ORIGINAL

In the

Supreme Court of the United States

UNITED STATES, Petitioner, vs DOMINIC NICHOLAS GIORDANO, et al., Respondents.	No. 72-1057
UNITED STATES, Petitioner, vs UMBERTO JOSE CHAVEZ, et al., Respondents.	No. 72-1319

Washington, D. C.
January 8, 1974

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Washington, D. C.,

Tuesday, January 8, 1974.

The above-entitled matters came on for argument at 1:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNA, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; for the Petitioner.

H. RUSSELL SMOUSE, ESQ., 1700 First National Bank Building, Baltimore, Maryland 21202; for Respondents Giordano, et al.

JAMES F. HEWITT, ESQ., Federal Public Defender, 450 Golden Gate Avenue, San Francisco, California 94102; for Respondents Chavez, et al.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1057 and 1319, United States against Giordano and United States against Chavez.

Mr. Solicitor General, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BORK: Mr. Chief Justice, may it please the Court:

We have two cases, United States against Giordano and United States against Chavez, which involve the suppression of wire interception evidence and the fruits of that evidence in narcotics cases.

The cases are here on writs of certiorari from the Fourth and Ninth Circuits, respectively. In both cases the District Court suppressed the evidence applying Title III of the Safe Streets statute, and this the Courts of Appeals affirmed and this Court granted the government petitions for certiorari.

These two cases represent a great many cases, some of them pending here on petitions for certiorari and others awaiting resolution in lower courts, being held up.

The issue, as the government sees it, is entirely a statutory one. It's the construction of Title III of the

Crime Control and Safe Streets Act of 1968. And the government's -- the propriety, the adequacy of the government's procedures in processing applications to courts for orders permitting wire interception.

In addition to the adequacy of those procedures, the cases raise the question of whether, assuming the procedures were in some degree defective, suppression is the remedy called for.

At the outset I'd like to stress what these cases are not about.

There are no constitutional violations, in our view, in these cases, no violations of the Fourth Amendment. Those provisions of this statute which were drawn to comply with this Court's decisions in Berger and Katz were fully complied with.

The courts did pass upon probable cause and all other Fourth Amendment elements.

There is no contention, nor do I think could there be any, that the evidence that has been suppressed is not reliable evidence and is not accurate evidence. There is no question in this case, in these cases of convicting innocent persons.

I think, as we look at the case and the facts, it will also become perfectly plain that the government's procedures here, which, in one or two respects, certainly must

be said to be not the best compliance with some aspects of the statute, do not display any malevolent purpose. There was no sinister purpose, there was no purpose of hiding anything in these procedures.

And I think, in so far as there was a deviation from a procedure, we can demonstrate that it was a harmless error; and an error, I might add, which has now been corrected.

Let me first --

QUESTION: Corrected for the future, you mean?

MR. BORK: It's been corrected for some time, Mr. Chief Justice.

QUESTION: Two years, approximately?

MR. BORK: In 1972 the last correction took place, in November, I believe.

QUESTION: Mr. Solicitor General, is it the fact that in each of these cases, what was told the judge in each instance, is not quite accurate; isn't that what happened?

MR. BORK: In every one of these cases there was a letter authorizing an application, which went out over the signature of Mr. Will Wilson, then head of the Criminal Division. The letter looked as if Mr. Will Wilson had made the operative decision to authorize the application to the court.

As a result, the court orders identified Mr. Wilson

as the person who had authorized the application. In fact, those applications had been authorized either by the Attorney General in most cases and in some cases by the Executive Assistant to the Attorney General, Mr. Sol Lindenbaum.

That was the result entirely, as I hope to show, of the way the internal memoranda were drafted in the Department of Justice and was not a deliberate misidentification in any way.

QUESTION: Now, that wasn't my question. I gather, though, that what -- the information the judge had before him was not accurate information, at all, was it?

MR. BORK: He had accurate information as to everything except Mr. Wilson's name.

QUESTION: Well, that's rather important, isn't it?

MR. BORK: Yes. Well, --

QUESTION: Under the statute.

MR. BORK: I think it has importance under the statute. I don't think it has any importance that would justify suppression in these cases.

It would probably help if I could describe the general procedures that were followed in all of these cases, and the statutory provisions that are claimed to be violated by that fact, and then come to the particular facts of these two cases.

When it was thought by an investigator or a field

attorney that a wire interception order was required or was appropriate, he would then gather together the information, the affidavits and the application, to show probable cause, the necessity for the use of wire interception as a technique, and the other aspects that the statute calls for.

He would forward that to Washington.

In Washington it was reviewed by an attorney in the special unit of the Organized Crime and Racketeering Section of the Criminal Division. A special unit set up just for this purpose. That was the main review.

It then went, with the memorandum from the attorney in that unit, to the Assistant Attorney General of the Criminal Division, where, by designation, it was reviewed by one of the two Deputies, one of the two Deputy Attorney Generals, Mr. Shapiro or Mr. Petersen, at that time.

Should they approve -- and I should stress that at every level disapproval meant it was sent back, it did not -- if anybody disapproved it, the authorization request did not go on; and a number of them were in fact sent back.

Should they approve, the application and the memo were sent up to the Attorney General's office, where it was reviewed by the Executive Assistant, Mr. Sol Lindenbaum, who has been the Executive Assistant to the Attorneys General starting with Attorney General Ramsey Clark and is still the Executive Assistant to the Attorney General.

Mr. Lindenbaum would review it, and then send it on to the Attorney General, Mr. Mitchell, with his recommendation.

Through 1969, when this practice, when the experience with this statute first began, 33 such applications were authorized by Mr. Mitchell personally. Mr. Lindenbaum, in 1969, did not attach his, Mr. Mitchell's, initials to any, they were all, every one was done by Mr. Mitchell.

As 1970 began, and the flow of these applications began to increase, and Mr. Mitchell began to do some traveling, as close as we can calculate it, about April 1st of 1970, after there had been some further experience beyond the 33 applications in 1969, Mr. Mitchell authorized, orally, Mr. Lindenbaum to act on his behalf when Mr. Mitchell was unavailable and he could not be reached by telephone, with the statement that when he returned Mr. Lindenbaum was to tell him what he had done in these respects, and he would then see whether he approved; as he did in all of these cases.

QUESTION: What if he hadn't approved, after he got back from a month's trip?

MR. BORK: Well, if he hadn't approved, I assume that the interception would have terminated.

But Mr. Lindenbaum --

QUESTION: But the interception would have taken place.

MR. BORK: For the month, Mr. Justice Stewart; correct.

I wish to say, however, that Mr. Lindenbaum was operating under a policy established by Mr. Mitchell, and he had worked on these things with Mr. Mitchell for some time before he began to do this, and I think there was no question that he understood the policy Mr. Mitchell was applying.

Now, I should also stress, although I'm afraid it's something I will stress repeatedly, that, although the interception would have taken place, had such a thing occurred it would only have taken place after a court had determined that every element of probable cause and every other required element was present.

QUESTION: Well, but also the court might have determined that Will Wilson had approved it, too, when he hadn't?

MR. BORK: That is correct.

QUESTION: And that Will Wilson had been specifically designated and had in fact approved it.

MR. BORK: That is correct, but --

QUESTION: When, in fact, it would have been approved, under my hypothetical case, by Mr. Lindenbaum who was orally authorized to do it; but then on the return of the Attorney General had been disapproved.

That's my hypothetical.

MR. BORK: Under your hypothetical, that would be true.

QUESTION: Yes.

MR. BORK: However, that did not happen, and these procedures are no longer in effect, so it cannot happen now.

About 150 to 180 of these applications appear to have been initialed by Mr. Lindenbaum with Mr. Mitchell's signature. Now, that's out of a total of --

QUESTION: That's beginning in April 1970?

MR. BORK: That is correct, Mr. Chief Justice.

QUESTION: And for how long a period --

MR. BORK: Into 1971 when this practice was first questioned in court, because the Department of Justice had no inkling that anybody, that there was anything troublesome about this practice.

When it was first questioned in court, they changed it.

But I wish to say, about those 170 or so applications that were authorized by Mr. Lindenbaum putting Mr. Mitchell's signature on the memorandum, that a great many of those were in fact applications that had been authorized by Mr. Mitchell over the telephone. Mr. Lindenbaum had gotten to him over the telephone, had read him the material, and had received Mr. Mitchell's approval. So that Mr. Lindenbaum was performing in those cases a ministerial act only of doing

what Mr. Mitchell informed him he should do.

Unfortunately, Mr. Lindenbaum did not keep a record of the telephone calls, so that we, in every case in which Mr. Lindenbaum put Mr. Mitchell's signature on the memorandum, we must assume that that may be a case in which there was no telephone authorization. Although we know that a great many of them were in fact authorized by telephone.

It's at this stage that the first problem of, or claim of violation of the statute occurs. Because, in Title III, 18 USC 2516, it is provided that the Attorney General or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge.

And the claim is that when Mr. Lindenbaum, the Executive Assistant, applying the policy laid down for him by the Attorney General, authorized, that that falls outside the statute.

Now, the second issue arises because of the form of the memorandum that Mr. Lindenbaum or Mr. Mitchell -- Mr. Mitchell in most cases -- actually initialed.

The form of the memorandum -- the memorandum was drafted so as to track the statute. That memorandum was drafted, so far as we can tell, by an attorney in the Special Unit, which first reviews these things, and sent up with the file for Mr. Mitchell to authorize.

And it was in the form of a special delegation, so that when the memorandum was initialed, it went back down to the Criminal Division, addressed to Mr. Wilson, saying: Pursuant to the powers conferred on me by Section 2516 of Title 18, you are hereby specially designated to exercise those powers for the purpose of authorizing the particular trial attorney to make the above-described application.

He is designated solely for the purpose of authorizing it, so that it is understood that Mr. Wilson is to perform a ministerial act; he's not designated to make any judgment. In fact, the judgment of the Criminal Division had already been made when the file was on its way up, or it wouldn't have gone up.

The net result was that when that memorandum went down, this ministerial act of affixing Mr. Wilson's signature to a letter was performed by one of his two deputies, both of whom were authorized to do this in a number of matters, Mr. Henry Petersen or Mr. Harold Shapiro.

The letter went out, as was noted, looking as if Mr. Wilson had made the operative decision, when, in fact, the Attorney General had made the operative decision or, in some cases, the Attorney General's Executive Assistant.

And the attorney in the field would have no way of knowing about this memorandum and its form and why this had occurred, so he would assume usually that Mr. Will Wilson had

made the operative decision, and he would so tell the court, and it is claimed there -- and the court would include that fact in its order, and the claim therefore is that Section 2518 of Title 18, which provides that each application shall include the following information: (a) the identity of the author authorizing the application; and in 4(d) the identity of the person authorizing the application must be in the judge's order, the wire intercept order.

In all of these cases --

QUESTION: Mr. Solicitor General, the order would name, in this sequence, at that time, the Assistant Attorney General of the Criminal Division, or who would be the named person?

MR. BORK: In every one of these wire intercept orders, some 500 of them, Mr. Wilson's name appears, the Criminal Division, because of this memorandum and forms that were used in the Department.

