from parties to intercepted conversations, a judge is likely to require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities. No purpose is served by holding that those authorities have no routine duty to supply the judge with relevant information. The Court of Appeals for the Ninth Circuit recently confronted this problem of

²⁰ It is worth noting that shortly before Senator Hart proposed this amendment to S. 971, Senator Long had read to the Senate portions of a report prepared by the Association of the Bar of the City of New York on federal wiretap legislation. That report commented that parties to intercepted conversations other than those named in the application or order probably should be served with inventory notice, but it also recognized that under some circumstances the provision of such notice could be harmful and gave the following example:

"A, a businessman, talks to his customers, and the latter are served with papers showing that A is being bugged[.] [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory." 114 Cong. Rec. 14476 (1968).

dual responsibility, and we adopt the balanced construction that court placed on § 2518 (8)(d):

"To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted conversation is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although the judicial officer has the duty to cause the filing of the inventory [notice], it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his statutory § 2518 (8)(d) discretion, . . . the government is also required to furnish such information as is available to it." *United States v. Chun*, 503 F. 2d 533, 540 (1974).

We agree with the Ninth Circuit that this allocation of responsibility best serves the purposes of Title III.²¹

²¹ At oral argument, counsel for the United States recognized the merit of the approach specified in *United States v. Chun*:

"Perhaps the approach of the Court of Appeals for the Ninth Circuit, which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this regard." Tr. of Oral Arg., at 3-7.

Currently, the policy of the Justice Department is to provide the issuing judge with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment. Brief for the United States, at 39. Because it fails to assure that the necessary range of information will be before the issuing judge, this policy does not meet the test set out in *Chun*. Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete. Applying these principles, we find that the Government did not comply adequately with § 2518 (8)(d), since the names of respondents Merlo and Lauer were not included on the purportedly complete list of identifiable persons submitted to the issuing judge.

III

We turn now to the question whether the District Court properly suppressed evidence derived from the wiretaps at issue solely because of the failure of the law enforcement authorities to comply fully with the provisions of §§ 2518 (1)(b)(iv) and 2518 (8)(d). Section 2515 expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518 (10)(a):

- "(i) the communication was unlawfully intercepted;
- "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- "(iii) the interception was not made in conformity with the order of authorization or approval."

There is no basis on the facts of this case to suggest that the authorization orders are facially insufficient, or that the

interception was not conducted in conformity with the orders. Thus, only § 2518 (10)(a)(i) is relevant: were the communications "unlawfully intercepted" given the violations of §§ 2518 (1)(b)(iv) and 2518 (8)(d)?²²

Resolution of that question must begin with *United States v. Giordano*, 416 U. S. 505 (1974), and *United States v. Chavez*, 416 U. S. 562 (1974). Those cases hold that "[not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" *United States v. Chavez*, 416 U. S., at 574-575. To the contrary, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States v. Giordano*, 416 U. S., at 527.

Giordano concerned the provision in Title III requiring that an application for an intercept order be approved by the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Concluding that Congress intended to condition the use of wiretap procedures on the judgment of senior officials in the Department of Justice, the Court required suppression for failure to comply with the approval provision. *Chavez* concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application. The problem in *Chavez* was one of misidentification; although the application had in fact been authorized by the Attorney General, the application erroneously identified an

²²The availability of the suppression remedy for these statutory, as opposed to constitutional, violations, see nn. 15 and 19, *supra*, turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. *United States v. Giordano*, *supra*, 416 U. S., at 524.

Assistant Attorney General as the official authorizing the application. The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of § 2518 (10) (a)(i) since that identification requirement did not play a "substantive role" in the regulatory system. 416 U. S., at 578.

In the instant case, the Court of Appeals concluded that both the identification requirement of § 2518 (1)(b)(iv) and the notice requirement of § 2515 (8)(d) played a "central role" in the statutory framework, and for that reason affirmed the District Court's order suppressing relevant evidence. Although both statutory requirements are undoubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements.

A

As to § 2518 (1)(b)(iv), the issue is whether the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a "substantive role" with respect to judicial authorization of intercept orders and consequently imposes a limitation on the use of intercept procedures. The statute provides that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities. If, after evaluating the statutorily enumerated factors in light of the information contained in

the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. The intercept order may issue only if the issuing judge determines that the statutory factors are present, and the failure to name additional targets in no way detracts from the sufficiency of those factors.

This case is unlike *Giordano*, where failure to satisfy the statutory requirement of prior approval by specified Justice Department officials bypassed a congressionally imposed limitation on the use of the intercept procedure. The Court there noted that it was reasonable to believe that requiring prior approval from senior officials in the Justice Department "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." 416 U. S., at 528. Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept.²⁰ Rather, this case resembles *Chavez*, where we held that a wiretap was not unlawful sim-

²⁰ There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzzaco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. Nor is there any suggestion that, as a result of the failure to name these three respondents they were denied the mandatory inventory notice supplied to persons named in the application. 18 U. S. C. § 2518 (8)(d). Respondents Donovan, Robbins, and Buzzaco were among the 37 persons served with the initial inventory.

ply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The *Chavez* intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied.²⁴

Finally, we note that nothing in the legislative history suggests that Congress intended this broad identification requirement to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *United States v. Chavez*, 418 U. S., at 578. Neither S. 675 nor S. 2050, the predecessor bills of S. 971, contained an identification provision. See p. 11, *supra*. The

²⁴ No one suggests that the failure to identify in a wiretap application individuals who are "unknown" within the meaning of the statute, see *United States v. Kahn*, 415 U. S. 143 (1974), requires suppression of intercepted conversations to which those individuals were parties. Though recognizing that the failure to identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, respondents Donovan, Robbins, and Buzzaco suggest that the opposite is true with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified by analogy to warrantless searches or arrests. Tr. of Oral Arg., at 40. Although law enforcement officials can often take action without a warrant when they have been unable to foresee the circumstances that eventually confronted them, they still must obtain a search or arrest warrant when their prior knowledge is sufficient to establish probable cause, and it is suggested that the same principle applies here. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

only explanation given in the Senate Report for the inclusion of the broad identification provision was that it was intended to reflect what Congress perceived to be the constitutional command of particularization. This explanation was offered with respect to all the information required by § 2518 (1)(6) to be set out in an intercept application. No additional guidance can be gleaned from the floor debates, since they contain no substantive discussion of the identification provision.²³

B

We reach the same conclusion with respect to the Government's duty to inform the judge of all identifiable persons whose conversations were intercepted. As noted earlier, the version of Title III that emerged from the Senate Judiciary Committee provided only for mandatory notice to the "persons named in the order or the application." The Senate Report detailed the purpose of that provision:

"[T]he intent of the provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all author-

²³ Even if we assume that Congress thought that a broad identification requirement was constitutionally mandated, it does not follow that Congress imposed *statutory* suppression under §§ 2515 and 2518 (10) (a) (i) as a sanction for noncompliance. In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No. 107, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a District Court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone. This requirement was satisfied here when the application set forth sufficient information to indicate that the primary targets were conducting a gambling business over four particular telephones. Nothing in the legislative history indicates that Congress intended to declare an otherwise constitutional intercept order "unlawful" under § 2518 (10) (a) (i)—resulting in suppression under § 2515—for failure to name additional targets.

ized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress, for example, under section 2520 . . . if he feels that his privacy has been unlawfully invaded." S. Rep. No. 1097, 90th Cong., 2d Sess., 105 (1968).

The floor discussion concerning the amendment adding the provision for discretionary notice merely indicates an intent to provide notice to such additional persons as may be constitutionally required.

Nothing in the structure of the Act or this legislative history suggests that incriminating conversations are "unlawfully intercepted" whenever parties to those conversations do not receive discretionary inventory notice as a result of the Government's failure to inform the District Court of their identities. At the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order. The fact that discretionary notice reached 39 rather than 41 identifiable persons does not in itself mean that the conversations were unlawfully intercepted.²³

The legislative history indicates that postintercept notice

²³ Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional, Tr. of Oral Arg., at 32, and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties. Nor does this case present an opportunity to comment upon the suggestion, recognized by the United States, Brief, at 49 n. 40, that suppression might be required if the agents knew before the interception that no inventory would be served.

