Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool

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Imagine a suspect of a crime under investigation. The police are observing his home through binoculars, a mail cover\(^1\) has been placed upon his incoming mail, a search warrant has been obtained for the contents of several of his letters, a pen register and a wiretap have been placed upon his telephone, and the records of his long-distance calls are periodically examined. The search warrant for the letters is similar to the wiretap with respect to the interests and procedures involved.\(^2\) Both result in the detection of the substantive contents of a communication and need not be considered here. The pen register, which logs numbers dialed from a particular telephone without monitoring any conversations,\(^3\) may be analogized to the nonelectronic surveillance techniques represented in this hypothetical situation by the mail cover and binocular watch. Yet while the latter two techniques have raised no serious objections within recent years,\(^4\) the use of the pen register

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\(^1\) The post office conducts a “mail cover” by furnishing the government with the information appearing on the face of all envelopes addressed to a particular address: name and address of receiver, postmark, name and address of sender (if it appears), and class of mail. The actual mail is delivered to the addressee and only the letter carrier’s notation reaches the government agency that requests the mail cover. United States v. Balistrieri, 403 F.2d 472, 475 (7th Cir. 1968).


\(^3\) The court in United States v. Caplan, 255 F. Supp. 805 (E.D. Mich. 1966), described the pen register more fully as follows:

The pen register is a device attached to a given telephone line usually at a central telephone office. A pulsation of the dial on the line to which the pen register is attached records on a paper tape dashes equal in number to the number dialed. The paper tape then becomes a permanent and complete record of outgoing numbers called on the particular line. With reference to incoming calls, the pen register records only a dash for each ring of the telephone but does not identify the number from which the incoming call originated. The pen register cuts off after the number is dialed on outgoing calls and after the ringing is concluded on incoming calls without determining whether the call is completed or the receiver is answered. There is neither recording nor monitoring of the conversation. Id. at 807. A TR-12 Touch Tone decoder is a device analogous to the pen register. It is used for touch tone telephones and prints out the number in arabic numerals rather than as a series of dashes.

\(^4\) See, e.g., Lustiger v. United States, 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968) (mail cover held not a violation of fourth amendment); United States v.
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has engendered considerable controversy and needless confusion. At present, a situation may be encountered wherein a mail cover can be instituted without any judicial intervention, and a disclosure of long-distance toll call records can be obtained with a subpoena, but a list of all calls, both local and long-distance, can only be gathered by a pen register that is operated pursuant to a search warrant. This difference in judicial treatment is largely attributable to a questionable application of section 605 of the Federal Communications Act of 1934 and a questionable interpretation of the applicability to pen registers of the fourth amendment's proscription of unreasonable searches and seizures.

In the normal course of telephone company business, the pen register is employed to determine whether a home phone is being used to conduct a business, to check for a defective dial, or to check for overbilling. However, the pen register is also used within the context of an ongoing criminal surveillance, such as an investigation of illicit gambling, in which the monitoring is performed without the consent or knowledge of either the telephone subscriber or the intended recipient of the telephone call. Its

Costello, 255 F.2d 876, 881-82 (2d Cir.), cert. denied, 357 U.S. 937 (1958) (mail cover held not an obstruction of mail).


6 47 U.S.C. § 605 (1970). This section provides in relevant part:

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication . . . for his own benefit . . . .

7 See note 94 infra.


9 See United States v. Dote, 371 F.2d 176, 181 (7th Cir. 1966).

10 Id.

11 Additionally, the pen register is often used in the context of annoying telephone calls. The device is placed on the telephone of a person whom the harassed recipient has
widespread attractiveness and use in this manner derive in part from its utility as a means of developing probable cause to seek a search warrant or a judicial order to institute a full-scale wiretap. This Note will examine whether the arguments that have served to restrict the use of the pen register in a law enforcement context are valid.

I
THE IMPACT OF SECTION 605

Prior to the 1968 enactment of Title III of the Omnibus Crime Control and Safe Streets Act, section 605 of the Federal Communications Act of 1934 had served as the primary federal statutory constraint upon the use of electronic surveillance techniques in criminal investigations. In essence, section 605 as originally enacted provided that “no person” involved in receiving or transmitting interstate or foreign communications by wire or radio could reveal the “existence” or “substance” of that communication except upon “demand of . . . lawful authority” or in certain other limited instances.