There is no -- all of the cases involve what we call the Will Wilson issue, because of that form letter going out. Only some of the cases involve the question of the delegation by Mr. Mitchell to Mr. Lindenbaum, of the authority.

QUESTION: Well, how did this happen, Mr. Solicitor General? It just happened, it's just the way things happened to work out, and nobody caught it?

MR. BORK: Nobody caught it. In fact, Mr. Justice White, when we caught, when the Department caught the delegation problem, because litigation arose over it, the delegation from Mr. Mitchell to Mr. Lindenbaum, they corrected that, but they didn't look at the other form. And that continued until litigation began over that form, the Will Wilson one.

QUESTION: That form also?

MR. BORK: Right.

And these forms, this was a new statute when Mr. Mitchell started working with this statute, it hadn't been used before, and Attorney --

QUESTION: It had been in your Department, hadn't it?

MR. BORK: Some of these relevant propositions had been, yes, Mr. Stewart.

QUESTION: Mr. Solicitor, see if I get this clearly. 18 USC 2518(1)(a), I think that's the one you just referred to, isn't it?

MR. BORK: Yes.

QUESTION: That each application, that means the application to the judge, does it not?

MR. BORK: That is correct, Mr. Justice Brennan.

QUESTION: And that shall include -- shall include the following information: (a) the identity of the investiga-

tive or law enforcement officer making the application.

Now, do I understand that none of these applications accurately identified the investigative or law enforcement officer making the application?

MR. BORK: No, Mr. Justice Brennan.

QUESTION: That's what I thought.

MR. BORK: They did identify that man, that was the trial attorney or the investigator.

QUESTION: Right.

MR. BORK: But they did not correctly identify the officer --

QUESTION: Officer authorizing.

MR. BORK: -- authorizing the application.

QUESTION: None of them did.

MR. BORK: That is correct.

QUESTION: So that at least on the face of the statute none of these applications complied with that provision of the statute.

MR. BORK: That is correct.

QUESTION: Right.

QUESTION: So, in other words, the facts are that Will Wilson never authorized one of these and never signed the letter?

MR. BORK: Will Wilson certainly never signed the letter. And the best that can be said about the authoriza-

tion procedure is that if delegation is permissible in this area -- a point that I want to come to -- he had delegated on the way up the power to approve the application to his deputies, two deputies, Mr. Petersen and Mr. Shapiro. And they did approve them on the way up.

When the memo came back down, Mr. Wilson made no operative decision, and neither did his deputies at that stage.

QUESTION: But one or the other of the deputies would put his signature on it, with a rubber stamp or a facsimile signature of some kind?

MR. BORK: I don't -- I think -- whether they used a stamp or facsimile, I don't know, but they did put on --

QUESTION: Or write out his name, as though it were his signature.

MR. BORK: That's correct.

QUESTION: But he --

QUESTION: In effect this was following the practice that is routinely done with ordinary letters, day to day, as distinguished from applications to a court?

MR. BORK: Oh, yes. In fact, there are many -- as I intend to state, there are many cases of delegations of this sort of authorizations to --.

In the case of Mr. Wilson, when the memorandum came back down, I believe it's quite clearly a ministerial act at

that stage. And the only problem -- there's no question about the authority to put on the name, the only problem is that when the letter goes out that way, the attorney in the field tells the court that Mr. Wilson made the operative decision, when, in fact, Mr. Mitchell made it.

QUESTION: How is it ministerial, to describe the issuance of a subpoena; the purpose taken isn't ministerial, is it?

MR. BORK: No, I only meant by that, Mr. Justice Douglas, was that the fact that somebody else signed Mr. Wilson's signature, I think, was ministerial. The fact that the signature should not have been there as the person authorizing is not ministerial; that's more substantive.

QUESTION: I guess what you said brought me up rather sharply, because when I was in the Executive Branch this was a recurring problem, and we never dreamed that you could delegate to anybody the signing of subpoenas, in your name.

MR. BORK: Mr. Justice Douglas, I don't think there was any delegation of the signing of subpoenas.

QUESTION: Well, this is -- we're getting at the same thing.

MR. BORK: Had --

QUESTION: They're collecting evidence.

MR. BORK: Had the letter said -- this letter was

only notifying the trial attorney. Had the letter said the Attorney General has authorized this, as was the case, and had Mr. Petersen signed Mr. Wilson's name to a statement that the Attorney General authorized, I don't think there would have been any problem. That would have been a ministerial act.

The problem is --

QUESTION: If the Attorney General had authorized this.

MR. BORK: That's correct, yes.

The problem is the identification of the authorizing officer, not the affixing of the signature; not the question of which person affixed the signature.

QUESTION: But the order that came back down from the Attorney General actually did say you are authorized to notify; didn't it?

MR. BORK: It said, Mr. Justice White, that you are specially designated to act in this matter for the purpose of authorizing the application.

"Pursuant to the powers conferred on me by Section 2516, you are hereby specially designated to exercise those powers for the purpose of authorizing the trial attorney to make the above-described application."

QUESTION: And that was the communication from the Attorney General to Assistant Attorney General Wilson, is that

it?

MR. BORK: That's correct.

QUESTION: And the fact was that at that stage the Attorney General had already approved this and, in effect, it was an order to Wilson to go ahead and approve it himself, I suppose.

MR. BORK: That's correct.

QUESTION: Is there any way in the world that the judge could know that Mr. Lindenbaum had approved it, and not the Attorney General?

QUESTION: No.

MR. BORK: Not unless inquiry was made, Mr. Justice Marshall, as it --

QUESTION: There would be no reason for him to make the inquiry, would it?

MR. BORK: No, there would not.

I think, however, --

QUESTION: Well, what you were actually doing, you were telling the judge that either Mr. Wilson or the Attorney General approved this, --

MR. BORK: Well, it was that --

QUESTION: -- and, in fact, the Executive Assistant was doing it.

MR. BORK: Well, in some cases the Executive Assistant was doing it, Mr. Justice Marshall.

QUESTION: That's the one -- those are the ones I'm talking about.

MR. BORK: But in no case was the judge told that the Attorney General did it, he was always told that Mr. Wilson did it.

QUESTION: But Mr. Wilson wasn't doing it.

MR. BORK: No. Even in the case when the Attorney General was --

QUESTION: Mr. Wilson was doing what Mr. Lindenbaum told him to do, with Mr. Mitchell's signature.

MR. BORK: That is correct. That is correct. There is no doubt about that in some of these cases.

But I might say, Mr. Justice Marshall, I think that's not an uncommon situation in which an Attorney General delegates certain functions that are specified by statute as being Attorney General's functions, and often nobody knows that in fact the operative decision was made by someone other than the Attorney General.

QUESTION: Well, I don't know whether that's happened so often. I hope it doesn't happen so often, when you are interfering with people's rights of privacy, et cetera.

MR. BORK: Mr. Justice Marshall, I intend to discuss at some length the fact --

QUESTION: Okay. Fine.

MR. BORK: No, no. I want to answer it now, too.

I didn't mean to put it off.

QUESTION: No, that's all right.

MR. BORK: I just wanted to indicate my answer --

QUESTION: That's all right.

MR. BORK: -- which is that I think nobody's right of privacy was interfered with in these cases in any way. These are all cases in which every Fourth Amendment right was observed, and in which, in fact, Mr. Lindenbaum applied Mr. Mitchell's policy, and nothing would have changed had Mr. Mitchell been there.

The same interceptions would have occurred, the same findings of probable cause and so forth would have been made.

QUESTION: Here, I suppose, Mr. Solicitor General, what this will come down to, this being, as you opened your statement, a statutory matter, is what significance did the Congress attach to that provision requiring that the application identify the officer authorizing the application; doesn't it?

That, notwithstanding all of this, Congress had a purpose for making that requirement, and that purpose was not satisfied by these procedures. Notwithstanding everything you've said, I expect it's still a statutory violation, isn't it?

ARVOICE: Your Honor doesn't concede it.

QUESTION: Well, not only doesn't -- you may not concede it, but that's what the issue comes down to, isn't it?

MR. BORK: The issue comes down to that, certainly, Mr. Justice Brennan.

I think it's neither a statutory violation, particularly in the case of the delegation from Mr. Mitchell to Mr. Lindenbaum, nor do I think there is any case in the statute or elsewhere for suppression of the evidence.

QUESTION: Well, I gather --

QUESTION: Even if it's a statutory violation.

MR. BORK: Right. That is correct.

QUESTION: But I gather, when you get to whether or not it's a statutory violation, you will address, won't you, that report of the -- the Senate Report in which, in dealing with this requirement, the emphasis was on the lines of responsibility leading to an identifiable person, and that this provision in itself should go a long way toward guaranteeing that no abuses will happen?

MR. BORK: I think indeed -- I will come to that, and indeed in terms of the delegation by Mr. Mitchell to Mr. Lindenbaum, I would contend that the statutory purposes are carried out precisely. There is a unitary policy, it was established by Mr. Mitchell. Mr. Lindenbaum understood it, and carried it out very well. And in fact the Attorney General

was responsible, and there has been no question about affixing the responsibility to him.

QUESTION: It may not. Behind the scenes, that's quite true. But the question is whether what was before the judge at the time of the application satisfied that requirement of the statute.

MR. BORK: Yes, Mr. Justice Brennan, that is the 2518(1) and (4)(d) question. I was addressing the 2516 question.

QUESTION: I see, yes; I beg your pardon.

MR. BORK: Let me come to the -- I suppose since these cases are so general in their impact, I need not, perhaps, detail the particular facts of this case and how it happened. In the Giordano case, Mr. Lindenbaum did authorize the first application;when the time came, seven days later I believe it was, for an extension order, Mr. Mitchell was back in the office, saw what had been done, and signed -- and authorized the application for an extension.

One could see, I think, ratification in that.

But the issue is far more general than simply this one case, although it occurred in one case if not others.

But let me -- the issue is quite general, the issue of Mr. Mitchell's delegation to Mr. Lindenbaum, the 2516(1) case affects 60 cases with 626 defendants.

The issue of Mr. Wilson being identified as the

authorizing officer, which is the 2518 issue, affects 159 cases with 1433 defendants.

QUESTION: Now, are those mutually exclusive, or is --

MR. BORK: No, they are the latter, Mr. Justice Stewart, I was about to say all of the --

QUESTION: So it was the latter instead of the former?

MR. BORK: Yes.

QUESTION: Right.

MR. BORK: All of the Mitchell-Lindenbaum cases are also Wilson issue cases, --

QUESTION: Right.

MR. BORK: -- so that the outside figure is 1433 defendants in these Organized Crime cases.

There are 525 applications for orders which are at stake. In fact, two years' work of the Organized Crime Section is at stake in these cases.

I've said that the procedures here are no longer in use, I should say that up until, when this was recognized as an issue that would be in litigation, they moved immediately to a case where the Attorney General made the authorization, the papers show he made the authorization, and the court is told that.

Recently special delegation -- special designation has been made to Mr. Henry Petersen, the Assistant Attorney

General in charge of the Criminal Division, and he is now making the authorizations.