Moreover, respondents Merlo and Lauer were not prejudiced by their failure to receive postintercept notice under either of the District Court's inventory orders. As noted earlier, the Government made available to all defendants the intercept orders, applications, and related papers. See n. 7, *supra*. And in response to pretrial discovery motions, the Government produced transcripts of the intercepted conversations.

was designed instead to assure the community that the wiretap technique is reasonably employed. But even recognizing that Congress placed considerable emphasis on that aspect of the overall statutory scheme, we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure.

IV

Although the Government was required to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application for an extension of the initial intercept, failure to do so in the circumstances here presented did not warrant suppression under § 2518 (10)(a)(i). Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard. We hold that this is the correct result under the provisions of Title III, but we re-emphasize the suggestion we made in *United States v. Chavez*, that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." 416 U. S., at 580.

The order of the Court of Appeals is reversed and the case is remanded to that court for further proceedings in accord with this opinion.

It is so ordered.

~~P8
P16 Fw 21 deleted &
substance moved to
text at page 17;
Fws 22-27 renumbered
21-26.~~

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: _____

3rd
~~2nd~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Thomas W. Donovan et al. | peals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title

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on page 18.

III.¹ The application requested authorization to intercept gambling-related communications over two telephones at one address in North Olmstead, Ohio, and two other telephones

¹ The wiretap application procedure is set forth at 18 U. S. C. § 2518 (1), which provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (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 where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) 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;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

The issuing judge is free to require the applicant to furnish additional information. 18 U. S. C. § 2518 (2).

at a home in Canton, Ohio. The accompanying affidavit recited that the telephones were being used by Albert Kotoch, Joseph Spaganlo, and George Florea to conduct an illegal gambling business, and that in conducting that business they would place calls to and receive calls from various persons, three of whom were also named in the wiretap application.² The affiant also stated that the Government's informants would refuse to testify against the persons named in the application, that telephone records alone would be insufficient to support a gambling conviction, and that normal investigative techniques were unlikely to be fruitful. Pursuant to the Government's request, the District Court authorized for a period of 15 days the interception of gambling-related wire communications of Kotoch, Spaganlo, Florea, three named individuals other than the respondents, and "others as yet unknown," to and from the four listed telephones."

² The affidavit set forth extensive information indicating that the named individuals were conducting a gambling operation. This information was derived from physical surveillance by agents of the FBI, an examination of telephone company toll records, and the personal observations of six informants, whose past reliability also was detailed in the affidavit.

³ The District Court's order was issued pursuant 18 U. S. C. §§ 2518 (3), (4) which provide in pertinent part:

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted

During the course of the wiretap, the Government learned that respondents Donovan, Robbins, and Buzzaco were discussing illegal gambling activities with the named subjects. On December 26, 1972, the Government applied for an extension of the initial intercept order.⁴ This time it sought authorization to intercept gambling-related conversations of Kotoch, Spaganlo, Florea, two other named individuals, and "others as yet unknown," but it did not identify respondents

are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

⁴In addition to the December 26 application requesting an extension of the initial intercept order, the Government also filed on that date a separate application seeking authorization to monitor a third telephone discovered at the same North Olmstead address. Both applications were accompanied by another affidavit setting forth the results of the initial monitoring, the manner in which the third phone was discovered, the facts indicating that the newly discovered telephone was being used to conduct a gambling business, and reasons why continued interception was necessary. A copy of the affidavit filed on November 28 was also attached to the December 26 applications. For the sake of clarity, the two applications filed on December 26 will be treated as a single application.

Donovan, Buzzaco, and Robbins in this second application.⁶ The District Court again authorized interception of gambling-related conversations for a maximum of 15 days.

On February 21, 1973, the Government submitted to the District Court a proposed order giving notice of the interceptions to 37 persons, a group which the Government apparently thought included all individuals who could be identified as having discussed gambling over the monitored telephones.⁷ The District Court signed the proposed order, and an inventory notice was served on the listed persons, including respondents Donovan, Buzzaco, and Robbins. On September 11, 1973, after the Government submitted the names of two additional persons whose identities allegedly had been omitted inadvertently from the initial list, the District Court entered an amended order giving notice to those individuals. As a result of what the Government labels "administrative oversight," respondents Merlo and Lauer

⁶The United States conceded in the Court of Appeals that respondents Donovan and Robbins were "known" within the meaning of the statute at the time of the December 26 application, but challenged as clearly erroneous the District Court's finding that respondent Buzzaco was "known" at that time. The Court of Appeals upheld the District Court's finding, and the United States has not sought review of that disposition. Thus, for our purposes, all three respondents were "known" on December 26.

⁷An inventory notice *must* be served within a designated period of time upon "the persons named in the order or the application." 18 U.S.C. § 2518 (8)(d). The inventory must give notice of the entry of the intercept order or application, state the disposition of the application, and indicate whether communications were or were not intercepted. *Ibid.* Upon the filing of a motion, the judge has discretion to make available the intercepted communications, the applications, and the orders. *Ibid.*

Title III also authorizes the District Court to cause an inventory notice to be served on "other parties to intercepted communications" if the judge determines that such notice is in the interest of justice. *Ibid.* Those other parties may also be given access to the intercepted communications, the applications, and the orders. *Ibid.*

were not included in either list of names and were never served with inventory notice.⁷

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Kotoch, Spaganlo, the five respondents, and 10 other individuals with conspiracy to conduct and conducting a gambling business in violation of 18 U. S. C. §§ 371 and 1955. The five respondents filed motions to suppress evidence derived from the wire interception. After an evidentiary hearing on the motions, the District Court suppressed as to respondents Donovan, Robbins, and Buzzaco all evidence derived from the December 26 intercept order on the ground that failure to identify them by name in the application and order of that date violated 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a). With respect to Merlo and Lauer, who were not known to the Government until after the December 26 application, the District Court suppressed all evidence derived from both intercept orders on the ground that they had not been served with inventory notice.

The Court of Appeals for the Sixth Circuit affirmed. 513 F. 2d 337 (1975).⁸ On the identification issue, the court held that the wiretap application must identify every person whose conversations relating to the subject criminal activity the Government has probable cause to believe it will intercept. Agreeing with the District Court that at the time of the December 26 application the Government had

⁷ Although respondents Merlo and Lauer were not served with inventory notice pursuant to § 2518 (8)(d), the intercept orders, applications, and related papers were made available to all the defendants, including Merlo and Lauer, on November 26, 1973. Thus, the introduction into evidence at trial of the contents of the intercepted conversations and evidence derived therefrom would not be prohibited by 18 U. S. C. § 2518 (9).

⁸ The Government filed its appeal from the District Court's order suppressing evidence under 18 U. S. C. § 3731, and there has been no trial on the charges with respect to the respondents.

probable cause to believe that it would overhear Donovan, Robbins, and Buzzaco "committing the offense," the Court of Appeals affirmed the suppression of evidence derived from the December 26 order. On the notice question, it held that the Government has an implied statutory duty to inform the issuing judge of the identities of the parties whose conversations were overheard so that he can determine whether discretionary inventory notice should be required.⁹ Because the Government had failed to perform this duty with respect to Merlo and Lauer, the Court of Appeals affirmed the District Court's order suppressing evidence derived from both intercept orders. The court found it unnecessary to determine whether the failure to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application and to name respondents Merlo and Lauer in the proposed inventory notice orders was inadvertent or purposeful, since the mere fact of omission was sufficient to require suppression under 18 U. S. C. § 2518 (10)(a).¹⁰

We granted certiorari to resolve these issues, which concern the construction of a major federal statute, 421 U. S. 907, and now reverse.

II

The United States contends that § 2518 (1)(b)(iv) requires that a wiretap application identify only the principal

⁹ See n. 6, *supra*.

¹⁰ 18 U. S. C. § 2518 (10)(a) provides in pertinent part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

C

UNITED STATES v. DONOVAN

target of the interception, and that § 2518 (8)(d) does not require the Government to provide the issuing judge with a list of all identifiable persons who were overheard in the course of an authorized interception. We think neither contention is sound.