In 1937, soon after the enactment of section 605, Nardone v. United States provided this statute with its first Supreme Court test. Conviction of the defendants was reversed upon the ground that section 605 rendered wiretap evidence inadmissible in federal criminal proceedings. Two years later, the Supreme Court
further expanded section 605 not only to ban direct wiretap evidence, but also to exclude evidence obtained from intercepted leads as the “fruit of the poisonous tree.” It therefore came as no surprise when three federal court decisions, in 1965 and 1966, condemned the use of the pen register as a per se violation of section 605. In United States v. Dote, the most recent and authoritative of the three cases, the Seventh Circuit affirmed a lower court motion to suppress pen register tapes compiled by the Illinois Telephone Company at the request of agents of the Internal Revenue Service, and concluded that the use of a pen register divulged the existence of an intercepted communication in contravention of the second clause of the statute. The court maintained that the dial pulses detected and recorded by the pen register were an indication of the ringing of the telephone of the intended recipient of the call, and since the mere ringing of a telephone may be a prearranged signal, the existence of a communication was revealed.

In order to understand the reasoning behind the Dote decision, one must revisit beginning with Nardone the cases dealing with electronic surveillance. Upon closer examination of Nardone, it appears that the Supreme Court in 1937 considered wiretapping by federal agents to be less acceptable than had the Supreme Court in 1928, when, in Olmstead v. United States, wiretapping was upheld against constitutional attack. In Nardone, the Court acknowledged: “For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong.” Thus, the Nardone Court was faced on the one hand with the Olmstead determination that wiretapping comports with the Constitution, and with a desire to restrict this “grave

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17 Nardone v. United States, 308 U.S. 338, 341 (1939). Furthermore, in Weiss v. United States, 308 U.S. 321 (1939), § 605 was held to cover intrastate as well as interstate telephone conversations.


19 371 F.2d 176 (7th Cir. 1966).

20 Id. at 181. In United States v. Caplan, 255 F. Supp. 805 (E.D. Mich. 1966), the court similarly held the pen register to be a violation of the second clause of § 605, but as an alternative holding, determined that the use of pen register tapes also violated the first sentence of § 605.

21 277 U.S. 438 (1928).

22 302 U.S. at 384.

23 Additionally, legislative attempts subsequent to Olmstead to expressly outlaw wiretaps uniformly failed. See H.R. 5416, 71st Cong., 1st Sess. (1929): “No information or evidence
wrong" on the other hand. To resolve this conflict, the Court in *Nardone* turned to section 605. The Court interpreted the terms of section 605 literally and stated that "[t]aken at face value the phrase 'no person' comprehends federal agents, and the ban on communication to 'any person' bars testimony to the content of an intercepted message." This proposition may be contrasted with a presumption previously expressed by the Supreme Court that the general words of a statute do not bind the government.

However, based upon the legislative history and background of this provision, it is apparent that the Supreme Court twisted the meaning of section 605 in order to cover a criminal law enforcement context. In so holding, the *Nardone* opinion evinces an expedient choice that fails to recognize the legislative intent implicit in the enactment of section 605.

Section 605, as promulgated in 1934, was based upon section 27 of the Radio Act of 1927, to which section 605 is almost identical. The purpose of the 1934 provision was to extend the Radio Act section to wire communications. There was no indication that section 605 would be used to regulate law enforcement agents. Section 27, in turn, was a successor to and a derivative of obtained by or resulting from the tapping of telephone or telegraph wires . . . shall be admitted as evidence in the courts of the United States . . . ."

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24 302 U.S. at 381.
25 Id. at 383-84. In the second *Nardone*, in 1939, Mr. Justice Frankfurter spoke of the first *Nardone* of 1937: "That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being." 308 U.S. at 340.
26 302 U.S. at 381-83.
27 Act of February 23, 1927, ch. 169, § 27, 44 Stat. 1172 (1927). In pertinent part, this statute provided:

No person receiving or assisting in receiving any communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable, or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; . . .

28 H.R. Rep. No. 1850, 73d Cong., 2d Sess. 9 (1934): "Section 605, prohibiting unauthorized publication of communications, is based upon section 27 of the Radio Act, but it is also made to apply to wire communications."
a similar prior provision subtitled "Secrecy of Messages," enacted in 1912 as part of a statute entitled "An Act to Regulate Radio Communications." Congressional debates indicate that the 1912 provision, a substitute offered on the House floor, was an attempt to ameliorate the severity of the penalty imposed by the corresponding portion of the original bill, and was designed to prevent telegraph operators from using the messages they handled for their own benefit.