We've argued this case a little bit in reverse of what would seem to be the usual order, that is, we usually argue we didn't violate the statute and then we argue suppression; we argued suppression first in this case, not because of any particular doubt about the -- or feeling of weakness about the statutory arguments, but because, as we looked at it, we felt the weight of this case is not our desire to sustain these procedures for the future. They are of no value, they were accidental procedures that came about by the way the memoranda were drafted.

The weight of this case is the preservation of all of these prosecutions against defendants, as to which the government feels it has a very good case. And that is why we argued the suppression point first, to indicate what the government perceives as the importance of these cases.

I confess that I find it difficult to see any case for the suppression of vital evidence and accurate evidence in this class of cases.

I think I have sufficiently --

QUESTION: Well, the section provides for it, doesn't it?

MR. BORK: I think not, Mr. Justice Douglas. I think the statute does not provide for suppression. And --

QUESTION: Well, what does that provision 2515, "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, ... before any court, ... if the disclosure of that information would be in violation of this chapter."

MR. BORK: That is --

QUESTION: That's the provision, isn't it?

MR. BORK: I don't think that's the operative provision, no, sir.

QUESTION: 2518(10) is the other.

MR. BORK: That is correct.

The disclosure provision goes back to "in violation of this subsection" and so forth; and I think you finally have to, as the Court of Appeals recognized, have to go to 2518(10) to see what was needed for a motion to suppress.

"Any aggrieved person ... may move to suppress ... on the grounds that

"(i) the communication was unlawfully intercepted;"

The court below said that that applied here.

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

And the court in the Fourth Circuit said that that applied here.

Now, I don't think those provisions can be read --

the first provision, I think, that the communication was unlawfully intercepted, most certainly cannot be read to say that if any provision of this Title was deviated from in any way, the suppression is called for because it's an unlawful interception.

If you read it that way, there would certainly be no reason to have (ii) or (iii), that the order if insufficient on its face, or that the interception is not made in conformity with the order. Because those are all violations of the statute, too.

And, furthermore, it would have been very easy to have drafted the statute to say that any time you deviate, the evidence is suppressed.

That is not what was done. I think when you look at the legislative history -- on page 39 of our brief we quote the Senate Report. In page --

QUESTION: In which of these cases is that?

MR. BORK: This is in Giordano, Mr. Justice Brennan.

QUESTION: Thank you. Page 39?

MR. BORK: Page 39. We quote the Senate Report. It is quoted also at page 29 of respondent Giordano's brief, but I think the passage quoted in that brief cuts off a trifle too soon.

The provision, section 2515, must be read, the

Senate Report says, in light of section 2518(10)(a), which is the point we've just been making.

"It largely reflects existing law."

And, further down, it says "There is no intention to change the attenuation rule, nor generally to press the scope of the suppression rule beyond present search and seizure law."

I think that reading of the legislative history supports the statutory analysis I just suggested, that if you look at 2518(10)(a), (i) obviously means the communication was unlawfully intercepted -- I think that means under present search and seizure law. It protects Fourth Amendment values.

It extends Fourth Amendment values in one respect, because it extends them to grand jury proceedings and so forth, where the Fourth Amendment might not otherwise apply.

Now, I don't think the misidentification of Will Wilson as the person who made the operative decision, nor the delegation in some cases to Sol Lindenbaum, can be made into a Fourth Amendment value; and therefore I don't think the first point here can conceivably be used to suppress the evidence in these cases.

If you go on to the second point, it says "the order of authorization or approval under which it was intercepted

is insufficient on its face". That Court of Appeals said a rather peculiar thing, I think; it said that once you realize that Will Wilson didn't make the authorization, which you find out by holding an evidentiary hearing, then you're entitled to take his name out of the order, that leaves a blank in the order, and at that point it becomes insufficient on its face.

I don't think that's the meaning in law of insufficiency on the face of the order.

That order was not insufficient on its face. It recited a man who could have been and was specially designated, and the order was valid on its face. I don't know how one can find facial invalidity by holding a hearing to find out if the underlying facts are true.

QUESTION: Are you saying that that test must be made by assuming the truth and accuracy of everything that's in the paper, on the paper, it is, nevertheless, deficient -- if that's the word of the statute; insufficient on its face?

MR. BORK: That's right, Mr. Chief Justice. I think one has to look at it. I think what this (ii) is is obviously a backstop to (i). The (i) says if the communication was unlawfully intercepted; (ii) says insufficient on its face. That means that the man who receives the order and is to go out and conduct the wire interception, if he

looks at the order and he sees that it's wrong on its face, he's got no business going forward. He ought to go back and find out why it's wrong.

And then, of course, (iii) is that he must follow the order.

So that I don't think --

QUESTION: Well, (iii) -- no court has held that (iii) is involved here, has it?

MR. BORK: No, sir. That's correct. That's correct, Mr. Justice Stewart, no court has said that (iii) is involved here.

I can't understand the facial invalidity argument. Respondent's brief, in the Giordano case, cites some cases which do not seem to me, as I read them, to discuss the on-its-face language; but, in fact, are cases that say that you may hold an evidentiary hearing to find out that a witness who swore to probable cause, facts showing probable cause, was not the right witness, or did not have the facts, and so forth.

Cases which I think are totally inapposite to the construction of this language in the statute about invalidity on the face of it.

I think that when one gets away -- oh, I should add, I think, that this reading not only comports with standard statutory analysis and with the indication of legislative

intent that we have, it also makes common sense because of the criminal penalties for wrongful disclosure and because of the civil liability for wrongful disclosure. It seems to me that we're talking about Fourth Amendment values of privacy in those areas, and that's what these suppression provisions are talking about, which are not involved in this case.

QUESTION: Well, there are a good many other provisions in the statute which are restrictions and limitations and conditions alerting the circumstances under which wiretapping can be lawfully carried on, in addition to the ones we're talking about here.

For example, just take for example 18 United States Code 2518(1)(c), the exhaustion requirement, as I think of it. There has to be a statement to the court that all other reasonable means have been tried and have failed, or an explanation of why they have not been.

MR. BORK: Unh-hunh.

QUESTION: Well, let's say that that was put in conclusory form, it looked all right to the court, but it turned out to be absolutely false, concededly false, that no effort had been made, and no other effort, this was just a lazy person who wanted to intercept a telephone conversation.

What does -- wouldn't your argument mean that there would be no sanction for that, either? That there could be

no suppression. Because that's not constitutional at all.

MR. BORK: No. But, Mr. Justice Stewart, I think I would not exclude the possibility that in cases of wilfull misleading of a court, this Court might care to use its supervisory powers.

QUESTION: Well, I'm talking about -- I'm really not talking about supervisory powers of the court, I'm talking about the meaning of 2518(10)(a)(i), "the communication was unlawfully intercepted"; and your point, as I get it, is that "unlawfully" means unconstitutionally. That may oversimplify your point, but that's basically it, as I get it.

MR. BORK: I think so, Mr. Justice Stewart; that's the core of the point. I would not exclude the possibility that in a case where the investigator you mentioned --

QUESTION: Just hadn't exhausted, although he said he did. But then it became clear, for one reason or another, that he hadn't.

Well, let's say he was in good faith, he thought he had exhausted, he read this and he looked around, and he said, Were any of your fellows eyewitnesses to that crime? and nobody was, and he thought that was enough of an exhaustion.

MR. BORK: If it was in good faith, Mr. Justice Stewart, I think I would have to say that --

QUESTION: Your argument would --

MR. BORK: -- the suppression provisions do not apply to it.

QUESTION: That's what I thought your argument would lead to.

Only --

MR. BORK: Congress could apply that at any time.

QUESTION: Oh, I understand that. But -- so your point really is that "unlawfully" means unconstitutionally, period; doesn't it?

MR. BORK: In terms of the statute, yes.

QUESTION: At 2518(10)(a)(i).

MR. BORK: In terms of the statute, I think, Mr. Justice Stewart, that is probably correct. I think I would like to reserve the possibility that a wilfull violation of the statute might be read either under (i) as the reason for suppression, or that the court might use its supervisory powers.

QUESTION: Well, my question was directed to (i), to the statute.

MR. BORK: I think I would like, if I may, to reserve the possibility of the wilfull violation --

QUESTION: Unh-hunh.

MR. BORK: -- of the statute, one that was done with a bad motive, to achieve a result that could go to --

QUESTION: Or to mislead the court.

MR. BORK: Yes. To achieve a result that could not otherwise be achieved.

I should point out --

QUESTION: To get the issuance of a warrant that otherwise wouldn't and couldn't have issued?

MR. BORK: That's correct.

QUESTION: Knowingly.

MR. BORK: That's correct.

QUESTION: Yes.

QUESTION: As to number (i), Mr. Solicitor General, would that embrace a situation where the United States Attorney in the field, or his assistant, just went out and placed a tap without any authority from anybody? Would that be --

MR. BORK: Well, that would certainly, Mr. Chief Justice, be a violation of (i).

QUESTION: Yes. That would be one of the kinds of things that would be under number (i).

MR. BORK: Or a case in which the probable cause was absent.

QUESTION: No authority whatever. Well, I was starting from the words.

MR. BORK: On no occasion. Yes. Certainly, Mr. Chief Justice, that is certainly true.

QUESTION: Yes. And then there would be a spectrum

of situations --

MR. BORK: Oh, there are a wide variety of situations.

QUESTION: -- that would all fall under number (i).

MR. BORK: That's correct, Mr. Chief Justice.

For example, I would think failure to minimize the number of interceptions, failure to terminate when you got the evidence that you're supposed to get. I think those are all cases which would come under number (i). There are a great many of them.

I don't think the situation we have here today is, unless one reads number (i) to say that any deviation from any provision in the statute requires suprression; and I don't think one can read it that way.

QUESTION: Well, what are the sanctions, then? What is the sanction for -- that's assuming, and I know you don't concede, but let's assume that these were violations of the statute; what are the sanctions?

MR. BORK: Well, I think they lie primarily with Congress.

QUESTION: Well, Congress has enacted this law and said what it wanted to take place.

MR. BORK: That's right.

QUESTION: So the Congress has done its job.

MR. BORK: Mr. Justice Stewart, what I meant by

that was that if the Congress wishes to add a sanction, that's where the sanction should come from.

Should the government -- it is quite conceivable that should the government, having once realized that its procedures were -- I'm assuming now, for the sake of argument, that the procedures are deficient --

QUESTION: Right.

MR. BORK: Should the government once it realized that those procedures are deficient and continue with the process, then I think I would have no particular difficulty in saying that a court, faced with that kind of government intransigency, ought to apply, as a supervisory matter, suppression.

QUESTION: Well, Congress here wasn't concerned really with good faith, it was primarily concerned with liriting the conditions and circumstances under which there could be a wiretap, a wire interception.

MR. BORK: That is correct.

QUESTION: And these are just dead letters, if there's no sanction.

MR. BORK: Mr. Justice Stewart, I don't think --

QUESTION: You observed -- even if the violations are in all good faith, whether the violations of the kind involved in the cases now before us, or the violation of the kind that I suggested under 2518(1)(c), no exhaustion,

Congress said there cannot be and there should -- must not be wire interceptions until all other means have failed, for example.