A

We turn first to the identification requirements of § 2518 (1)(b)(iv). That provision requires a wiretap application to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." In construing that language, this Court already has ruled that the Government is not required to identify an individual in the application unless it has probable cause to believe (i) that the individual is engaged in the criminal activity under investigation and (ii) that the individual's conversations will be intercepted over the target telephone. *United States v. Kahn*, 415 U. S. 143 (1974). The question at issue here is whether the Government is required to name all such individuals.¹¹

The United States argues that the most reasonable in-

¹¹ Every Court of Appeals that has considered the issue has concluded that an individual whose conversations probably will be intercepted by a wiretap must be identified in the wiretap application if the law enforcement authorities have probable cause to believe the individual is committing the offense for which the wiretap is sought. *United States v. Chiarizio*, 525 F. 2d 289, 292 (CA2 1975); *United States v. Bernstein*, 509 F. 2d 996 (CA4 1975), petition for cert. filed, No. 74-1486; *United States v. Doolittle*, 507 F. 2d 1368, aff'd en banc, 518 F. 2d 500 (CA5 1975), petitions for cert. filed Nos. 75-500, 75-509, 75-513; *United States v. Civella*, 533 F. 2d 1395 (CA8 1976), petitions for cert. filed, Nos. 75-1813, 75-169; *United States v. Russo*, 527 F. 2d 1150, 1156 (CA10 1975), cert. denied, — U. S. — (1976). See also *United States v. Moore*, — U. S. App. D. C. —, 513 F. 2d 485, 493-494 (1975) (interpreting 23 D. C. Code 547 (a)(3), which is almost identical to the provision at issue here).

A number of these courts have concluded, and respondents Donovan, Robbins, and Buzzaco argue, that our decision in *United States v. Kahn*,

terpretation of the plain language of the statute is that the application must identify only the principal target of the investigation, who "will almost always be the individual whose phone is monitored."¹² Brief for the United States, at 18. Under this interpretation, if the Government has reason to believe that an individual will use the target telephone to place or receive calls, and the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation, the individual qualifies as a principal target and must be named in the wiretap application. On the other hand, an individual who uses a different telephone to place calls to or receive calls from the target telephone is not a principal target even if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation. In other words, whether one is a principal target of the investigation depends on whether one operates the target telephone to place or receive calls.¹³

415 U. S. 143 (1974), resolved this identification issue. See *United States v. Chiarisio*, *supra*; *United States v. Moore*, *supra*. Although there is language in *Kahn* suggesting that wiretap applications must identify all such individuals, the identification question presented here was not before us in *Kahn*. The question in that case was whether a wiretap application must identify a known user of the target telephone whose complicity in the criminal activity under investigation was not known at the time of the application. *Kahn* is a relevant, though not controlling, precedent.

¹² The United States does not suggest that regardless of the factual circumstances a wiretap application must identify only a single individual. To the contrary, it concedes that if two or more persons are using the target telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief for the United States, at 18 n. 13.

¹³ Counsel for the United States explained this position succinctly at oral argument: "The critical distinction . . . is one between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other hand." Tr. of Oral Arg., at 13.

Whatever the merits of such a statutory scheme, we find little support for it in the language and structure of Title III or in the legislative history. The statutory language itself refers only to "the person, if known, committing the offense and whose communications are to be intercepted." That description is as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from that telephone. It is true, as the United States suggests, that when read in the context of the other subdivisions of § 2518 (1)(b), an argument can be made that Congress focused in subdivision (iv) on the primary user of the target telephone. But it is also clear from other sections of the statute that Congress expected that wiretap applications would name more than one individual. For example, Title III requires that inventory notice be served upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d) (emphasis added). And § 2518 (1)(e) requires that an intercept application disclose all previous intercept applications "involving any of the same persons . . . specified in the application" (emphasis added). It may well be that Congress anticipated that a given application would cover more than one telephone or that several suspects would use one telephone, and that an application for those reasons alone would require identification of more than one individual. But nothing on the face of the statute suggests that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application.¹⁴

¹⁴ Indeed, the contrary conclusion is suggested by the fact that identification of an individual in an application for an intercept order triggers other statutory provisions. First, § 2518 (1)(e) requires an intercept application to disclose all previous applications "involving any of the same persons . . . specified in the application." To the extent that Congress thought it necessary to provide the issuing judge with

Nor can we find support in the legislative history for the "principal target" interpretation. Title III originated as a combination of S. 875, the Federal Wire Interception Act, which was introduced by Senator McClellan several months prior to this Court's decision in *Berger v. New York*, 388 U. S. 41 (1967), and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska a few days after the *Berger* decision. S. Rep. No. 1097, 90th Cong., 2d Sess., 86 (1968). Both bills required that wiretap applications include a full and complete statement of the facts and circumstances relied upon by the applicant and specification of the nature and location of the communication facilities involved. Although neither bill contained an express identification requirement such as that at issue here, both bills required the application to include "a full and complete statement of the facts concerning all previous applications . . . involving any person named in the application as committing, having committed, or being about to commit an offense." Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., at 77, § 8 (a)(3) and 1006, § 2518 (a)(4) (1967) (emphasis added). Thus, even at this early stage, it was recognized that an application could identify several individuals, and there is no indication that the identification would be limited to principal targets.

S. 971 combined the major provisions of S. 875 and S. 2050 and eventually was enacted. While it was pending before the Senate Judiciary Committee, this Court decided *Katz*

such information, there is no indication of congressional intent to require provision of such information only if a suspect operated from one end of a telephone line. Second, § 2518 (5)(d) mandates that an inventory notice be served upon "the persons named in the order or the application." As with § 2518 (1)(e), the congressional purpose would not be served by limiting that notice on the basis of the telephone from which one speaks.

v. *United States*, 389 U. S. 347 (1967). S. 971 was then redrafted to conform to *Katz* as well as *Berger*, and the identification provision was added at that time. The Senate Report states that the requirements set forth in the various subdivisions of § 2518 (1)(b), including the identification requirement at issue here, "[were] intended to reflect the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968), citing *Berger v. New York*, 388 U. S. 41, 58-60, and *Katz v. United States*, 389 U. S. 347, 354-356 (1967). The United States now contends that although it may be that Congress read *Berger* and *Katz* to require, as a constitutional matter, that the subject of the surveillance be named if known, Congress would hardly have read those cases as requiring the naming of all parties likely to be overheard.¹² Brief, at 25-26. But to the extent that Congress thought it was meeting the constitutional commands of particularization established in *Burger* and *Katz*, Congress may have read those cases as mandating a broad identification requirement. The statute that we confronted in *Berger* required identification of "the person or persons" whose communications were to be overheard. 388 U. S., at 59. And we expressly noted that that provision "[did] no more than identify the person whose constitutionally protected area is to be invaded . . ." *Ibid.* Given the statute at issue in *Berger* and our comment upon it,

¹² At the time of the enactment of Title III, Congress did not have before it the view we expressed on this issue in *United States v. Kahn*, 415 U. S., at 155 n. 15. The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized. It is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named. Specification of this sort "identif[ies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." *Berger v. New York*, 388 U. S. 41, 59 (1967).

Congress may have concluded that the Constitution required the naming, in a wiretap application, of all suspects rather than just the primary user.¹⁶

In any event, for our present purposes it is unnecessary to speculate as to exactly how Congress interpreted *Berger* and *Katz* with respect to the identification issue. It is sufficient to note that in response to those decisions Congress included an identification requirement which on its face draws no distinction based on the telephone one uses, and the United States points to no evidence in the legislative history that supports such a distinction. Indeed, the legislative materials apparently contain no use of the term "principal target" or any discussion of a different treatment based on the telephone from which a suspect speaks.¹⁷ We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone.

B

The other statutory provision at issue in this case is

¹⁶ That Congress may have so understood the constitutional requirement is also suggested by the portion of the Senate Report dealing with that provision of S. 971 that required the intercept order to identify "the person, if known, whose conversations are to be intercepted." The Senate Report merely cites *West v. Cabell*, 153 U. S. 78 (1894), which concerns the need for proper identification of the subject of an arrest warrant. S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968). To the extent that Congress may have considered *West* to apply to wiretap orders, we have no reason to believe that Congress considered its applicability to extend only to those suspects using the target telephone.

¹⁷ At least one Senator read the identification requirement in S. 971 to parallel the identification requirement contained in the statute at issue in *Berger v. New York*: "Specificity is required as to the person or persons whose communications are to be intercepted." 114 Cong. Rec., at 14763 (1968) (remarks of Sen. Percy).