There is no indication at any point in the above chain of legislative history of any congressional intent to enact an evidentiary rule. And, as one federal court of appeals observed:

Section 605 nowhere within its own corners is designated as a rule of evidence. It has certain civil and criminal significance by virtue of other sections of the Federal Communications Act. It becomes, however, a rule of evidence for federal courts by judicial construction. Nardone v. United States.

Prior analogous statutes forbidding telegraph operators from divulging the contents of a message have been held to have no operative evidentiary effect.

In the years just prior to 1968, dissatisfaction with the legal status of wiretapping, including the use of section 605, was ex-
pressed.\textsuperscript{35} The development of the law in this area had been "uneven and often without the consistency that comes with self-consciousness."\textsuperscript{36} Congressional action was urged.\textsuperscript{37}

The legislative response took the form of Title III of the Omnibus Crime Control and Safe Streets Act of 1968,\textsuperscript{38} which enacted a comprehensive wiretapping statute and simultaneously amended section 605.\textsuperscript{39} In reviewing the status of electronic surveillance,\textsuperscript{40} Congress distinguished three modes of communication—wire, oral, and radio. Title III was enacted to ensure the privacy of wire and oral communications by prohibiting all wiretapping and other electronic surveillance of these communications by persons other than law enforcement officers authorized in accordance with rigid procedures and judicial supervision.\textsuperscript{41} As amended in 1968, the sole subject of section 605, which regulates the conduct of communications personnel, is the third category, radio communication.\textsuperscript{42} The exclusion of radio communications from the protective safeguards of Title III is an acknowledgement that, as a result of the omnidirectional nature of radio broadcasts, the concept of privacy is less of a concern in this instance than with wire and oral communications.\textsuperscript{43}

The present status of the law with respect to wiretapping and bugging is intolerable. It serves the interests neither of privacy nor of law enforcement. One way or the other, the present controversy with respect to electronic surveillance must be resolved. See also Advisory Committee on the Police Function, American Bar Association, Standards Relating to Electronic Surveillance 96-98 (1968).

\textsuperscript{36} A. Westin, Privacy and Freedom 367 (1967).

\textsuperscript{37} See note 35 supra.


\textsuperscript{39} See notes 6 & 13 supra.

\textsuperscript{40} Electronic surveillance is the generic term used to cover all of the following: wiretapping (interception of a communication transmitted over phone wire without consent of participant), bugging (interception of communication transmitted orally without consent of participant), recording (electronic recording of wire or oral communication with the consent of participant), transmitting (radio transmission of oral communication with the consent of participant). 171 N.Y.L.J., Feb. 14, 1974, at 4, col. 2.

\textsuperscript{41} S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968). Title III does not speak in terms of the modes of surveillance (see note 40 supra), but rather prohibits the "interception" (see note 45 infra) of the two classes of communication, wire and oral. 18 U.S.C. § 2511 (1970).

\textsuperscript{42} Id. at 107-08. The one remaining reference to wire communications in § 605 in the first clause was not deleted because the radio transmission process, unlike the receipt of communications covered in the third clause, does entail, to a certain extent, the use of wire conductors. But see United States v. Hall, 488 F.2d 193, 196-98 (9th Cir. 1973), wherein the court admittedly reached an absurd result due to a failure to distinguish properly between the three modes of communication.

\textsuperscript{43} Cf. United States v. Sugden, 226 F.2d 281, 285 (9th Cir. 1955).
The desired impact upon the use of the pen register in a law enforcement context is clear. There was no congressional intention to subject the pen register to the proscriptive standards of Title III. The Senate report states:

The proposed legislation is not designed to prevent the tracing of phone calls. The use of a "pen register", for example, would be permissible. . . . The proposed legislation is intended to protect the privacy of the communication . . . .44

The well-settled case law similarly concludes that Title III is not applicable to the use of pen registers. The reason most often given is that the device does not "intercept" communications as that term is defined in the statute.45

With respect to section 605 subsequent to 1968, lawyers and judges alike have, for the most part, considered the present section 605 to be no more than a modification of the prior provision and therefore continue to accord the pen register the same treatment as that found in pre-1968 cases.46 These jurists are hard put to


The quoted portion of the Senate Report also includes a reference: "But see United States v. Dote . . . ." This is an example of a legislative reporting practice used throughout the Senate Report to indicate the cases that are no longer controlling.