And under your view there just will continue to be such interceptions if you get a --

QUESTION: In that connection, when the cases come here from the State courts, it has traditionally been the argument that the remedies, the sanctions are, first, it can prosecute the policeman, the man, criminally for doing this unlawful thing; or secondly the citizen who is injured can sue under 1983 for damages.

You don't think either of those alternatives would be available here?

MR. BORK: If there's a wilfull disclosure of the kind that the statute forbids, Mr. Justice Douglas, there isn't.

QUESTION: I'm talking about violations of the procedure for generating the search.

MR. BORK: No, I doubt, Mr. Justice Douglas, that I would think that the delegation from this -- I am sure I would think that the delegation from Mr. Mitchell to Mr. Linderbaum does not generate either criminal or civil liability. And I think the misidentification of Mr. Wilson does not generate either of those varieties.

QUESTION: Then Justice Stewart is right, to get

down to --

QUESTION: No sanction.

QUESTION: -- no sanction, unless the suppression --

MR. BORK: Well, Mr. Justice Stewart and Mr. Justice Douglas, I may say that sanctions have been specified by Congress, and the fact that they did not specify this sanction, I think ought to mean something, as well as the --

QUESTION: Well, that means these words are just precatory.

MR. BORK: They are precatory with, if I may say, one exception. It seems to me that the courts do have supervisory powers, and if it's wilfull or if it continues, once it has been ruled that these procedures are not adequate, then they are no longer precatory. This Court would have the power at that stage to begin to suppress -- not under the statute.

QUESTION: No. Even then your argument is the statute would not have been -- it would not be under (a)(i) or (ii).

MR. BORK: That is correct.

QUESTION: Right. Or (iii).

MR. BORK: That is correct.

QUESTION: Do you think this statute would have a different meaning, Mr. Solicitor General, if, now calling

your attention first to 2518, where all the language is mandatory, "shall be made in writing", "shall state the applicant's authority","shall including the following", having that in mind and then dropping down to (10)(a), instead of reading as it does now "any aggrieved person ... may move to suppress", suppose the statute had read that any evidence obtained in, not in conformity with the following paragraphs (i), (ii), and (iii), shall be excluded from evidence for all purposes.

Do you think my hypothetical statute that I've just tried to construct would be a different statute from the one that was written?

MR. BORK: No, Mr. Chief Justice, I do not. It seems to me that the grounds for suppression would remain the same. It would be different only --

QUESTION: But this does not, anywhere in this statute, say anything about what the court shall do, it says what the party may do; the party may move to suppress. That certainly gives an implication that the court -- that this isn't an idle gesture, and that maybe the court's going to entertain the motion.

Now, what is the range of the judge's discretion when that motion is made, in your view?

MR. BORK: In my view, Mr. Chief Justice, if the communication was unlawfully intercepted in the sense that

we've been talking about, I doubt that the judge has any discretion.

QUESTION: Yes. Well, then, how about number (ii)?

MR. BORK: Well, I don't think he has any discretion there, either. If the order is insufficient on its face, I think the evidence must be suppressed. That order should not have been followed by the man who went out and applied the device to the wire.

QUESTION: And therefore it would have been an unconstitutional tap.

MR. BORK: That is correct.

QUESTION: With an insufficient warrant.

MR. BORK: And if he doesn't follow the terms of the order, I think he must be suppressed as well.

QUESTION: Now, Mr. Solicitor General, are you suggesting that 2518 is to be read without reference to 2515?

MR. BORK: No, Mr. Justice Brennan, I think that 2518(10)(a), as we just read in the Senate Report here a moment ago, on page 39 -- was it -- what the Senate said was that 2515 must be read in the light of section 2518(10)(a).

I think 2518(10)(a) is really the implementing.

QUESTION: Right. But 2515 is certainly explicit, isn't it?

MR. BORK: Not terribly, Mr. Justice Brennan.

QUESTION: Well, I don't think this statute certainly is a model of clarity, by any means. I don't think any of us who have had to wrestle with it would think so.

But at least 2515 is susceptible, isn't it, of the interpretation, no evidence derived therefrom may be received in evidence in any trial before any court if the disclosure would be in violation of this chapter?

MR. BORK: Well, we'd had to discover, then, Mr. Justice Brennan, what disclosure would be in violation of this chapter, and then you get back to the suppression provision.

QUESTION: Yes.

QUESTION: But it does incorporate into the statute the judicially constructed exclusionary rule, does it not?

MR. BORK: Oh, yes.

QUESTION: There's no question about that.

MR. BORK: No question, Mr. Chief Justice, but I don't think the 2515 point is important, because you only know what disclosure, Mr. Justice Brennan, is in violation of the statute by knowing what may not be disclosed; that is, what must be suppressed.

QUESTION: But once you decide what that is, what is unlawful, then you get to your point that if you do decide it's unlawful there's no discretion. You must suppress it.

MR. BORK: I think so.

QUESTION: Under -- because 2515 says so.

MR. BORK: That is correct. That is correct, Mr. Justice --

QUESTION: Not 2518, 2515 says it must be suppressed.

MR. BORK: I think that's correct.

QUESTION: Unh-hunh.

QUESTION: Your argument, Mr. Solicitor General, seems to mean -- and this is not criticism of it -- it has echoes of the harmless error argument, everything you say, there's nothing, they violated the statute but it was in an irrelevant, immaterial way.

MR. BORK: Well, Mr. Justice Douglas, I think there is an echo in that, particularly as to the Will Wilson misidentification issue. I -- but it is harmless error, for this reason: no constitutional rights were violated; no wiretaps occurred that would not otherwise have occurred; the evidence is accurate, there is no question here of convicting the innocent with evidence that may be inaccurate. And there is no deterrence function to be served at this time. These are abandoned procedures, the Department of Justice is not going back to them. There was no purpose in them in the first place, except a mixup in the memoranda.

And, indeed, were there to be a ruling that the procedures were inadequate, it seems to me that there would be

every reason in the world to rule that that ruling had prospective application only. Since there's no deterrent function.

That would -- that would adequately serve any deterrent function there was.

QUESTION: In this respect, do you distinguish at all between what we might call the Lindenbaum authorization and those actually made by the Attorney General, but which Mr. Wilson did not in fact act upon? Is there any difference, in your mind?

MR. BORK: I don't think in this connection, Mr. Chief Justice, that I make any.

We had, the Department of Justice had excellent reason to believe that Mr. Mitchell had the power, had the lawful right to delegate this to Mr. Lindenbaum.

And perhaps I should address that for the moment, because this certainly goes --

QUESTION: Before you do for a moment, is it the thread of your argument that if, in fact, the Attorney General who had the power did make the decision, that the confusion about Mr. Will Wilson is irrelevant because the Attorney General had greater power, since he was the source of the power, it made no difference; is that it?

MR. BORK: Mr. Chief Justice, essentially that. If the Attorney General himself made the decision, and through

this confusion about memoranda Mr. Wilson's name got sent out, when it shouldn't have, it seems to me that that's error, it seems to me that it shouldn't happen; but I certainly think if anything is harmless error, that is.

There is certainly no reason to say that a judge who has found all the constitutional elements, probable cause, need for wire interception, failure of other techniques and so forth, would have turned down the application had he been told that the Attorney General rather than the Assistant Attorney General had authorized it.

So I can't -- it seems to me that that's utterly, utterly harmless error.

But, on the Lindenbaum-Mitchell delegation, which I think is the next question that follows from the question you just asked, Mr. Chief Justice, I think it's clear -- and I'm now moving from the argument that there's no case for a suppression of evidence. And if there were a case it should be perspective only.

To the argument that in fact the statute was complied with in major respects, in the major respect.

The purpose of section 2516(1) which is the section that governs, that says it must be the Attorney General -- the Attorney General may authorize or specially designated Assistant Attorney General,. is stated in language in the Senate Report, which is quoted on page 54 of our brief in

the Giordano case, and the purpose is to centralize policy, to get uniformity of policy, and to have a publicly responsible official.

I think both of those purposes were completely satisfied when the Attorney General said: When I'm not available, Mr. Lindenbaum, you know my policies, you are directly in the Attorney General's office, you work with me every day, when I'm unavailable, you go ahead and act.

That is, that purpose is served. You have centralization, unity of policy, and you have Mr. Mitchell responsible.

Now, the question is whether the statute forbids that delegation. I think rather clearly it does not forbid that delegation.

You have, as we've pointed out in our brief at page 30 -- and this is by no means our only reliance -- the general delegation statute for the Department of Justice, 28 USC Section 510. It gives the Attorney General power to authorize others to perform any function of the Attorney General.

And the law generally allows delegation of this sort. We have cited a series of them at page 53 of the brief. You have Title III, the same statute we're dealing with here, 18 USC 2514, which is the witness immunity statute, which is -- the Attorney General is given the power to grant a witness

immunity. And it's been held that that function of the Attorney General, given to the Attorney General by the statute, may be delegated.

You have I think an even clearer example in the second paragraph of the footnote on that page, in the case of Jay v. Boyd, construing 8 USC 1254, a statute which says that the Attorney General, quote, "may in his discretion", close quote, suspend deportation of any alien.

That language seems to me to imply even more than the language in the statute we're examining that it is a personal decision of the Attorney General, and yet this Court has held that that statutory power may be delegated.

And in Kleindienst v. Mandel, which is quoted at the bottom of that footnote, the Attorney General was given discretion which was in fact, in that case, exercised by the Immigration and Naturalization Service; he delegated it.

So that Mr. Mitchell and Mr. Lindenbaum were operating against a background of statutes, a general delegation statute and specific other statutes giving the Attorney General the power or the duty to do things, which have been delegated and which delegations have been upheld in the past.

QUESTION: Your argument would be very convincing if this statute now before us had simply said the Attorney General, but when it adds "or any Assistant Attorney General

specially designated by the attorney General", doesn't it detract from the argument that there is an inherent delegation of authority to delegate to other people? To other people.

MR. BORK: I think it does, Mr. Justice Stewart, and I think to this extent. I think there is a limitation, obviously, but I think the limitation is best read as to the office, the immediate control of one of these two officials.

And I say that because we have two examples in our brief, on page 57 and page 58, in which this same Congress had provided a couple of months before that something must be done by the Attorney General or the deputy Attorney General, which parallels the language we're talking about, and then Congress went on and said, "which function may not be delegated".

Now, when you compare that with the language here, I think Mr. Mitchell and Mr. Lindenbaum had a right to say -- here was an Attorney General and a Deputy attorney General, just as in this statute Attorney General and Assistant Attorney General. In the Civil Rights Act they say it may not be delegated; in this statute they don't say it. Which I think gave them a right to think that some delegation within the office was possible.

Again, the Federal Food, Drug and Cosmetic Act, which we discuss on page 58, has the same kind of language

about the Secretary of Health, Education, and Welfare.

And I should say one more thing. If you look, if one looks at 2516(2), we see that Congress clearly allows hundreds of State prosecutors to authorize these applications; and, in fact, in the legislative history which we cite in the brief, it says the question of whether the State officer may delegate -- State Attorney General may delegate, will be controlled by the law of delegation of the State.