18 U. S. C. § 2518 (8)(d), which provides that the judge shall cause to be served on the persons named in the order or application an inventory, which must give notice of the entry of the order or application, state the disposition of the application, and indicate whether communications were intercepted.¹⁸ Although the statute mandates inventory notice only for persons named in the application or the order, the statute also provides that the judge may order similar notice to other parties to intercepted communications if he concludes that such action is in the interest of justice.¹⁹ Observing that this notice provision does not expressly require law enforcement authorities routinely to supply the judge with specific information upon which to exercise his discretion, the United States contends that it would be inappropriate to read such a requirement into the statute since the judge has the option of asking the law enforcement authorities for whatever information he requires.

Our reading of the legislative history of the discretionary notice provision in light of the purposes of Title III leads us to reject the Government's interpretation. As reported from the Judiciary Committee, section 2518 (8)(d) contained only a provision mandating notice to the persons named in the application or the order; the discretionary notice provision was added by amendment on the floor of the Senate.

¹⁸ The inventory notice must be served within a reasonable time but not later than 90 days after the date the application for an intercept order was filed. On an *ex parte* showing of good cause, service of the inventory may be postponed.

¹⁹ In addition to these provisions for mandatory and discretionary inventory notice, the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions. 18 U. S. C. § 2518 (8)(a). These notice and return provisions satisfy constitutional requirements. See *Katz v. United States*, 389 U. S. 347, 355-356, and n. 16 (1967); *Berger v. New York*, 388 U. S. 41, 60 (1967).

In introducing that amendment, Senator Hart explained its purpose:

"The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted conversations, even though such parties are not specifically named in the court order. The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute. It may be that the required notice must be served on all parties to intercepted communications. Since legitimate interests of privacy may make such notice to all parties undesirable, the amendment leaves the final determination to the judge." 114 Cong. Rec. 14485-14486 (1968).²⁰

In deciding whether legitimate privacy interests justify withholding inventory notice from parties to intercepted conversations, a judge is likely to require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities. No purpose is served by holding that those authorities have no routine duty to supply the judge with relevant information. The Court of Appeals for the Ninth Circuit recently confronted this problem of

²⁰ It is worth noting that shortly before Senator Hart proposed this amendment to S. 971, Senator Long had read to the Senate portions of a report prepared by the Association of the Bar of the City of New York on federal wiretap legislation. That report commented that parties to intercepted conversations other than those named in the application or order probably should be served with inventory notice, but it also recognized that under some circumstances the provision of such notice could be harmful and gave the following example:

"A, a businessman, talks to his customers, and the latter are served with papers showing that A is being bugged[.] [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory." 114 Cong. Rec. 14476 (1968).

dual responsibility, and we adopt the balanced construction that court placed on § 2518 (8)(d):

"To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted conversation is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although the judicial officer has the duty to cause the filing of the inventory [notice], it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his statutory § 2518 (8)(d) discretion, . . . the government is also required to furnish such information as is available to it." *United States v. Chun*, 503 F. 2d 533, 540 (1974).

We agree with the Ninth Circuit that this allocation of responsibility best serves the purposes of Title III.²¹

²¹ At oral argument, counsel for the United States recognized the merit of the approach specified in *United States v. Chun*:

"Perhaps the approach of the Court of Appeals for the Ninth Circuit, which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this regard." Tr. of Oral Arg., at 6-7.

Currently, the policy of the Justice Department is to provide the issuing judge with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment. Brief for the United States, at 39. Because it fails to assure that the necessary range of information will be before the issuing judge, this policy does not meet the test set out in *Chun*. Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete. Applying these principles, we find that the Government did not comply adequately with § 2518 (8)(d), since the names of respondents Merlo and Lauer were not included on the purportedly complete list of identifiable persons submitted to the issuing judge.

III

We turn now to the question whether the District Court properly suppressed evidence derived from the wiretaps at issue solely because of the failure of the law enforcement authorities to comply fully with the provisions of §§ 2518 (1)(b)(iv) and 2518 (8)(d). Section 2515 expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518 (10)(a):

- "(i) the communication was unlawfully intercepted;
- "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- "(iii) the interception was not made in conformity with the order of authorization or approval."

There is no basis on the facts of this case to suggest that the authorization orders are facially insufficient, or that the

interception was not conducted in conformity with the orders. Thus, only § 2518 (10)(a)(i) is relevant: were the communications "unlawfully intercepted" given the violations of §§ 2518 (1)(b)(iv) and 2518 (8)(d) ²²?

Resolution of that question must begin with *United States v. Giordano*, 416 U. S. 505 (1974), and *United States v. Chavez*, 416 U. S. 562 (1974). Those cases hold that "[not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" *United States v. Chavez*, 416 U. S., at 574-575. To the contrary, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States v. Giordano*, 416 U. S., at 527.

Giordano concerned the provision in Title III requiring that an application for an intercept order be approved by the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Concluding that Congress intended to condition the use of wiretap procedures on the judgment of senior officials in the Department of Justice, the Court required suppression for failure to comply with the approval provision. *Chavez* concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application. The problem in *Chavez* was one of misidentification; although the application had in fact been authorized by the Attorney General, the application erroneously identified an

²² The availability of the suppression remedy for these statutory, as opposed to constitutional, violations, see nn. 15 and 19, *supra*, turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. *United States v. Giordano*, *supra*, 416 U. S., at 524.

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Assistant Attorney General as the official authorizing the application. The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of § 2518 (10) (a)(i) since that identification requirement did not play a "substantive role" in the regulatory system. 416 U. S., at 578.

In the instant case, the Court of Appeals concluded that both the identification requirement of § 2518 (1)(b)(iv) and the notice requirement of § 2515 (8)(d) played a "central role" in the statutory framework, and for that reason affirmed the District Court's order suppressing relevant evidence. Although both statutory requirements are undoubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements.

A

As to § 2518 (1)(b)(iv), the issue is whether the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a "substantive role" with respect to judicial authorization of intercept orders and consequently imposes a limitation on the use of intercept procedures. The statute provides that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities. If, after evaluating the statutorily enumerated factors in light of the information contained in

the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. The intercept order may issue only if the issuing judge determines that the statutory factors are present, and the failure to name additional targets in no way detracts from the sufficiency of those factors.

This case is unlike *Giordano*, where failure to satisfy the statutory requirement of prior approval by specified Justice Department officials bypassed a congressionally imposed limitation on the use of the intercept procedure. The Court there noted that it was reasonable to believe that requiring prior approval from senior officials in the Justice Department "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." 416 U. S., at 528. Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept.²³ Rather, this case resembles *Chavez*, where we held that a wiretap was not unlawful sim-

²³ There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzzaco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. Nor is there any suggestion that as a result of the failure to name these three respondents they were denied the mandatory inventory notice supplied to persons named in the application. 18 U. S. C. § 2518 (8)(d). Respondents Donovan, Robbins, and Buzzaco were among the 37 persons served with the initial inventory.

ply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The *Chavez* intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied.²⁴

Finally, we note that nothing in the legislative history suggests that Congress intended this broad identification requirement to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *United States v. Chavez*, 416 U. S., at 578. Neither S. 675 nor S. 2050, the predecessor bills of S. 971, contained an identification provision. See p. 11, *supra*. The

²⁴ No one suggests that the failure to identify in a wiretap application individuals who are "unknown" within the meaning of the statute, see *United States v. Kahn*, 415 U. S. 143 (1974), requires suppression of intercepted conversations to which those individuals were parties. Though recognizing that the failure to identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, respondents Donovan, Robbins, and Buzzaco suggest that the opposite is true with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified by analogy to warrantless searches or arrests. Tr. of Oral Arg., at 40. Although law enforcement officials can often take action without a warrant when they have been unable to foresee the circumstances that eventually confronted them, they still must obtain a search or arrest warrant when their prior knowledge is sufficient to establish probable cause, and it is suggested that the same principle applies here. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

only explanation given in the Senate Report for the inclusion of the broad identification provision was that it was intended to reflect what Congress perceived to be the constitutional command of particularization. This explanation was offered with respect to all the information required by § 2518 (1)(6) to be set out in an intercept application. No additional guidance can be gleaned from the floor debates, since they contain no substantive discussion of the identification provision.²⁵

B

We reach the same conclusion with respect to the Government's duty to inform the judge of all identifiable persons whose conversations were intercepted. As noted earlier, the version of Title III that emerged from the Senate Judiciary Committee provided only for mandatory notice to the "persons named in the order or the application." The Senate Report detailed the purpose of that provision:

"[T]he intent of the provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all author-

²⁵ Even if we assume that Congress thought that a broad identification requirement was constitutionally mandated, it does not follow that Congress imposed *statutory* suppression under §§ 2515 and 2518 (10)(a)(i) as a sanction for noncompliance. In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No. 107, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a District Court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone. This requirement was satisfied here when the application set forth sufficient information to indicate that the primary targets were conducting a gambling business over four particular telephones. Nothing in the legislative history indicates that Congress intended to declare an otherwise constitutional intercept order "unlawful" under § 2518 (10)(a)(i)—resulting in suppression under § 2515—for failure to name additional targets.

ized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress, for example, under section 2520 . . . if he feels that his privacy has been unlawfully invaded." S. Rep. No. 1097, 90th Cong., 2d Sess., 105 (1968).