However, judges have often employed distinctions of questionable significance in order to subject the pen register to the rigid procedures of Title III. See, e.g., Korman v. United States, 486 F.2d 926 (7th Cir. 1973) (pen register used concurrently with a wiretap subject to Title III); In re Alperen, 355 F. Supp. 372 (D. Mass.), aff'd, 478 F.2d 194 (1st Cir. 1973) (pen register used concurrently with a wiretap); United States v. Focarile, 340 F. Supp. 1033 (D.C. Md. 1972), aff'd sub nom. United States v. Giordano, 469 F.2d 522, 473 F.2d 906 (4th Cir. 1973), aff'd, 416 U.S. 505 (1974) (TR-12 Touch Tone decoder governed by Title III if used contemporaneously or subsequently with a sound transducer which converts the dial pulses into audible clicks).

46 See cases cited in note 51 infra; but see United States v. Falcone, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975), wherein the court set aside the pen register cases antecedent to 1968 in an opinion that represents the closest that any court has come to the § 605 analysis expressed in this Note. The Seventh Circuit appeared to be on a similar track in Korman v. United States, 486 F.2d 926 (7th Cir. 1973). In that case the continuing vitality of the Dote opinion (also a Seventh Circuit case) was strongly questioned. While the court did not expressly overrule Dote, it seemed that all future pen register cases in the Seventh Circuit would
reconcile the often conflicting case law. However, some measure of consistency can be gleaned from the cases.

The major effect of the amendment has been to force the courts to examine the pen register under the first clause of the new section 605. The second clause was formerly preferable because of its absolute prohibition that allowed the courts to avoid consideration of the exceptions to section 605 enumerated in the first clause. But in 1968, the second clause of section 605 was expressly restricted to radio communications and has subsequently posed no difficulty in dealing with pen registers. It is primarily the first clause that has proved the most troublesome to judges confronted with the task of untangling the relative applicability of these statutory provisions. The almost uniform result in the cases that have considered section 605 has been to curtail the use of pen registers. This is accomplished either by holding that the existence of a communication is divulged, or by avoiding the section 605 question and relying upon some distinguishing factor in the attendant circumstances which allows the court to find that the pen register is subject to Title III in that particular instance. Similarly, the courts have often struggled with the problem of what constitutes “demand of ... lawful authority” so as to allow the use of pen register tapes under section 605.

thereafter neither follow Dote nor find the pen register subject to § 605. However, in United States v. Finn, 502 F.2d 938 (7th Cir. 1974), the Seventh Circuit retreated: the Korman opinion was limited to holding only the second clause of § 605 inapplicable to pen registers and a search warrant was deemed sufficient “lawful authority” within the first clause of § 605.

In addition, Dote has survived the Korman opinion in various other jurisdictions, especially on the state level, and is thus of continued relevance. See, e.g., Commonwealth v. Coviello, — Mass. —, 291 N.E.2d 416 (1973); People v. Fusco, 75 Misc. 2d 981, 348 N.Y.S.2d 858 (1973).

Prior to the changes in § 605 in 1968, the pen register was usually discussed as an “interception” of a communication within the second clause. See, e.g., United States v. Dote, 371 F.2d 176 (7th Cir. 1966). However, the first clause of § 605, both before and after 1968, made no reference to “interception” and dealt solely with divulgence and publication. See notes 6 & 13 supra.

Thus, modern courts have exaggerated the limited conflict presented by the pre-1968 decisions. The judges have obscured the point that the applicability of section 605 in a law enforcement context was questionable in the first place. And it must also be concluded, as will be discussed below, that the pen register is not within the purview of section 605 after its amendment in 1968.

The 1968 act represents a congressional attempt to free this area of the law from the accretions of time and decisional law. Congress's intent to eliminate all possible influence of the pre-1968 case law with respect to wiretaps and pen registers under section 605 is clearly expressed in the legislative history of the statute:

This [new] section amends section 605 of the Communications Act of 1934 ... This section is not intended merely to be a reenactment of section 605. The new provision is intended as a substitute. The regulation of the interception of wire or oral communications in the future is to be governed by proposed [Title III] ... 

In this manner, a conscious attempt was made to disavow and discard decisions from Nardone to Dote, at least to the extent that they encumbered section 605. It is unfortunate that the statute was not more explicit in this respect. The obviously inadequate notification to members of the judiciary and the bar of the actual legislative intent has done much to hinder the desired effects.

In striving to understand why courts have, for the most part, persisted in holding the pen register subject to section 605, one must realize that judges generally arrive at their conclusions based upon an analysis of statutes, upon relevant precedents, or upon their conceptions of the proper policy considerations. Unfortunately, the policy approach apparently chosen by the courts to deal

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54 See, e.g., United States v. King, 335 F. Supp. 523 (S.D. Cal. 1971), aff'd in part, rev'd in part on other grounds, 478 F.2d 494 (9th Cir. 1973) (attempt to distinguish pre-1968 cases); but see discussion in note 46 supra.