Now, that takes the heart out of this argument that Congress was so concerned that the Attorney General himself had to involve himself in the minutiae of every application for a wire interception order.

QUESTION: Well, wouldn't a draft of this type, Mr. Solicitor General, would have authorized a United States Attorney to make the application?

MR. BORK: There was a draft of that sort.

QUESTION: And I gather it was Justice that came in and said, through Mr. Miller, wasn't it, they preferred it be limited to the Attorney General or an assistant designated by him?

MR. BORK: That's correct. That's correct. And I think he suggested that, and I think when one looks at that against the law of delegation and the law of no delegation, which Congress had worked out, I think it's quite clear that they're talking about the Attorney General and his immediate

office and any Assistant Attorney General and his immediate office; and I think these State cases indicate the same policy.

QUESTION: Well, might not Congress have felt, though, that in the case of the States that was pretty much a matter for the States to decide for themselves; but in the case of the federal government, they wanted to lay down more stringent standards than they were willing to impose on the States?

MR. BORK: Mr. Justice Rehnquist, it seems to me that that would be a very curious result if stated in that way, because what that would mean is that Congress was really not terribly concerned about unitary policies of any kind; they were more suspicious of the Department of Justice of the federal government than they were in proliferation of State and local and county governments across the nation.

I think the purpose Congress had was, in unifying policy, they did not mind delegation so long as that policy was unified and you could identify the man who was responsible, even though he's delegated. I think that's true in the State governments, I think that's true in the federal government, under standard delegation law that was just discussed.

QUESTION: Well, of course, then it's virtually an abandonment of the notion that you don't -- that you want to

identify the man, to say he can delegate it so long as his signature appears; because, presumably, in the most elaborate bureaucracy in the world the head man's signature appears on the thing before it goes out.

MR. BORK: No, no, when I said delegation, Mr. Justice Rehnquist, what I meant was: this statute says to the Attorney General, unless you designate an Assistant Attorney General you are the man to be held responsible, and we want uniformity of policy.

And that is accomplished when he takes a man, his Executive Assistant, who has done 50 or 60 of these applications, and says: Now you know my policy, when I'm unavailable, act; tell me when I get back.

And it seems to me that that is consistent with what we mean by -- it limits the scope of delegation, it keeps the thing within a narrow compass. It seems to me, given the States, the way Congress treated the States, it's the much more realistic reading of the congressional policy.

QUESTION: Mr. Solicitor General, I still have trouble as to why he didn't give this to Will Wilson.

MR. BORK: I beg your pardon?

QUESTION: Why didn't he give Will Wilson that authority while he was out of town?

MR. BORK: Mr. --

QUESTION: After all, Will Wilson was approved by

Congress, wasn't he?

MR. BORK: Oh, yes, Mr. Justice Marshall.

QUESTION: And Mr. Lindenbaum was not.

MR. BORK: That is correct, Mr. Justice Marshall.

QUESTION: I didn't mean the Congress, I mean the Senate.

But I mean it was an approved officer.

MR. BORK: That is correct, sir.

QUESTION: And -- well, I think your answer is that it would have been better if he had done it, but it's not wrong the way he did it; is that it?

MR. BORK: As a matter of fact, I think it might have been better, Mr. Justice Marshall, the way he did do it. Because the Attorney General --

QUESTION: Why?

MR. BORK: -- did not want to designate any Assistant Attorney General to exercise this operative -- to make the operative decision. He thought he had in Mr. Lindenbaum, and in fact he did have in Mr. Lindenbaum, a man who would follow his policies exactly, to act when he was unavailable.

QUESTION: Well, that -- well, are there Deputy Attorney Generals that run around loose over there?

[Laughter.]

MR. BORK: Well, it varies from time to time, Mr.

Justice Marshall. Deputy Attorney Generals?

QUESTION: Assistant Attorney Generals.

MR. BORK: That run around -- you mean are there irresponsible Assistant Attorney Generals?

QUESTION: Yeah. Of course, they are under the Attorney General, aren't they?

MR. BORK: Yes, but not in day-to-day context.

QUESTION: And don't they carry out the policy of the Attorney General?

MR. BORK: They do, indeed, Mr. Justice Marshall.

QUESTION: And wouldn't they carry out the policy -- didn't he participate in many of these cases, as Mr. Lindenbaum did?

MR. BORK: Mr. Wilson?

QUESTION: Of course he did.

MR. BORK: No, I -- apparently Mr. Wilson had very, one might say, minimal involvement in any of these cases.

QUESTION: Well, who did? It was his Deputies.

MR. BORK: His Deputies were,Mr. Petersen and Mr. Shapiro were greatly involved as the memoranda were going up, they approved them. But the operative decision was Mr. Mitchell's, except in those cases where he was unavailable. And then it was Mr. Lindenbaum carrying out Mr. Mitchell's policies. So I think Mr. Mitchell thought that that was greater control over the decision than it would have been

had he designated --

QUESTION: And when he went away he said, On other things you take over, too; I would presume he did.

MR. BORK: Oh, the Executive Assistant acts in many ways for the Attorney General, on routine matters, when he understands the Attorney General's policies in many cases, which is another reason --

QUESTION: You would say --

MR. BORK: -- pardon me. I say which is another reason why they thought this was perfectly acceptable.

QUESTION: You spoke of a special unit handling these matters. Was that a special unit apart from the Criminal Division, or within the Criminal Division?

MR. BORK: Within the Organized Crime Section of the Criminal Division.

QUESTION: Well, now, is that -- are you suggesting that that had a certain autonomy and that they were functioning in this special field on their --

MR. BORK: Well, Mr. Chief Justice, they didn't have any autonomy on that --

QUESTION: By autonomy, I'm speaking of autonomy from the regular staff, by a command of the Criminal Division.

MR. BORK: No, not autonomy, Mr. Chief Justice. They were specialized. And it was their specialized function to make the initial review of these matters before sending it

to hierarchy through the Criminal Division.

QUESTION: Unh-hunh.

MR. BORK: But they had not autonomy.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Smouse.

ORAL ARGUMENT OF H. RUSSELL SMOUSE, ESQ.,

ON BEHALF OF RESPONDENT GIORDANO

MR. SMOUSE: Mr. Chief Justice, and may it please the Court:

In the Giordano case the Court is confronted with compounded violations of Title III, specifically sections 2516(1) and 2518(1)(a) and (4)(d).

As for the section 2516 point, the fact is that on October 16, 1970, Francis S. Brocato, an Assistant United States Attorney for the District of Maryland, submitted to Chief Judge Northrop of the United States District Court for Maryland an application for an order authorizing interception of wire communication on the telephone of my client, Dominic Nicholas Giordano.

Attached to the application as exhibits were a, quote, "Will Wilson letter", unquote, to Mr. Brocato, and the affidavits of two agents of the Bureau of Narcotics and Dangerous Drugs.

The Will Wilson letter evidences the fact that Mr. Brocato had requested authorization to apply for the

wiretap order, this request having been made to then Attorney General John N. Mitchell. Although the request had been directed to the Attorney General, the record submitted in this case shows that it never was reviewed by the Attorney General himself, but that his initials had been placed on the authorization memorandum by Mr. Sol Lindenbaum, his Executive Assistant.

This authorization memorandum had then been dispatched to Assistant Attorney General Will Wilson, or the office of Assistant Attorney General Will Wilson, purportedly designating Mr. Wilson to authorize the application to be presented to the United States District Court for the District of Maryland.

The record in this case, and in the case of Harder, in the evidentiary hearing held before Judge Mehrtens in the Southern District of Florida, evidences the fact that the Attorney General had never specially designated any of his Assistant Attorneys General to issue wiretap authorization.

It is also uncontested that the Will Wilson letters, indeed, were never signed by Mr. Wilson; not in this case nor, indeed, in any of the host of cases which have arisen in this series of litigation.

There was, subsequent to the application for a wiretap order, application for an extension order, dated November 6, 1970, some 21 days after the original application.

I believe the Solicitor General indicated perhaps some seven days after the original application the Attorney General had become familiar with the operative facts.

The affidavit of Mr. Lindenbaum indicates that some 21 days later the Attorney General authorized the application for an extension.

Included within that application for extension was another Will Wilson letter, and an additional affidavit from Agent Abraham Azzam of the Bureau of Narcotics and Dangerous Drugs.

On review of the Azzam affidavit, it is to be noted that the operative facts setting forth probable cause are those investigative details and intelligence which developed pursuant to the original wiretap. The government, I believe, in its brief indicates that the Azzam application reasserts the facts that were set forth in the original application. Indeed, they do not. It merely states "I reassert" without specifying what those facts were, the facts set forth in the original application. Indeed, it is an incorporation-by-reference type approach.

I would ask this honorable Court to look critically at the particular facts in the case at hand, as, indeed, I suspect they are at perhaps some variance from the facts which the government indicates in its brief, developed at some subsequent point in time with regard to checking with

the Attorney General and apprizing him of the facts after the fact.

As for the section 2518 point, it must be noted that not only did Mr. Wilson not sign the letter, he indeed never saw any of the papers in this case, nor, indeed, did the Attorney General, prior to the application for the extension order.

Mr. Wilson testified, as I indicated before, at the evidentiary hearing in the Southern District of Florida, in the Marder case, at which time he stated he did not know that the Will Wilson letter was being submitted to the United States District Courts around the country; in fact, he testified he, quote, "did not know exactly what was made of them." He did not know that Mr. Lindenbaum was signing the Attorney General's initials to authorization memos; he did not know that anyone other than the Attorney General in fact was authorizing wiretaps.

I would submit to this honorable Court that this suggests a rather amazing lack of communication within the Department of Justice.

This incredibly loose procedure led the late Judge Sobeloff to conclude in his opinion below, and I quote: If Judge Northrop had been aware of the real status of the application, that neither Mitchell nor Wilson even knew of it, and that the application had been approved and initialed

JNM by Lindenbaum, we are certain that he would have refused to permit the wiretap. Unquote.

The sequence of events here involved, I submit, constitutes the, quote, "elaborate paper charade", unquote, which the United States Court of Appeals for the Ninth Circuit condemned in the King case.

It is significant that where the violations here in question have been shown to exist in combination, the vast majority of federal courts have found the violation of 2516 and have decreed suppression as the remedy.

In addition to the Giordano case in the Fourth Circuit, there is the opinion, of course, of the Robinson court in the Fifth Circuit, the per curiam opinion in the Roberts case in the Seventh Circuit, the opinion of the Ninth Circuit in the King case, and the opinion of the Court of Appeals for the District of Columbia in the Mantello case.

In addition --

QUESTION: Do you find any Courts of Appeals the other way?

MR. SMOUSE: The Pisacano case, Mr. Justice Brennan, in the Second Circuit, which was later followed, although I must say I don't feel embraced, by the opinion in the Becker case. Chief Judge Friendly wrote the opinion in Pisacano; Judge Mansfield wrote the Becker opinion.

QUESTION: But it's only the Second Circuit?

MR. SMOUSE: The Second Circuit is the only circuit that I'm aware of, Mr. Justice Brennan, to the contrary.

QUESTION: Did Robinson ever come out en banc from the Fifth Circuit?