The floor discussion concerning the amendment adding the provision for discretionary notice merely indicates an intent to provide notice to such additional persons as may be constitutionally required.

Nothing in the structure of the Act or this legislative history suggests that incriminating conversations are "unlawfully intercepted" whenever parties to those conversations do not receive discretionary inventory notice as a result of the Government's failure to inform the District Court of their identities. At the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order. The fact that discretionary notice reached 39 rather than 41 identifiable persons does not in itself mean that the conversations were unlawfully intercepted.²⁰

The legislative history indicates that postintercept notice

²⁰ Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional, Tr. of Oral Arg., at 32, and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties. Nor does this case present an opportunity to comment upon the suggestion, recognized by the United States, Brief, at 49 n. 40, that suppression might be required if the agents knew before the interception that no inventory would be served.

Moreover, respondents Merlo and Lauer were not prejudiced by their failure to receive postintercept notice under either of the District Court's inventory orders. As noted earlier, the Government made available to all defendants the intercept orders, applications, and related papers. See n. 7, *supra*. And in response to pretrial discovery motions, the Government produced transcripts of the intercepted conversations.

was designed instead to assure the community that the wiretap technique is reasonably employed. But even recognizing that Congress placed considerable emphasis on that aspect of the overall statutory scheme, we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure.

IV

Although the Government was required to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application for an extension of the initial intercept, failure to do so in the circumstances here presented did not warrant suppression under § 2518 (10)(a)(i). Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard. We hold that this is the correct result under the provisions of Title III, but we re-emphasize the suggestion we made in *United States v. Chavez*, that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." 416 U. S., at 580.

The order of the Court of Appeals is reversed and the case is remanded to that court for further proceedings in accord with this opinion.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 75-212

United States, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
Thomas W. Donovan et al. | peals for the Sixth Circuit.

[December —, 1976]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents issues concerning the construction of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510-2520. Specifically, we must decide whether 18 U. S. C. § 2518 (1)(b)(iv), which requires the Government to include in its wiretap applications "the identity of the person, if known, committing the offense, and whose conversations are to be intercepted," is satisfied when the Government identifies only the "principal targets" of the intercept. Second, we must decide whether the Government has a statutory responsibility to inform the issuing judge of the identities of persons whose conversations were overheard in the course of the interception, thus enabling him to decide whether they should be served with notice of the interception pursuant to 18 U. S. C. § 2518 (8)(d). And finally, we must determine whether failure to comply fully with these statutory provisions requires suppression of evidence under 18 U. S. C. § 2518 (10)(a).

I

On November 28, 1972, a special agent of the Federal Bureau of Investigation applied to the United States District Court for the Northern District of Ohio for an order authorizing a wiretap interception in accordance with Title

III.¹ The application requested authorization to intercept gambling-related communications over two telephones at one address in North Olmstead, Ohio, and two other telephones

¹ The wiretap application procedure is set forth at 18 U. S. C. § 2518 (1), which provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (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 where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) 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;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

The issuing judge is free to require the applicant to furnish additional information. 18 U. S. C. § 2518 (2).

at a home in Canton, Ohio. The accompanying affidavit recited that the telephones were being used by Albert Kotoch, Joseph Spaganlo, and George Florea to conduct an illegal gambling business, and that in conducting that business they would place calls to and receive calls from various persons, three of whom were also named in the wiretap application.² The affiant also stated that the Government's informants would refuse to testify against the persons named in the application, that telephone records alone would be insufficient to support a gambling conviction, and that normal investigative techniques were unlikely to be fruitful. Pursuant to the Government's request, the District Court authorized for a period of 15 days the interception of gambling-related wire communications of Kotoch, Spaganlo, Florea, three named individuals other than the respondents, and "others as yet unknown," to and from the four listed telephones.³

² The affidavit set forth extensive information indicating that the named individuals were conducting a gambling operation. This information was derived from physical surveillance by agents of the FBI, an examination of telephone company toll records, and the personal observations of six informants, whose past reliability also was detailed in the affidavit.

³ The District Court's order was issued pursuant 18 U. S. C. §§ 2518 (3), (4) which provide in pertinent part:

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2518 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted

During the course of the wiretap, the Government learned that respondents Donovan, Robbins, and Buzzaco were discussing illegal gambling activities with the named subjects. On December 26, 1972, the Government applied for an extension of the initial intercept order.⁴ This time it sought authorization to intercept gambling-related conversations of Kotoch, Spaganlo, Florea, two other named individuals, and "others as yet unknown," but it did not identify respondents

are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

⁴In addition to the December 23 application requesting an extension of the initial intercept order, the Government also filed on that date a separate application seeking authorization to monitor a third telephone discovered at the same North Olmstead address. Both applications were accompanied by another affidavit setting forth the results of the initial monitoring, the manner in which the third phone was discovered, the facts indicating that the newly discovered telephone was being used to conduct a gambling business, and reasons why continued interception was necessary. A copy of the affidavit filed on November 28 was also attached to the December 26 applications. For the sake of clarity, the two applications filed on December 26 will be treated as a single application.

Donovan, Buzzaco, and Robbins in this second application.⁵ The District Court again authorized interception of gambling-related conversations for a maximum of 15 days.

On February 21, 1973, the Government submitted to the District Court a proposed order giving notice of the interceptions to 37 persons, a group which the Government apparently thought included all individuals who could be identified as having discussed gambling over the monitored telephones.⁶ The District Court signed the proposed order, and an inventory notice was served on the listed persons, including respondents Donovan, Buzzaco, and Robbins. On September 11, 1973, after the Government submitted the names of two additional persons whose identities allegedly had been omitted inadvertently from the initial list, the District Court entered an amended order giving notice to those individuals. As a result of what the Government labels "administrative oversight," respondents Merlo and Lauer

⁵ The United States conceded in the Court of Appeals that respondents Donovan and Robbins were "known" within the meaning of the statute at the time of the December 28 application, but challenged as clearly erroneous the District Court's finding that respondent Buzzaco was "known" at that time. The Court of Appeals upheld the District Court's finding, and the United States has not sought review of that disposition. Thus, for our purposes, all three respondents were "known" on December 26.

⁶ An inventory notice *must* be served within a designated period of time upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d). The inventory must give notice of the entry of the intercept order or application, state the disposition of the application, and indicate whether communications were or were not intercepted. *Ibid.* Upon the filing of a motion, the judge has discretion to make available the intercepted communications, the applications, and the orders. *Ibid.*

Title III also authorizes the District Court to cause an inventory notice to be served on "other parties to intercepted communications" if the judge determines that such notice is in the interest of justice. *Ibid.* Those other parties may also be given access to the intercepted communications, the applications, and the orders. *Ibid.*

were not included in either list of names and were never served with inventory notice.⁷

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Kotoch, Spaganlo, the five respondents, and 10 other individuals with conspiracy to conduct and conducting a gambling business in violation of 18 U. S. C. §§ 371 and 1955. The five respondents filed motions to suppress evidence derived from the wire interception. After an evidentiary hearing on the motions, the District Court suppressed as to respondents Donovan, Robbins, and Buzzaco all evidence derived from the December 26 intercept order on the ground that failure to identify them by name in the application and order of that date violated 18 U. S. C. §§ 2518 (1)(b)(iv) and 2518 (4)(a). With respect to Merlo and Lauer, who were not known to the Government until after the December 26 application, the District Court suppressed all evidence derived from both intercept orders on the ground that they had not been served with inventory notice.