55 See text accompanying notes 21-34 supra.


57 A reasonable course of action for Congress would have been to enact the substitute provision under an entirely different section number.
with pen registers reflects a generalized distaste for wiretaps.\textsuperscript{58} As a result of this visceral response, the courts have erroneously categorized the pen register as an electronic surveillance technique. Consequently, they have scrutinized the device in terms of wiretap statutes. However, a close examination of the nature of the pen register would seem to require its inclusion in the category of ordinary, rather than electronic, surveillance. The character of the intrusion is more closely analogous to the mail cover than to the wiretap, even though the pen register, like the wiretap, operates through electronic components. Neither the mail cover nor the pen register can reveal substantive communications; both merely alert the authorities to the fact of a communication (or, at least, an attempt to communicate).\textsuperscript{59} Thus, the majority of the judges have foregone a proper statutory analysis in their willingness to twist the statute and thereby find it applicable. They have grasped at any available argument to support their disposition and have accordingly created questionable precedents.

A proper statutory analysis reveals that the use of the pen register should in no way be constrained by section 605. First, the attempt by Congress to break free of prior case decisions is again seen in the legislative history of the substitute provision: “‘Person’ [within section 605] does not include a law enforcement officer acting in the normal course of his duties.”\textsuperscript{60} Technically, it is usually a telephone company employee who places the pen register on the subscriber’s telephone. But this is a direct result of the specialized knowledge and skills required to connect, operate, and maintain the device.\textsuperscript{61} Thus, when the telephone company installs a pen register at the request of law enforcement officers, it can be seriously contended that it is the government agents who are in effect using the instrument.\textsuperscript{62}

Second, even assuming \textit{arguendo} that the pen register is within the proscriptions of section 605, the “demand of lawful authority”

\textsuperscript{58} The pen register is most commonly used either immediately prior to or concurrently with a wiretap. From an alternative policy viewpoint, the pen register, as a lesser intrusion, is often a desirable substitute for the wiretap. An attitude of generalized distaste for wiretaps and a genuine concern for privacy are best served by affording law enforcement agents easy access to the pen register or its analogue, and encouraging its initial use in the place of wiretaps.

\textsuperscript{59} \textit{See} text accompanying note 100 infra.


\textsuperscript{61} \textit{See} Claerhout, \textit{supra} note 11, at 110 n.15.

\textsuperscript{62} \textit{See} notes 81-83 and accompanying text infra. \textit{Cf.} United States v. Hall, 488 F.2d 193, 196 n.4 (9th Cir. 1973).
exception in the first clause has consistently been construed too narrowly with respect to pen registers. The "lawful authority" contemplated by section 605 need not necessarily be limited to subpoenas, summons, or search warrants. There is no reason to exclude an official request by a police officer who is involved in a legitimate criminal investigation. Furthermore, it has been stated that a telephone subscriber authorizes the telephone company to intercept his calls to the extent necessary to compile its records. This is normally done for long-distance communications in the form of toll call records used to aid the billing process. It would seem to be unrealistic and unreasonable to attempt to distinguish between long-distance and local calls in this regard. The compilation of all calls, whether acquired through the pen register or automatic billing equipment, appears to be the prerogative of the telephone company. Simply because such a listing is not ordinarily made does not mean that it cannot be made if the company should so wish. Therefore, the tapes obtained by the pen register, no less than toll call records, are the legitimate property of the telephone company and may be divulged at the company's discretion.

Third, in addition to the contention that an unwarranted conclusion was reached by the Supreme Court in Nardone, it can be argued that section 605 has been fundamentally misapplied to the pen register both before and after 1968. A serious claim can be made that the pen register does not divulge or publish the existence of a "communication," but rather records a subscriber's efforts to establish a communication. Therefore, its use is not governed by section 605.

The pre-1968 cases dealt with this issue, and their resolution of the question apparently continues to enjoy widespread acceptance. In United States v. Caplan, the court offered the following reasoning as a basis for holding that the use of the pen register constitutes the interception of a communication:

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63 See note 53 supra.

64 Cf. United States v. King, 335 F. Supp. 523, 534 (S.D. Cal. 1971), aff'd in part, rev'd in part on other grounds, 478 F.2d 494 (9th Cir. 1973) (request by special agent of the United States Customs Agency Service, Treasury Dep't, held sufficient "lawful authority").