MR. SMOUSE: It did, Mr. Justice Rehnquist. Not en banc, it was remanded for an evidentiary hearing after the en banc hearing; it went back to the Southern District of Florida. The evidentiary hearing was conducted in the Marder case, and I gather the case is now pending in the Fifth Circuit again.

QUESTION: But there was an appeal of the Court of Appeals of the Fifth Circuit en banc in Robinson?

MR. SMOUSE: The original opinion resulted in a petition for rehearing. Rehearing was conducted en banc, remand then for an evidentiary hearing to the Southern District of Florida in the Marder case.

QUESTION: My question was -- while you're already interrupted -- you said that all of these courts with the exceptions you've now noted have decreed suppression. Have all of them, without exception, relied on 2518(10)(a) or have they done it in the exercise of, the purported exercise of some supervisory power?

MR. SMOUSE: In reliance on 2515 and 2518(10)(a).

QUESTION: So they've held -- more accurately they've held that the statute compels suppression; is that it?

MR. SMOUSE: That is precisely correct, yes.

QUESTION: Right.

MR. SMOUSE: In addition to the Circuits which have so held, a number of District Courts in other Circuits, specifically two courts, I believe, in the Third Circuit and courts in the Sixth Circuit have ruled in like manner.

QUESTION: In other words, your case -- to be sure I have it absolutely clear -- would stand independently even if there was no such thing as the doctrine of exclusion of evidence?

MR. SMOUSE: Yes, Your Honor. We feel that the remedy here is --

QUESTION: The statute has prescribed the remedy is your case.

MR. SMOUSE: That is correct, Mr. Chief Justice. We feel that Title III is self-executing as to remedy.

The Roberts court speaks of the persuasive reasoning of Judge Sobeloff in Giordano; indeed Giordano seems to be the case most frequently looked to for guidance, most frequently cited, and whose language is most frequently adopted by other courts.

The courts have, with overwhelming consistency, really viewed the 2516 defect as a substantial violation.

With this background in mind, I would like to turn to section 2516, the rationale for that section, and speak to

the government's contention concerning the section.

Judge Sobeloff, in his opinion below, effectively lays to rest the alter-ego theory which has, with recurring predictability, been advanced by the government. Judge Sobeloff stating, in pertinent part: The alter-ego theory is open-ended, it need not stop with Lindenbaum but could be extended with an equal claim of validity to anyone within or without the Department of Justice. In determining who qualifies as an alter-ego, it would permit sidestepping the congressional mandate fixing the level of those who may be designated to authorize applications.

Senate Report 1097 is instructive where, in referring to section 2516(1), it is stated, and I quote this language which has earlier been referred to by, I believe, Mr. Justice Brennan, but which I feel bears repeating: "This provision centralizes in a publicly responsible official, subject to the political process, the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person."

The legislative history of course speaks to "identifiable person" and not an "identifiable office".

In the first Robinson case, the court, after noting

this provision --

QUESTION: Well, I didn't get that last. It does lead to an identifiable office, does it not?

MR. SMOUSE: I submit it does not, Your Honor. "Identifiable person" speaks of that individual.

QUESTION: Well, the incumbent, whoever is the incumbent of that office, is the identifiable person, is he not?

MR. SMOUSE: Yes, he is, Mr. Chief Justice, --

QUESTION: He is the Attorney General.

MR. SMOUSE: -- the Attorney General.

QUESTION: So it's an identifiable office in terms of -- which changes in terms of the incumbency from time to time.

MR. SMOUSE: That is -- that is correct, Mr. Chief Justice.

QUESTION: Yes.

MR. SMOUSE: I submit that what the Senate reflects in this legislative history is that they were speaking, though, of the person, either in the position of Attorney General or one of his Assistant Attorneys General who has gone through the process of Senatorial confirmation. The Senate's wish to exercise this degree of supervision, shall we say, or restraint over exercise of the awesome power of wire surveillance.

QUESTION: Could the Attorney General have, under this statute, lawfully designated all of the Assistant Attorneys General?

MR. SMOUSE: He could, Your Honor.

QUESTION: And Acting Assistant Attorneys General?

MR. SMOUSE: I cannot speak to Acting Assistants, I'm not sure that they receive, they have gone through the --

QUESTION: They do not.

MR. SMOUSE: They have not gone through the confirmation process. I would say no to that, Mr. Chief Justice.

QUESTION: Where in the statute do you find this limited to those confirmed by the Senate?

MR. SMOUSE: In the legislative history, actually Senate Report 1097, where it speaks to an official "subject to the political process"; and I submit that means the confirmation process. That is the rationale, really, of the Fifth Circuit in the Robinson case, wherein that court noted: By expressing its intention that only a publicly responsible official, subject to the political process, could initiate a wiretap application, Congress wanted to make certain that every such matter would have the personal attention of an individual appointed by the President and confirmed by the Senate.

QUESTION: And you would also exclude an Acting

Attorney General?

MR. SMOUSE: I would, Your Honor, unless he had, as I believe Mr. Kleindienst then had, been confirmed. I believe he had been confirmed as Deputy.

QUESTION: How about the last Acting Attorney General?

QUESTION: The present Solicitor General.

QUESTION: Who was confirmed as Solicitor General; but not as Attorney General.

MR. SMOUSE: He has been tested by the political process.

[Laughter.]

QUESTION: Mr. Smouse, is it essential to your case that that be the standard? Is not the Deputy Assistant Attorney General, where they have one, as much subject to the political process, in the sense that if the Assistant Attorney General is dismissed, leaves, or resigns, the Deputy Assistant Attorney General is there at suffrance?

Are not all the political, the truly political appointees, whether appointed by the President or by the Attorney General, are they not all responsive to the political process?

MR. SMOUSE: Yes, Mr. Chief Justice, they are involved in the political process, --

QUESTION: Only the career people --

MR. SMOUSE: -- but they have not been Senatorially confirmed.

QUESTION: No, but the statute says --

MR. SMOUSE: I feel the Senate meant --

QUESTION: No, the statute doesn't say anything about Senatorially confirmed. You draw that from --

MR. SMOUSE: I do, Your Honor.

QUESTION: -- the legislative history.

MR. SMOUSE: I do, Mr. Chief Justice.

QUESTION: But you draw it from the language, the political language; but surely a Deputy Assistant Attorney General selected, whether by the Assistant Attorney General himself or by the Attorney General, but in fact appointed by the Attorney General, is politically responsive in the sense of that legislative history, is he not?

MR. SMOUSE: I submit, Mr. Chief Justice, that confirmation is what the Senate had in mind.

QUESTION: Where did they particularly say that?

MR. SMOUSE: They do not say it. I feel that is inherent in the language of the legislative history, and I feel that the interpretation placed on that history by a number of lower courts, which have looked to the problem, --

QUESTION: Each Division of the Department of Justice has one, two, or possibly three exempt positions at the top echelon, does it not?

MR. SMOUSE: I believe that is correct, Mr. Chief Justice.

QUESTION: And you say they are not embraced within this political process? They are something less than political, but different from career.

MR. SMOUSE: The stamp of approval has not been placed on them --

QUESTION: Unh-hunh.

MR. SMOUSE: -- by the Senate, in an area where the Senate wanted great care exercised in the authorization of wiretap surveillance.

QUESTION: Then, to pursue Mr. Justice Blackmun's inquiry of a few moments ago, if you had a period where you had an Acting Attorney General appointed under a recess appointment, who might act for quite a while, as some have, you would be immobilized under this statute.

MR. SMOUSE: That would easily be met, Mr. Chief Justice, had his predecessor designated an Assistant Attorney General to exercise authorization in this area. And the Congress --

QUESTION: Wouldn't the government immediately run under the proposition that when the principal ceases to hold the power, all his agents fell with him?

MR. SMOUSE: I think not, Mr. Chief Justice. I feel that if the Attorney General had exercised the fore-

sight here to designate the man chosen to head the Criminal Division to authorize wiretap applications, obviously there would not be this host of cases before the courts.

Provision for delegation was made, so that the government could operate in an effective fashion in the area of criminal investigation and in utilization of wire surveillance. It merely required some delegation within that authorized by the statute. And, easily enough, the Attorney General could have designated one of his Assistants and the Acting Attorney General who might succeed him would have the benefits, then, of a person properly designated.

This honorable Court in Gelbard, through Mr. Justice Brennan writing for the majority, made the following significant comment concerning Title III, in noting that the Act sets forth, and I quote, "an approval that may not be given except upon compliance with stringent conditions", citing 18 USC 2516 and 2518(1) through (8).

Obviously and admittedly, the Gelbard case did not involve any of the issues here before the Court, but I feel that language is helpful and instructive.

The courts, I submit, in the better reason cases, speak in terms of 2516 being enacted as a necessary safeguard, as expressed in the following language in King:

"The Act and its legislative history make clear the purpose of the authorization requirement, 2516(1).

Congress was well aware of the grave threat to the privacy of every American that is posed by modern techniques of electronic surveillance. ... In order to insure circumspection in their use, Congress erected the elaborate procedural safeguards", then citing 2516.

And, as has earlier been noted, the language of the statute authorizing but limiting the delegation evolved from the testimony of then Assistant Attorney General Miller, head of the Criminal Division.

The responsibility theory which the government has advanced in its brief in this case, and which forms the underlying rationale of Pisacano, we submit, ignores the complete legislative history and ignores the specifically limiting language of section 2516. And, as I noted before, Judge Mansfield in the Second Circuit, in writing in Becker, expressed no great enthusiasm for the Pisacano holding, where he stated: We feel bound to follow Pisacano, especially since it is so recent, and the facts before the court are indistinguishable. Our adherence to the law of the circuit as thus established is not to be considered as an approval of the procedure followed by the Attorney General and his staff. End quote.

With regard to the general delegation of authority section, 28 USC section 510, I would submit that, as stated in our brief, normal rules of statutory construction reject the

applicability of that general delegation of authority section; 2516 is narrow, specific, and limited in terms.

Moreover, 28 USC section 510 was in existence prior to the enactment of Title III.

The Fifth Circuit, in Robinson, I submit, properly concluded that 2516(1) was intended to act as a limit upon section 510.

Concerning the remedy, the statute itself, in sections 2515 and 2518(10)(a)(i) and (ii), mandates the remedy. And it should be noted that the violation here is of considerable dimension. This is not an isolated case, not an incidental slip-up.

From the host of cases where the violations here in question have been framed, it clearly appears that for a substantial period of time disregard of the statutory safeguards of Title III in the area of authorization and identification were continuing and constantly recurring within the Department of Justice.

The government seems to espouse as applicable the standard suggested by the American Law Institute, as footnoted on page 41 of the government's brief, where it is proposed that the application of the exclusionary rule be determined by the substantiality of the infringement involved.

While, as I noted before, we submit that the statute itself mandates the remedy, and that we are not here

dealing with the judicially framed exclusionary rule, even looking at the test espoused by the government, it must be recognized that the course of conduct engaged in by the Department of Justice thwarted the clear requirements of Title III; and the purpose of the sections in question and the violation of them, as I noted before, was recurring.