The Court of Appeals for the Sixth Circuit affirmed. 513 F. 2d 337 (1975).⁸ On the identification issue, the court held that the wiretap application must identify every person whose conversations relating to the subject criminal activity the Government has probable cause to believe it will intercept. Agreeing with the District Court that at the time of the December 26 application the Government had

⁷ Although respondents Merlo and Lauer were not served with inventory notice pursuant to § 2518 (8)(d), the intercept orders, applications, and related papers were made available to all the defendants, including Merlo and Lauer, on November 26, 1973. Thus, the introduction into evidence at trial of the contents of the intercepted conversations and evidence derived therefrom would not be prohibited by 18 U. S. C. § 2518 (9).

⁸ The Government filed its appeal from the District Court's order suppressing evidence under 18 U. S. C. § 3731, and there has been no trial on the charges with respect to the respondents.

probable cause to believe that it would overhear Donovan, Robbins, and Buzzaco "committing the offense," the Court of Appeals affirmed the suppression of evidence derived from the December 26 order. On the notice question, it held that the Government has an implied statutory duty to inform the issuing judge of the identities of the parties whose conversations were overheard so that he can determine whether discretionary inventory notice should be required.⁹ Because the Government had failed to perform this duty with respect to Merlo and Lauer, the Court of Appeals affirmed the District Court's order suppressing evidence derived from both intercept orders. The court found it unnecessary to determine whether the failure to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application and to name respondents Merlo and Lauer in the proposed inventory notice orders was inadvertent or purposeful, since the mere fact of omission was sufficient to require suppression under 18 U. S. C. § 2518 (10)(a).¹⁰

We granted certiorari to resolve these issues, which concern the construction of a major federal statute, 421 U. S. 907, and now reverse.

II

The United States contends that § 2518 (1)(b)(iv) requires that a wiretap application identify only the principal

⁹ See n. 6, *supra*.

¹⁰ 18 U. S. C. § 2518 (10)(a) provides in pertinent part:

"(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

target of the interception, and that § 2518 (8)(d) does not require the Government to provide the issuing judge with a list of all identifiable persons who were overheard in the course of an authorized interception. We think neither contention is sound.

A

We turn first to the identification requirements of § 2518 (i)(b)(iv). That provision requires a wiretap application to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." In construing that language, this Court already has ruled that the Government is not required to identify an individual in the application unless it has probable cause to believe (i) that the individual is engaged in the criminal activity under investigation and (ii) that the individual's conversations will be intercepted over the target telephone. *United States v. Kahn*, 415 U. S. 143 (1974). The question at issue here is whether the Government is required to name *all* such individuals.¹¹

The United States argues that the most reasonable in-

¹¹ Every Court of Appeals that has considered the issue has concluded that an individual whose conversations probably will be intercepted by a wiretap must be identified in the wiretap application if the law enforcement authorities have probable cause to believe the individual is committing the offense for which the wiretap is sought. *United States v. Chiarizio*, 523 F. 2d 289, 292 (CA2 1975); *United States v. Bernstein*, 509 F. 2d 996 (CA4 1975), petition for cert. filed, No. 74-1486; *United States v. Doolittle*, 507 F. 2d 1368, aff'd en banc, 518 F. 2d 500 (CA5 1975), petitions for cert. filed Nos. 75-500, 75-509, 75-513; *United States v. Civella*, 533 F. 2d 1395 (CA8 1976), petitions for cert. filed, Nos. 75-1813, 76-169; *United States v. Russo*, 527 F. 2d 1150, 1156 (CA10 1975), cert. denied, — U. S. — (1976). See also *United States v. Moore*, — U. S. App. D. C. —, 513 F. 2d 485, 493-494 (1975) (interpreting 23 D. C. Code 547 (a) (2), which is almost identical to the provision at issue here).

A number of these courts have concluded, and respondents Donovan, Robbins, and Buzzaco argue, that our decision in *United States v. Kahn*,

interpretation of the plain language of the statute is that the application must identify only the principal target of the investigation, who "will almost always be the individual whose phone is monitored."¹² Brief for the United States, at 18. Under this interpretation, if the Government has reason to believe that an individual will use the target telephone to place or receive calls, and the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation, the individual qualifies as a principal target and must be named in the wiretap application. On the other hand, an individual who uses a different telephone to place calls to or receive calls from the target telephone is not a principal target even if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation. In other words, whether one is a principal target of the investigation depends on whether one operates the target telephone to place or receive calls.¹³

415 U. S. 143 (1974), resolved this identification issue. See *United States v. Chiarizio*, *supra*; *United States v. Moore*, *supra*. Although there is language in *Kahn* suggesting that wiretap applications must identify all such individuals, the identification question presented here was not before us in *Kahn*. The question in that case was whether a wiretap application must identify a known user of the target telephone whose complicity in the criminal activity under investigation was not known at the time of the application. *Kahn* is a relevant, though not controlling, precedent.

¹² The United States does not suggest that regardless of the factual circumstances a wiretap application must identify only a single individual. To the contrary, it concedes that if two or more persons are using the target telephone "equally" to commit the offense, and thus are "equally" targets of the investigation, "all must be named." Brief for the United States, at 18 n. 13.

¹³ Counsel for the United States explained this position succinctly at oral argument: "The critical distinction . . . is one between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other hand." Tr. of Oral Arg., at 13.

Whatever the merits of such a statutory scheme, we find little support for it in the language and structure of Title III or in the legislative history. The statutory language itself refers only to "the person, if known, committing the offense and whose communications are to be intercepted." That description is as applicable to a suspect placing calls to the target telephone as it is to a suspect placing calls from that telephone. It is true, as the United States suggests, that when read in the context of the other subdivisions of § 2518 (1)(b), an argument can be made that Congress focused in subdivision (iv) on the primary user of the target telephone. But it is also clear from other sections of the statute that Congress expected that wiretap applications would name more than one individual. For example, Title III requires that inventory notice be served upon "the persons named in the order or the application." 18 U. S. C. § 2518 (8)(d) (emphasis added). And § 2518 (1)(e) requires that an intercept application disclose all previous intercept applications "involving any of the same persons . . . specified in the application" (emphasis added). It may well be that Congress anticipated that a given application would cover more than one telephone or that several suspects would use one telephone, and that an application for those reasons alone would require identification of more than one individual. But nothing on the face of the statute suggests that Congress intended to remove from the identification requirement those suspects whose intercepted communications originated on a telephone other than that listed in the wiretap application.²⁴

²⁴ Indeed, the contrary conclusion is suggested by the fact that identification of an individual in an application for an intercept order triggers other statutory provisions. First, § 2518 (1)(e) requires an intercept application to disclose all previous applications "involving any of the same persons . . . specified in the application." To the extent that Congress thought it necessary to provide the issuing judge with

Nor can we find support in the legislative history for the "principal target" interpretation. Title III originated as a combination of S. 675, the Federal Wire Interception Act, which was introduced by Senator McClellan several months prior to this Court's decision in *Berger v. New York*, 388 U. S. 41 (1967), and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska a few days after the *Berger* decision. S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968). Both bills required that wiretap applications include a full and complete statement of the facts and circumstances relied upon by the applicant and specification of the nature and location of the communication facilities involved. Although neither bill contained an express identification requirement such as that at issue here, both bills required the application to include "a full and complete statement of the facts concerning all previous applications . . . involving any person named in the application as committing, having committed, or being about to commit an offense." Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., at 77, § 8 (a)(3) and 1006, § 2518 (a)(4) (1967) (emphasis added). Thus, even at this early stage, it was recognized that an application could identify several individuals, and there is no indication that the identification would be limited to principal targets.