65 United States v. Gallo, 123 F.2d 229, 231 (2d Cir. 1941):
When a person takes up a telephone he knows that the company will make, or may make, some kind of a record of the event, and he must be deemed to consent to whatever record the business convenience of the company requires.

66 See notes 6 & 13 supra. Both clauses of § 605 include the proscription against unauthorized divulgence or publication.

67 See note 18 supra.

To the government's argument that no "communication" was intercepted, defendants, in open court, demonstrated that it was possible to dial a number and to permit the phone to ring a specified number of times and then to hang up. When this was done, the pen register dutifully recorded the fact that the number was called. History affords us the illustration of a pre-arranged signal. Paul Revere's associate who hung a lantern in the Old North Church, would hardly have been exculpated at a trial for treason if he had argued that he was not sending a communication, but was only illuminating the belfrey.  

This "prearranged-signal-as-a-communication" concept was soon propounded again in United States v. Dote, an opinion which cited Caplan favorably. In Dote, the court concluded:

The ringing of a telephone may be more than merely a signal indicating a call. Even if a call is not answered, a call at a certain time, or a certain number of rings, or repeated calls may well be a pre-arranged message or signal. The ringing of the telephone, therefore, may of itself be a communication, and a device, attached to the telephone line, which indicates to a third party that such a communication is taking place or is about to take place, intercepts it. United States v. Caplan . . . .

There are several difficulties with equating mechanical preliminaries with protected communication. First, it is not at all clear that the necessary link of identity can be established between the dial pulses that are recorded by the pen register and the pulses which generate the ringing of the telephone. The dial pulses effectively operate within and for the benefit of the telephone company switching facilities in order to establish a connection with the desired party. Those pulses never reach the telephone of the intended recipient of the call. Moreover, if it is determined that the intended recipient of the dial pulses is actually the telephone company equipment, then the pulse would not be a "communication" to the intended recipient of the conversation. And the telephone company as a party to the "communication of dial pulses" would be entitled to reveal it.

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69 Id. at 808.
70 371 F.2d 176 (7th Cir. 1966).
71 Id. at 179.
72 Id. at 181 (emphasis added).
73 See Bixler v. Hille, 80 Wash. 2d 668, 671, 497 P.2d 594, 596 (1972).
74 Cf. Rathhun v. United States, 355 U.S. 107 (1957) (principle that one party to a
Second, it is not possible to look at the pen register tape and thereupon state with any reasonable degree of certainty that a particular telephone number represents a prearranged signal.\textsuperscript{75} The "prearranged-signal-as-a-communication" concept necessarily assumes that someone is always present on the other end to be signaled. However, the image of a co-conspirator standing ready to receive a prescribed number of rings is belied by the small percentage of calls that commonly result in a completed connection.\textsuperscript{76} This may be variously ascribed to persons not home, busy signals, wrong numbers, and telephones which are out of order. Nevertheless, the pen register indiscriminantly records all the numbers dialed and does not indicate which went through to completion or went unanswered.\textsuperscript{77}

Of course, the resolution of the "prearranged signal" question turns on the definition of "communication."\textsuperscript{78} But, a discussion of this issue is unnecessary with respect to the pen register in light of the congressional intent to limit the scope of section 605 to radio communications.\textsuperscript{79} In this manner, the result achieved is consistent communication takes the risk that the other party will reveal it). For a discussion of the telephone company's obligation to reveal pen register tapes, see note 97 infra.

\textsuperscript{75} See Bixler v. Hille, 80 Wash. 2d 668, 671, 497 P.2d 594, 596 (1972):

\begin{quote}
It was argued a code could be established to transmit messages by the mere ringing of the telephone. \ldots Such an activity would not be recorded by the pen register. The argument, therefore, that messages could be transmitted by a ringing code is without merit \ldots .
\end{quote}

\textsuperscript{76} Although a statistic of the number of completed calls is difficult to compile, some indication of the significance of this factor is obtained from statistics gathered in connection with wiretaps. In United States v. Bynum, 360 F. Supp. 400 (S.D.N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated and remanded, 417 U.S. 903 (1974), the court had occasion to examine such statistics in detail:

During the operation of the wire surveillance, which continued for 34 days on phone one and 14 days on phone two, a total of 2,604 calls were made or received on phone one, and 832 on phone two. All of these calls, 3,436, were automatically recorded. Of these 3,436 calls, 1,378 were not completed due to busy signals, wrong numbers and the like, and some 84 calls were made to information, weather and similar services.\textsuperscript{7}\textsuperscript{15}

\textsuperscript{75} See note 3 and accompanying text supra.