And if quantum of impropriety is to be the applicable standard in this case, then I submit that suppression must necessarily follow.

QUESTION: You rely on 2518(10)(a)(i) or (ii) or, I guess the answer is, you rely on both?

MR. SMOUSE: I would rely on both, Your Honor. In fact, Judge Sobeloff, I believe, spoke in terms of (ii) in the opinion below.

QUESTION: On (ii), and the District Court in terms of (i); isn't that it? Or am I thinking of another case?

MR. SMOUSE: The District Court in this case and the Focarile case termed it -- yes, Your Honor, that is correct.

QUESTION: Yes.

MR. SMOUSE: Actually turned on the 2518 violation. The Court of Appeals for the Fourth Circuit decided the case on the basis of the 2516 violation.

QUESTION: Yes.

MR. SMOUSE: We submit that, actually what the government here proposes is that this honorable Court ignore the plain language of the statute; the government, moreover, seems to fail to acknowledge the enormity of the violation involved, and turns its argument or its approach on a proposition that the violations in question are not central to Fourth Amendment values and that the sanction should be something less than suppression.

I submit that neither the plain language of the statute, nor legislative history, nor judicial interpretation would support this contention.

This honorable Court in Berger spoke in terms of protective procedures in the area of eavesdropping, which of course would embrace wire surveillance, so as to insure the protection of inherent Fourth Amendment rights.

I would submit that we are here dealing with the right of conversational privacy.

As noted in Scott, Title III represents the effort of Congress to meet the concerns expressed by this honorable Court in Berger and Katz and to structure a limited system of wire surveillance and electronic eavesdropping within the framework of the Fourth Amendment and the guidelines of Berger and Katz.

QUESTION: That's already been done, hasn't it? Hasn't the Department of Justice already done that?

MR. SMOUSE: They have changed and apparently corrected their procedures.

QUESTION: We don't have to do that for them, do we?

MR. SMOUSE: No, Mr. Justice.

QUESTION: And nothing in Berger or Katz, that I can remember -- you tell me if I'm wrong -- said that in a federal case the Attorney General or some specially designated Assistant Attorney General had to approve it.

MR. SMOUSE: That is correct, Mr. Justice Stewart. There is no such language in Berger and Katz.

QUESTION: And you don't suggest that anything in the Constitution requires --

MR. SMOUSE: I do not.

QUESTION: -- that it has such a requirement, do you?

MR. SMOUSE: I do not. Berger, as the Court well knows, spoke in terms of protective procedures. Your Honor, I believe, in Katz, spoke in terms of appropriate safeguards.

Congress, cognizant of this, expressed concern by this Court for the need to embrace protective procedures framed in Title III, in an effort to meet those concerns and to meet congressional concerns over a limited approach in this area.

Again, if I may borrow from the language of Judge

Sobeloff, rejecting the government contention that suppression would be inappropriate, he stated, and I quote: This is a beautiful example of the bootstrap technique -- a characterization with which Judge Duniway in the Ninth Circuit readily agrees.

He goes on to say: First the government minimizes the violation of the various statutory provisions, characterizing them as technical defects, and then, in typical bootstrap fashion, postulates that for minor violations there should be no sanction. The defects in this case, however, go to the very heart of Title III.

The Senate Report, dealing with section 2515, provides that this section must be read in light of 2518(10)(a). Again, the Gelbard opinion, where Mr. Justice Brennan wrote for this Court, is instructive in noting that: "Indeed, the congressional findings articulate clearly the intent to utilize the evidentiary prohibition of 2515 to enforce the limitations imposed by Title III upon wiretapping and electronic surveillance."

The Seventh Circuit, in Roberts, meets the government's argument as to the drastic remedy of suppression by noting that 2515 and 2518(10)(a) are patently clear in expressing the congressional judgment that these intercepted communications may not be received in evidence.

This whole area, I submit, is placed in perspective

by this additional cogent statement by Chief Judge Bazelon, in the case of In re Evans, wherein he said: "First, 2515 describes in the most sweeping possible terms a prohibition against the use of evidence tainted by an unlawful wiretap. But the section gives no indication of a specific remedy. ... Viewed as a whole, however, the Omnibus Crime Control Act does provide such a remedy -- the motion to suppress authorized by 2518(10)(a)."

The "no need to deter" argument rejected in Robinson, which is here again advanced by the government, is disposed of in the Wierzbicki case in the following fashion.

The government claims that no real deterrent effect would result from suppression; however, we are not dealing with the court-fashioned exclusionary rule, what we have here is a separate statutory requirement which this Court has no authority to ignore.

Judge Becker enunciated the potential problem in the Narducci case, when he stated: "the necessity for strict compliance with the statute in a wiretap situation stems just as much from the precedent-setting example of condoning laxity which could lead to further laxity in years to come."

As for the 2518 point, I will defer to Mr. Hewitt, who will argue the Chavez case. However, I would note that in this area the Congress intended, if indeed it be a matter of form, that form be treated as importantly as substance.

The implementation of this awesome authority, I submit, was to be treated in accordance with the statutory mandate.

In our brief, reference is made to a course of conduct here engaged in by the Department of Justice as amounting to a scheme of governmental trickery. On reflection, I submit and confess that this was too harsh a term; to the extent that was too harsh a judgment, I apologize.

But if use of so dramatic a term is inappropriate, I would submit that what we have here is a course of governmental inattention, indeed, what I submit does amount to governmental wilfulness and governmental sloppiness of a quality mounting up to gross mishandling in a particularly sensitive area, the appropriate remedy for which must necessarily be suppression of all evidence obtained from the wiretaps in this and cases similar situated.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Smouse.

Mr. Hewitt.

ORAL ARGUMENT OF JAMES F. HEWITT, ESQ.,

ON BEHALF OF RESPONDENT CHAVEZ

MR. HEWITT: Mr. Chief Justice, and may it please the Court:

While the issues in Chavez involve both types of wiretap here -- the Sol Lindenbaum approved tap, and the John

Mitchell approved tap -- since this Court granted the government petition for certiorari limited the issue of the tap purportedly approved by the Attorney General, and the Chavez decision was based -- the decision as to that tap -- solely upon the application of 2518, I'll try and limit my remarks to that aspect of this total problem. But there may be some overlapping, of necessity.

I would submit to the Court that this issue is important for two reasons.

First, it involves a very important question of congressional intent in the enactment of this legislation that affects a very sensitive area in this modern electronic age.

And secondly, the important issue is whether or not there has been compliance by the Justice Department with this mandate of Congress, which surrounds virtually this authorization to engage in these authorized wiretaps.

It's obvious, I think, from the legislative history and certainly from the decision of the Ninth Circuit, that the institutional decision was of some concern to Congress.

Mr. Justice Marshall asked the question of how often do these institutional decisions happen; and I think it's fair to say that they happen often enough, over the history of our Justice Department, that Congress was concerned about it, and wanted to make sure that these wiretap applications

would not be the subject of institutional decisions, they would not be rubberstamped, and they would not be handled by subordinate members of the Justice Department, no matter how knowledgeable nor how responsible they might be in the performance of their duties.

It is for that reason that the legislative history is clear that Congress wanted a responsible high-ranking Department official to make these decisions. And recognizing that the Attorney General could not conceivably review and make these important decisions in every case, he was empowered to designate an Assistant Attorney General, a specifically identifiable officer within the Department, to act on these applications and make these decisions on his behalf.

Now, the purpose of this is obviously to fix responsibility on this identifiable person, so that in later years, or should a wiretap become a gross abuse of discretion, abuse of prosecutor discretion, that Congress and the public and the courts could put their finger on that responsible individual and point the finger of responsibility to him.

And for that reason Congress made a rather unique provision in the statute, that he be identified with particularity not only in the application but in the court order itself, that he be identified in the reports that the

District Judge must make within ten days after the completion of the wiretap; that he be identified by the Administrative Office of the Courts in the Annual Report of the Director, and the Annual Report of the Judicial Conference. So that this particular individual must be identified throughout the entire reporting scheme as the person who is responsible for the wiretap which bears his name.

And of course the way to get this information is to have him set forth, with accurate particularity,in the application and the order.

Now, the statutory --

QUESTION: Mr. Hewitt, let me ask you just a technical question: Whom do you represent here?

MR. HEWITT: I represent the respondents in Chavez, Your Honor.

QUESTION: Respondents, plural?

MR. HEWITT: Well, I'm appointed to represent the respondent Apodaca, but I'm appearing on behalf of the other respondents also.

QUESTION: Even though your brief is restricted to George Apodaca?

MR. HEWITT: That's correct, Your Honor. He's the only one I was appointed by the District Court to represent.

QUESTION: But you are positioning yourself as representing all of them here?

MR. HEWITT: Yes, Your Honor. And I believe there's correspondence in the file from some of the other counsel to that effect.

The statute sets forth, in essence, a broader set of requirements than customarily are found in search warrants. It sets forth that there must be a finding of need for the wiretap, there must be a finding of probable cause, and there must be this important prosecutor decision by this responsible officer.

Now, the mere fact that the district judge need not pass upon the propriety of the prosecutor decision of the responsible officer doesn't make it any less than the important prong of this protective device that Congress set up within the statutory scheme. The court does have to find a need for the wiretap, and that other methods are unlikely to succeed if tried, and must find probable cause; but the court, relying upon the representations in the papers presented to it, must assume that a proper prosecutor determination that this is the kind of case that justifies this gross intrusion has been made, and find that it has been made by a responsible officer as named in the statute.

And this is where the courts were misled in this particular case.

Now, the government doesn't seem to feel that that's a particularly important factor --

QUESTION: Is it essential to your case, Mr. Hewitt, that the court was in fact misled?

MR. HEWITT: No. No, I don't believe so, Your Honor, because the statute wasn't complied with if the wrong person were placed in it.

QUESTION: That's the end of it, isn't it, whether the court was affected by that or whether it was not affected, from your case that's irrelevant?

MR. HEWITT: It isn't necessary, but it certainly makes the violation certainly more --

QUESTION: Of course. But even if --

MR. HEWITT: No, even if --

QUESTION: -- you stopped before, you've got to what the judge believed or what he thought he was acting on, or what he relied on; you think you'd have your case in the same posture you have it now?

MR. HEWITT: Yes. We would, Your Honor.

And as a result --

QUESTION: If your order said that it was done by Will Wilson and as a matter of fact it had been done by John Mitchell?

MR. HEWITT: It would be bad, Your Honor. Because that identifies the wrong person.

When, in later years, someone wishes to put the finger of responsibility for the Chavez wiretap, they would

go to the records of the court, the records of the Administrative Office, and Wilson would be the party responsible.

QUESTION: And they would do what to Wilson?

MR. HEWITT: They might say: Wilson, how dare you authorize this improper wiretap.

Mr. Wilson would say: I didn't sign that letter, it was signed by one of my subordinates.

This is exactly what Congress wanted to prevent.

QUESTION: No, no, that's not what I said. I said, where the letter is signed by Wilson and it says that "I have approved this", when, as a matter of fact, he had not approved it but John Mitchell, his boss, had approved it.

MR. HEWITT: This is the position in the Chavez case, Your Honor. That's pretty much the status of the facts.