S. 971 combined the major provisions of S. 675 and S. 2050 and eventually was enacted. While it was pending before the Senate Judiciary Committee, this Court decided *Katz*

such information, there is no indication of congressional intent to require provision of such information only if a suspect operated from one end of a telephone line. Second, § 2518 (8)(d) mandates that an inventory notice be served upon "the persons named in the order or the application." As with § 2518 (1)(e), the congressional purpose would not be served by limiting that notice on the basis of the telephone from which one speaks.

v. *United States*, 389 U. S. 347 (1967). S. 971 was then redrafted to conform to *Katz* as well as *Berger*, and the identification provision was added at that time. The Senate Report states that the requirements set forth in the various subdivisions of § 2518 (1)(b), including the identification requirement at issue here, "[were] intended to reflect the constitutional command of particularization." S. Rep. No. 1097, 90th Cong., 2d Sess., 101 (1968), citing *Berger v. New York*, 388 U. S. 41, 58-60, and *Katz v. United States*, 389 U. S. 347, 354-356 (1967). The United States now contends that although it may be that Congress read *Berger* and *Katz* to require, as a constitutional matter, that the subject of the surveillance be named if known, Congress would hardly have read those cases as requiring the naming of all parties likely to be overheard.¹⁵ Brief, at 25-26. But to the extent that Congress thought it was meeting the constitutional commands of particularization established in *Burger* and *Katz*, Congress may have read those cases as mandating a broad identification requirement. The statute that we confronted in *Berger* required identification of "the person or persons" whose communications were to be overheard. 388 U. S., at 59. And we expressly noted that that provision "[did] no more than identify the person whose constitutionally protected area is to be invaded" *Ibid.* Given the statute at issue in *Berger* and our comment upon it,

¹⁵ At the time of the enactment of Title III, Congress did not have before it the view we expressed on this issue in *United States v. Kahn*, 415 U. S., at 155 n. 15. The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized. It is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named. Specification of this sort "identif[ies] the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." *Berger v. New York*, 388 U. S. 41, 59 (1967).

Congress may have concluded that the Constitution required the naming, in a wiretap application, of all suspects rather than just the primary user.¹⁰

In any event, for our present purposes it is unnecessary to speculate as to exactly how Congress interpreted *Berger* and *Katz* with respect to the identification issue. It is sufficient to note that in response to those decisions Congress included an identification requirement which on its face draws no distinction based on the telephone one uses, and the United States points to no evidence in the legislative history that supports such a distinction. Indeed, the legislative materials apparently contain no use of the term "principal target" or any discussion of a different treatment based on the telephone from which a suspect speaks.¹¹ We therefore conclude that a wiretap application must name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone.

B

The other statutory provision at issue in this case is

¹⁰ That Congress may have so understood the constitutional requirement is also suggested by the portion of the Senate Report dealing with that provision of S. 971 that required the intercept order to identify "the person, if known, whose conversations are to be intercepted." The Senate Report merely cites *West v. Cabell*, 153 U. S. 78 (1894), which concerns the need for proper identification of the subject of an arrest warrant. S. Rep. No. 1097, 80th Cong., 2d Sess., 102 (1968). To the extent that Congress may have considered *West* to apply to wiretap orders, we have no reason to believe that Congress considered its applicability to extend only to those suspects using the target telephone.

¹¹ At least one Senator read the identification requirement in S. 971 to parallel the identification requirement contained in the statute at issue in *Berger v. New York*: "Specificity is required as to the person or persons whose communications are to be intercepted." 114 Cong. Rec., at 14763 (1968) (remarks of Sen. Percy).

18 U. S. C. § 2518 (8)(d), which provides that the judge shall cause to be served on the persons named in the order or application an inventory, which must give notice of the entry of the order or application, state the disposition of the application, and indicate whether communications were intercepted.¹⁸ Although the statute mandates inventory notice only for persons named in the application or the order, the statute also provides that the judge may order similar notice to other parties to intercepted communications if he concludes that such action is in the interest of justice.¹⁹ Observing that this notice provision does not expressly require law enforcement authorities routinely to supply the judge with specific information upon which to exercise his discretion, the United States contends that it would be inappropriate to read such a requirement into the statute since the judge has the option of asking the law enforcement authorities for whatever information he requires.

Our reading of the legislative history of the discretionary notice provision in light of the purposes of Title III leads us to reject the Government's interpretation. As reported from the Judiciary Committee, section 2518 (8)(d) contained only a provision mandating notice to the persons named in the application or the order; the discretionary notice provision was added by amendment on the floor of the Senate.

¹⁸ The inventory notice must be served within a reasonable time but not later than 90 days after the date the application for an intercept order was filed. On an *ex parte* showing of good cause, service of the inventory may be postponed.

¹⁹ In addition to these provisions for mandatory and discretionary inventory notice, the Government is required to supply the issuing judge with recordings of the intercepted conversations, which are to be sealed according to his directions. 18 U. S. C. § 2518 (8)(a). These notice and return provisions satisfy constitutional requirements. See *Katz v. United States*, 389 U. S. 347, 355-356, and n. 16 (1967); *Berger v. New York*, 388 U. S. 41, 60 (1967).

In introducing that amendment, Senator Hart explained its purpose:

"The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted conversations, even though such parties are not specifically named in the court order. The Berger and Katz decisions established that notice of surveillance is a constitutional requirement of any surveillance statute. It may be that the required notice must be served on all parties to intercepted communications. Since legitimate interests of privacy may make such notice to all parties undesirable, the amendment leaves the final determination to the judge." 114 Cong. Rec. 14485-14486 (1968).²⁰

In deciding whether legitimate privacy interests justify withholding inventory notice from parties to intercepted conversations, a judge is likely to require information and assistance beyond that contained in the application papers and the recordings of intercepted conversations made available by law enforcement authorities. No purpose is served by holding that those authorities have no routine duty to supply the judge with relevant information. The Court of Appeals for the Ninth Circuit recently confronted this problem of

²⁰ It is worth noting that shortly before Senator Hart proposed this amendment to S. 971, Senator Long had read to the Senate portions of a report prepared by the Association of the Bar of the City of New York on federal wiretap legislation. That report commented that parties to intercepted conversations other than those named in the application or order probably should be served with inventory notice, but it also recognized that under some circumstances the provision of such notice could be harmful and gave the following example:

"A, a businessman, talks to his customers, and the latter are served with papers showing that A is being bugged[.] [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory." 114 Cong. Rec. 14476 (1968).

dual responsibility, and we adopt the balanced construction that court placed on § 2518 (8)(d):

"To discharge this obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted conversation is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties. Furthermore, although the judicial officer has the duty to cause the filing of the inventory [notice], it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his statutory § 2518 (8)(d) discretion, . . . the government is also required to furnish such information as is available to it." *United States v. Chun*, 503 F. 2d 533, 540 (1974).

We agree with the Ninth Circuit that this allocation of responsibility best serves the purposes of Title III.²¹

²¹ At oral argument, counsel for the United States recognized the merit of the approach specified in *United States v. Chun*:

"Perhaps the approach of the Court of Appeals for the Ninth Circuit, which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this regard." Tr. of Oral Arg., at 6-7.

Currently, the policy of the Justice Department is to provide the issuing judge with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment. Brief for the United States, at 39. Because it fails to assure that the necessary range of information will be before the issuing judge, this policy does not meet the test set out in *Chun*. Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete. Applying these principles, we find that the Government did not comply adequately with § 2518 (8)(d), since the names of respondents Merlo and Lauer were not included on the purportedly complete list of identifiable persons submitted to the issuing judge.

III

We turn now to the question whether the District Court properly suppressed evidence derived from the wiretaps at issue solely because of the failure of the law enforcement authorities to comply fully with the provisions of §§ 2518 (1) (b)(iv) and 2518 (8)(d). Section 2515 expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." The circumstances that trigger suppression under § 2515 are in turn enumerated in § 2518 (10)(a):

- "(i) the communication was unlawfully intercepted;
- "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- "(iii) the interception was not made in conformity with the order of authorization or approval."

There is no basis on the facts of this case to suggest that the authorization orders are facially insufficient, or that the

interception was not conducted in conformity with the orders. Thus, only § 2518 (10)(a)(i) is relevant: were the communications "unlawfully intercepted" given the violations of §§ 2518 (1)(b)(iv) and 2518 (8)(d)?²²

Resolution of that question must begin with *United States v. Giordano*, 416 U. S. 505 (1974), and *United States v. Chavez*, 416 U. S. 562 (1974). Those cases hold that "[not] every failure to comply fully with any requirement provided

²²The availability of the suppression remedy for these statutory, as opposed to constitutional, violations, see nn. 15 and 19, *supra*, turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. *United States v. Giordano*, *supra*, 416 U. S., at 524.

The concurring opinion of THE CHIEF JUSTICE contends that respondents Donovan, Robbins, and Buzzaco lack standing even to seek suppression. *Post*, at —. This contention rests on the ground that Congress rejected an amendment proposed by Senators Long and Hart that would have added a fourth ground justifying suppression—namely, that the person against whom the Government sought to introduce the evidence was not named in the court order. Since these three respondents would have been entitled to suppression under the rejected amendment, the concurring opinion concludes they cannot seek suppression here.