\textsuperscript{79} Additional support for this conclusion can be inferred from the dissenting opinion of four Justices in United States v. Giordano, 416 U.S. 505, 553-54 (1974): "Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." The opinion went on to indicate in a footnote:

The Government suggests that the use of a pen register may not constitute a
with the similar exclusion of toll call records from the restrictions of section 605.80

II

THE INAPPLICABILITY OF THE FOURTH AMENDMENT

The initial hurdle to the consideration of pen registers under the fourth amendment is the requirement of governmental action. The fourth amendment does not address itself to searches by private parties. "[I]ts protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . ."81

The federal pen register cases, without exception, have not discussed this particular issue. However, the governmental action question is not excessively troublesome. When the telephone company installs a pen register at the request of law enforcement officers, it can be seriously contended that it is the government agents who are in effect using the instrument.82 It is therefore likely that sufficient government involvement can be found and for the purposes of further discussion it will be assumed that this hurdle has been cleared.83

The second and most critical question is whether the pen register operates as an unreasonable search and seizure within the fourth amendment. The inquiry may be further narrowed by

search within the meaning of the Fourth Amendment. I need not address this question, for in my view the constitutional guarantee, assuming its applicability, was satisfied in this case.

Id. at 554 n.4.


82 See text accompanying note 61 supra. Compare note 11 supra. In the setting described in note 11 supra, the cases have consistently held the fourth amendment inapplicable. See, e.g., People v. Green, 63 Misc. 2d 435, 312 N.Y.S.2d 290 (Kings County Crim. Ct. 1970); State v. Holliday, 169 N.W.2d 768 (Iowa 1969).

Additional support for the determination of governmental action can be obtained by analogy to the state action requirement of the fourteenth amendment. See, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (private conduct so enmeshed in state regulation that "state action" invests the private activity).

83 It should be noted that if it is concluded that the use of the pen register is attributable to governmental law enforcement action, then the applicability of § 605 would automatically be precluded under the view expressed herein that a law enforcement officer is not within the scope of the statutory "person." See text accompanying note 60 supra.
noting that the Supreme Court in \textit{Katz v. United States}^{84} determined that a search without a warrant is per se unreasonable.\textsuperscript{85} Thus, the entire point in issue turns upon whether the use of the pen register constitutes a search and seizure in the constitutional sense.\textsuperscript{86}

In \textit{Katz}, the Supreme Court “administered the formal \textit{coup de grace} to the moribund doctrine”\textsuperscript{87} that had controlled the applicability of the fourth amendment since \textit{Olmstead}. The Court held that the fourth amendment did apply where the FBI, acting without a warrant, attached a microphone to the top of a public telephone booth in order to monitor the conversations of a suspect thought to be engaged in interstate gambling. Affirming the trend of recent cases,\textsuperscript{88} the Court rejected an analysis limiting fourth amendment protection to freedom from physical intrusion.\textsuperscript{89} In discarding the doctrine of “constitutionally protected areas,” the Court cast aside the trespass analysis:

\begin{itemize}
\item \textsuperscript{84} 389 U.S. 347 (1967).
\item \textsuperscript{85} Id. at 357. The Court did acknowledge, however, the existence of certain limited exceptions. \textit{Id}. For an examination of the barrier posed by the warrant requirement with respect to pen registers, see note 103 and accompanying text \textit{infra}.
\item \textsuperscript{86} Other commonly encountered constitutional infirmities are not raised by the pen register. There is no violation of the fifth amendment privilege against self-incrimination because there is no compulsion upon a subscriber to dial. \textit{See} \textit{Olmstead v. United States}, 277 U.S. 438, 462 (1928) (use of incriminating conversations obtained with wiretap by government officer held permissible due to lack of element of coercion); State v. Holliday, 169 N.W.2d 768, 772 (Iowa 1969) (pen register); \textit{see also} \textit{Couch v. United States}, 409 U.S. 322 (1973) (disclosure to police by accountant of records voluntarily given to him not violative of fifth amendment privilege against compulsory self-incrimination); Hoffs v. United States, 385 U.S. 293, 303-04 (1966) (no compulsion to speak to “trusted” colleague who communicated with authorities as an informant).
\item \textsuperscript{87} 389 U.S. at 353. In \textit{Katz}, the Court specifically held that the \textit{Olmstead} (see text accompanying note 21 \textit{ supra}) trespass doctrine had been so eroded by subsequent decisions that it was no longer controlling. “[T]he reach of [the] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” 389 U.S. at 353.
\item \textsuperscript{88} Desist v. United States, 394 U.S. 244, 269 (1968) (Fortas, J., dissenting).
\item \textsuperscript{89} \textit{See}, e.g., Clinton v. Virginia, 377 U.S. 158 (1964) (thumbtack microphone); Silverman v. United States, 365 U.S. 505 (1961) (spike microphone).
\end{itemize}
The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.90