QUESTION: And that's wrong; for what reason?

MR. HEWITT: Because the order must identify the person who actually approved the wiretap.

QUESTION: Even though the subordinate signed it, the boss decided it.

MR. HEWITT: Yes, Your Honor. It must identify the proper person.

And the reason for this is so that this accurate information can, you might say, be disseminated to the interested parties, Congress and the public, and certainly the District Judge who makes the determination.

Because of this false letter, because of this letter bearing someone else's signature, purporting to be Will Wilson, and purporting to state in the body of the letter that Wilson reviewed this file, that he carefully looked at it, that he determined that this is the kind of case that requires a wiretap, that "I found probable cause; I found that other means -- I apply my experience and my position as Assistant Attorney General and I make this important decision."

He represents this in the letter, that wasn't even signed by him; as a result of that a false application is made to the District Court. The determination the District Judge makes to order the wiretap, to authorize it, is based upon a false representation. False information is incorporated into the court order, which the judge signs and is filed; it causes the District Judge to make a false report to the Administrative Office, that Wilson had authorized this tap; it causes the Administrative Office to make a false report in its Annual Report, which is subject to public scrutiny.

The entire scheme is false because this letter is not true. Will Wilson was not designated to authorize the tap, nor did he ever see the file.

QUESTION: If an application were presented to a District Judge, Mr. Hewitt, which recited the correct facts, that is that this -- in detail -- that this application was signed by Mr. Sol Lindenbaum on behalf of -- no. That Mr.

Sol Lindenbaum, acting for the Attorney General, authorized Mr. Will Wilson to make this application.

MR. HEWITT: I don't think that would --

QUESTION: You think that would not comply with the statute?

MR. HEWITT: I don't think so, Your Honor.

QUESTION: And the District Judge might look at the statute and say either, You can't do this with Mr. Lindenbaum, whoever he may be; says the District Judge out in California.

MR. HEWITT: Yes.

QUESTION: Now, on the other hand, if it correctly recited "this application was authorized by the Attorney General of the United States, by his designation of Mr. Will Wilson", would you think the District Judge would be misled in the same way?

MR. HEWITT: His --

QUESTION: Or does not the greater authority of the Attorney General swallow the lesser authority of any Assistant Attorney General?

MR. HEWITT: No. And for this reason, Your Honor: nowhere in this case does John Mitchell say that he ever saw this file, that he ever reviewed it, or he did more than authorize it. Will Wilson says, "I have carefully reviewed the file; I have exercised my discretion; I make this finding, I make that finding; I'm satisfied."

If Mr. Mitchell signed this letter saying, "I personally, as Attorney General, have reviewed this file and made these determinations", then I think the District Judge must rely upon those determinations.

But here the District Judge, rightfully and justifiably believed that these decisions were made by Will Wilson, the Assistant Attorney General, who says he reviewed the file and made these important decisions.

And this is simply -- I urge Your Honors, it isn't simply the finding of probable cause and need, I think the prosecutor decision as to whether or not this is the type of case that justifies a wiretap is a very important one, and I think the legislative scheme shows that there was not to be a rubber stamp, a blanket authority to tap any telephone; only those phones that the Attorney General or a responsible designated assistant finds to justify this intrusion may be used.

That's one of the important decisions that the District Judge was misled on, I think, as to who might have made that decision.

Now, the government takes the position that that's not a particularly important facet to the statutory scheme, and I would submit to Your Honors that it is very important. That it's important in the sense that from the Congressional Record on August 11th, 1969, Chairman McClellan summarized

the first year of operation under the Omnibus Crime bill, and he stated that apparently -- and I call the Court's attention to page 23240, Chairman McClellan says: Apparently the prosecutor screening process is in fact having a healthy effect on the number of orders applied for and thus granted. Indeed, it appears that a majority of the 167 applications that were approved for submission to the New York Courts were not approved in their original form.

He states also: I would suggest that the applications should be more complete on their face. Our thought was that mandating prosecutor involvement in the warrant process would strengthen it by guaranteeing that the decision to use these techniques would be preceded by a careful law enforcement screening process. Apparently this practice has been meaningful followed in the majority of cases.

He further states: Prosecutors on whom the administration of the statute rests heavily should always carefully prepare and review these applications in light of the law. What may have been permissible under old practice is not necessarily legal now. I hope, too, that our judiciary, even with crowded dockets, is always taking the necessary time to examine and pass on all applications thoroughly. The part they must play in scrutinizing and questioning these applications, as well as requiring strict adherence to the statutory standards, cannot be over-

emphasized.

QUESTION: Have you cited that in your brief, Mr. Hewitt?

MR. HEWITT: No, I haven't Your Honor. I found it just the other day.

QUESTION: Could you make that available?

MR. HEWITT: Yes, I will, Your Honor. I'll file it as a supplement to the brief.

Chairman McClellan goes on: I realize, too, that we're dealing with the new reporting system as well as new legislation, and I do not want to be overly critical. I do, however, want to admonish every law enforcement officer, prosecutor and judge involved in this area that the only way this legislation will be effective in combatting crime is by strict adherence to the standards it contains.

And he further stated later that: My purpose in making these remarks has been to help assure that this legislation will be in fact followed to the strictest letter of the law, both bringing criminals to book and protecting citizens' privacy. That is the only way in which it can be utilized as an efficient tool in reducing crime.

He states, as I've indicated: My only concern at the moment is that the prosecutors and the courts that have the responsibility under the statute will not become careless, but will remain firm in their determination to see that the

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

I think this is the undercurrent that underlies this legislation, is that there are these strict requirements. These important decisions by prosecuting officers are an integral part of the scheme to set in motion a rather unique, modern type of invasion of a citizen's privacy.

So I will say, Your Honors, that if the decision of the prosecutor in this case, either the Attorney General or the Assistant Attorney General, is important, then the information concerning who made that decision is of equal crucial importance.

The Ninth Circuit, in the decision in Chavez, relied solely upon section 2518, which is the deficiency of the order, in effect holding that an order that misidentifies the approving officer is the same as an order that would leave that information blank, and therefore it would be defective on its face.

I will submit to Your Honors that if the decision of the Ninth Circuit in Chavez is affirmed, of course that will take care of the Giordano matter as well; since, notwithstanding whether Mr. Lindenbaum was or was not authorized, if, as the Ninth Circuit held in Chavez, the order itself is defective and thereby vitiating the entire

validity of the wiretap, then both Chavez and Giordano would fall accordingly. And that would be our particular position with respect to the second prong of the Chavez prong of the argument.

QUESTION: Were there pen registers involved in your case?

MR. HEWITT: Yes, Your Honor.

QUESTION: And, as I understand, all that they reveal is the numbers called from a particular phone?

MR. HEWITT: Yes, Your Honor. I think pen registers have been held not to be a --

QUESTION: And not covered by the statute.

MR. HEWITT: That's correct.

QUESTION: They are, on the other hand, that you need -- they're covered by the Constitution in the Fourth Amendment, are they not?

MR. HEWITT: Yes, Your Honor.

I think the statutory scheme for pen registers is adequate;in this particular case they were not -- they were not the subject of the motion -- they were the subject of the motion to suppress in the District Court, but were not before the Court of Appeals necessarily, as an issue before the Court of Appeals.

The decision in Chavez parallels the District Court decision in Giordano, under the name Focarile, where the

District Judge in Giordano took the position that the orders itself were invalid and therefore the tap was vitiated.

This reasoning was adopted in Chavez, which was considered with the King case, which applied the same reasoning as is before the Court in Giordano, in these pair of cases.

QUESTION: I don't recall now, Mr. Hewitt, too clearly. Did Judge Duniway for the Ninth Circuit rely on both (i) and (ii) of section (10)?

QUESTION: He relied on the combination of --

MR. HEWITT: It's a little like --

QUESTION: -- 2515 and --

QUESTION: And 2518?

QUESTION: Yes.

MR. HEWITT: Yes. And --

QUESTION: But I'm talking now about the subdivisions of (i), (ii) and (iii), that the communication was unlawfully intercepted. Judge Sobeloff did not track the District Judge's inclusions in this respect; that is, he put emphasis on number (ii), as I recall.

MR. HEWITT: Yes.

QUESTION: I was just wondering, did Judge Duniway have a -- bracket the whole area?

MR. HEWITT: No, I think Judge Duniway was considering that probably it applied to both --

QUESTION: It says unlawful.

MR. HEWITT: -- both unlawfully intercepted and perhaps invalid on its face.

QUESTION: In (i) and (ii).

MR. HEWITT: In (i) and (ii).

QUESTION: Yes.

MR. HEWITT: I would disagree with my co-counsel, or associate, Mr. Smouse, to one extent. I think perhaps if the Court were to find that the statute was not broad enough to cover this, certainly there would be an inherent power on the part of this Court to remedy this by fashioning a supervisory rule. I think even though there's no constitutional point involved, I would see no prohibition on this Court in excluding this evidence on the basis that there must be some sanction for failure to comply with the strict statutory requirements.

QUESTION: Well, assuming, hypothetically, that 2518(10)(a)(i), (ii) and (iii) did not by implication cover this, certainly section 2515 is explicit, is it not?

MR. HEWITT: Yes. It is, Your Honor.

And I would point out that the legislative history indicates that it was the intent that 2518(10) pretty much set forth those grounds upon which traditional search-and-seizure concepts have led to the suppression of evidence. And here, in a situation like this, a search warrant affidavit, that had

these same defects, the misidentification of the affiant, certainly if the Court has the inherent power to suppress that, the same rationale should apply to the orders in the applications in this particular case.

QUESTION: Has what? If the Court has the power --?

MR. HEWITT: A search warrant affidavit that misidentifies the affiant,

QUESTION: Unh-hunh?

MR. HEWITT: The cases cited in our brief.

QUESTION: Well, but you're suggesting that some kind of a McNabb-Mallory --

MR. HEWITT: Yes, Your Honor, some type of supervisory rule that would give some sanction for not --

QUESTION: Even if we find this isn't covered by the statute?

MR. HEWITT: Yes.

I think the statute covers it, but I'm not sure that that will be crucial to uphold the Ninth Circuit's decision.

They were not that clear as to the rationale for the suppression. But certainly I think it's implicit in Judge Duniway's opinion that this type of conduct is in conflict with the legislative history, and certainly in conflict with the clear statutory language. And there must be some sanction for its violation.

QUESTION: Do you think a case is stronger or weaker on respect to a judge-made exclusionary rule in a situation like this, where Congress has laid down statutory qualifications and then itself provided the circumstances under which there should be suppression; or in a case like McNabb where simply Congress has enacted a statutory prohibition and has said nothing about suppression? Are the judges freer in one case than the other?

MR. HEWITT: I think the judges would be freer in this case, because they could interpret the statute unlawfully intercepted in a broad fashion to include those same traditional defects that the Court would consider defective -- consider controlling in a typical search and seizure.

QUESTION: Well, then it really wouldn't be any of our supervisory power, it would just be a statutory interpretation, wouldn't it?

MR. HEWITT: Yes, Your Honor.

Thank Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:57 o'clock, p.m., the case in the above-entitled matters was submitted.]