This view fails to recognize that § 2518 (10)(a) establishing the suppression remedy provides *alternative* grounds on which one can seek suppression of evidence derived from a wiretap. Thus, the mere fact that Congress chose not to add a fourth alternative could not mean that it intended to prevent persons who would have been covered by that alternative from seeking suppression on one of the other grounds. As the Justice Department commented, in the same statement cited in the concurring opinion: "The [Long and Hart] amendment is designed to limit the scope of electronic surveillance, but it accomplishes this objective in an artificial manner. *So long as the court order is validly obtained*, evidence obtained under the order should be admissible against any person, not merely against the person named in the order." 114 Cong. Rec., at 14715 (1968) (emphasis added). Here, respondents Donovan, Robbins, and Buzzaco challenge the validity of the court order, and nothing in either Congress' rejection of the proposed amendment or the Justice Department's comment thereon suggests that § 2518 (10)(a)(i) is unavailable to persons who might have had a remedy under a provision not enacted by Congress.

in Title III would render the interception of wire or oral communications 'unlawful.'" *United States v. Chavez*, 416 U. S., at 574-575. To the contrary, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States v. Giordano*, 416 U. S., at 527.

Giordano concerned the provision in Title III requiring that an application for an intercept order be approved by the Attorney General or an Assistant Attorney General specially designated by the Attorney General. Concluding that Congress intended to condition the use of wiretap procedures on the judgment of senior officials in the Department of Justice, the Court required suppression for failure to comply with the approval provision. *Chavez* concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application. The problem in *Chavez* was one of misidentification; although the application had in fact been authorized by the Attorney General, the application erroneously identified an Assistant Attorney General as the official authorizing the application. The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of § 2518 (10) (a)(i) since that identification requirement did not play a "substantive role" in the regulatory system. 416 U. S., at 578.

In the instant case, the Court of Appeals concluded that both the identification requirement of § 2518 (1)(b)(iv) and the notice requirement of § 2515 (8)(d) played a "central role" in the statutory framework, and for that reason affirmed the District Court's order suppressing relevant evidence. Although both statutory requirements are un-

doubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements.

A

As to § 2518 (1)(b)(iv), the issue is whether the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a "substantive role" with respect to judicial authorization of intercept orders and consequently imposes a limitation on the use of intercept procedures. The statute provides that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity, (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity. That determination is based on the "full and complete statement" of relevant facts supplied by law enforcement authorities. If, after evaluating the statutorily enumerated factors in light of the information contained in the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. The intercept order may issue only if the issuing judge determines that the statutory factors are present, and the failure to name additional targets in no way detracts from the sufficiency of those factors.

This case is unlike *Giordano*, where failure to satisfy the statutory requirement of prior approval by specified Justice Department officials bypassed a congressionally imposed limitation on the use of the intercept procedure. The Court there noted that it was reasonable to believe

that requiring prior approval from senior officials in the Justice Department "would inevitably foreclose resort to wiretapping in various situations where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use." 416 U. S., at 528. Here, however, the statutorily imposed preconditions to judicial authorization were satisfied, and the issuing judge was simply unaware that additional persons might be overheard engaging in incriminating conversations. In no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept.²³ Rather, this case resembles *Chavez*, where we held that a wiretap was not unlawful simply because the issuing judge was incorrectly informed as to which designated official had authorized the application. The *Chavez* intercept was lawful because the Justice Department had performed its task of prior approval, and the instant intercept is lawful because the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied.²⁴

²³ There is no suggestion in this case that the Government agents knowingly failed to identify respondents Donovan, Robbins, and Buzzaco for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case. Nor is there any suggestion that as a result of the failure to name these three respondents they were denied the mandatory inventory notice supplied to persons named in the application. 18 U. S. C. § 2518 (8)(d). Respondents Donovan, Robbins, and Buzzaco were among the 37 persons served with the initial inventory.

²⁴ No one suggests that the failure to identify in a wiretap application individuals who are "unknown" within the meaning of the statute, see *United States v. Kahn*, 415 U. S. 143 (1974), requires suppression of intercepted conversations to which those individuals were parties. Though recognizing that the failure to identify such an "unknown" individual does not make unlawful an otherwise valid intercept order, respondents Donovan, Robbins, and Buzzaco suggest that the opposite is true

Finally, we note that nothing in the legislative history suggests that Congress intended this broad identification requirement to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *United States v. Chavez*, 416 U. S., at 578. Neither S. 675 nor S. 2050, the predecessor bills of S. 971, contained an identification provision. See p. 11, *supra*. The only explanation given in the Senate Report for the inclusion of the broad identification provision was that it was intended to reflect what Congress perceived to be the constitutional command of particularization. This explanation was offered with respect to all the information required by § 2518 (1)(6) to be set out in an intercept application. No additional guidance can be gleaned from the floor debates, since they contain no substantive discussion of the identification provision.²³

with respect to the failure to identify in a wiretap application individuals who are "known" within the meaning of the statute. Counsel for these respondents suggested at oral argument that this difference in result is justified by analogy to warrantless searches or arrests. Tr. of Oral Arg., at 40. Although law enforcement officials can often take action without a warrant when they have been unable to foresee the circumstances that eventually confronted them, they still must obtain a search or arrest warrant when their prior knowledge is sufficient to establish probable cause, and it is suggested that the same principle applies here. The major flaw in that reasoning is that this case does not concern warrantless action. Here, the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.

²³ Even if we assume that Congress thought that a broad identification requirement was constitutionally mandated, it does not follow that Congress imposed *statutory* suppression under §§ 2515 and 2518 (10)(a) (i) as a sanction for noncompliance. In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No.

B

We reach the same conclusion with respect to the Government's duty to inform the judge of all identifiable persons whose conversations were intercepted. As noted earlier, the version of Title III that emerged from the Senate Judiciary Committee provided only for mandatory notice to the "persons named in the order or the application." The Senate Report detailed the purpose of that provision:

"[T]he intent of the provision is that the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress, for example, under section 2520 . . . if he feels that his privacy has been unlawfully invaded." S. Rep. No. 1097, 90th Cong., 2d Sess., 105 (1968).

The floor discussion concerning the amendment adding the provision for discretionary notice merely indicates an intent to provide notice to such additional persons as may be constitutionally required.

Nothing in the structure of the Act or this legislative history suggests that incriminating conversations are "unlawfully intercepted" whenever parties to those conversations do not receive discretionary inventory notice as a result of

107, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a District Court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone. This requirement was satisfied here when the application set forth sufficient information to indicate that the primary targets were conducting a gambling business over four particular telephones. Nothing in the legislative history indicates that Congress intended to declare an otherwise constitutional intercept order "unlawful" under § 2518 (10) (a) (i)—resulting in suppression under § 2515—for failure to name additional targets.

the Government's failure to inform the District Court of their identities. At the time inventory notice was served on the other identifiable persons, the intercept had been completed and the conversations had been "seized" under a valid intercept order. The fact that discretionary notice reached 39 rather than 41 identifiable persons does not in itself mean that the conversations were unlawfully intercepted.²⁰

The legislative history indicates that postintercept notice was designed instead to assure the community that the wiretap technique is reasonably employed. But even recognizing that Congress placed considerable emphasis on that aspect of the overall statutory scheme, we do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure.

IV

Although the Government was required to identify respondents Donovan, Robbins, and Buzzaco in the December 26 application for an extension of the initial intercept, failure to do so in the circumstances here presented did not warrant

²⁰ Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional. Tr. of Oral Arg., at 32, and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties. Nor does this case present an opportunity to comment upon the suggestion, recognized by the United States, Brief, at 49 n. 40, that suppression might be required if the agents knew before the interception that no inventory would be served.

Moreover, respondents Merlo and Lauer were not prejudiced by their failure to receive postintercept notice under either of the District Court's inventory orders. As noted earlier, the Government made available to all defendants the intercept orders, applications, and related papers. See n. 7, *supra*. And in response to pretrial discovery motions, the Government produced transcripts of the intercepted conversations.

suppression under § 2518 (10)(a)(i). Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard. We hold that this is the correct result under the provisions of Title III, but we re-emphasize the suggestion we made in *United States v. Chavez*, that "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." 416 U. S., at 580.

The order of the Court of Appeals is reversed and the case is remanded to that court for further proceedings in accord with this opinion.

It is so ordered.