The holding in *Katz* was clarified by a subsequent Supreme Court plurality opinion of four Justices in *United States v. White*:\(^\text{91}\)

Our problem is not what the privacy expectations of particular defendants in particular situations may be . . . . Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally “justifiable”—what expectations the Fourth Amendment will protect in the absence of a warrant.92

Thus, the amendment protects the information that a reasonable and prudent man would consider to be hidden from the public. The proper standards with which to measure the pen register under the fourth amendment, therefore, require not only that there be an actual expectation of privacy on the part of the telephone subscriber, but also a showing that the expectation is one which is recognized by society as reasonable.93

An application of the preceding tests indicates that the fourth amendment does not bar the use of the pen register.94 First, even assuming that a privacy expectation is in fact present, it is well settled that toll calls (and their records) are not entitled to a reasonable expectation of privacy.95 And, with respect to most areas of the country, there seems to be no valid distinction between . . . .

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90. 389 U.S. at 351-52.
92. *Id.* at 751-52.
94. The fourth amendment question has not yet been squarely faced by the courts. In *United States v. Focarile*, 340 F. Supp. 1033, 1040 (D.C. Mich. 1972), *aff’d* *sub nom.* United States v. Giordano, 469 F.2d 322, 473 F.2d 906 (4th Cir. 1973), *aff’d* 416 U.S. 505 (1974), the court indicated there might be a possible fourth amendment problem inherent in the use of the pen register. For the most part, however, the courts have only stated that the pen register is not a general search and seizure. *See, e.g., In re Alperen*, 355 F. Supp. 372, 374-75 (D.C. Mass.), *aff’d* 478 F.2d 194 (1st Cir. 1973); *United States v. Lanza*, 341 F. Supp. 405, 433 (D.C. Fla. 1972); *see also* discussion in note 79 *supra*.
95. *See, e.g.*, United States v. Baxter, 492 F.2d 150, 167 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974): “[T]he expectation of privacy protected by the Fourth Amendment attaches to the content of the telephone conversation and not to the fact that a conversation took place.” This statement, although made with respect to the disclosure of toll call records, seems equally applicable to pen register tapes. *Also, see* DiPiazza v. United States, 415 F.2d 99, 103-04 (6th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971).
the expectations associated with local calls on the one hand and those calls that cross the local hilling zone on the other hand. The majority of subscribers probably have no real knowledge as to the geographic boundaries of their "local call" zone. Second, all telephone subscribers must utilize equipment owned by a third party, the telephone company, in order to place a call. It is therefore unreasonable for a subscriber to assume that the fact of his call passing through the telephone system will remain a total secret from the telephone company.\textsuperscript{96} Once this assertion is accepted, it is clear that there can be no reasonable expectation of privacy from law enforcement authorities with respect to the dial pulses detected and recorded by the telephone company. In a variety of analogous contexts, the Supreme Court has determined that a person entitled to receive a communication is similarly entitled to reveal it to government officials without further legal process.\textsuperscript{97}

\textsuperscript{96} As a matter of ordinary telephone company procedure, the numbers of all calls are recorded when dialed from a telephone subject to a special rate structure.

\textsuperscript{97} In United States v. White, 401 U.S. 745 (1971) (plurality opinion), the defendant was not subjected to a search and seizure in violation of the fourth amendment when he spoke to an informant who simultaneously transmitted the conversation to police authorities. The Supreme Court recognized that "[v]ery probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters." \textit{Id.} at 751. However, the Court concluded that "the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police . . . ." \textit{Id.} at 752.


One fundamental aspect of the telephone company's "right" to reveal pen register data to law enforcement authorities is often taken for granted; to what extent is the telephone company \textit{obligated} to furnish such information and assistance to the government? In this regard, the Court of Appeals for the Ninth Circuit, in denying the government's request that a telephone company be required to assist in installing a pen register, stated:

\begin{quote}
We are not convinced that the authority which the Government would have the court exercise, to compel a telephone company to assist in the investigation of suspected law violators can be derived, by analogy, from the power law enforcement officers may have to assemble a \textit{posse comitatus} to keep the peace and to pursue and arrest law violators. Nor do we find, outside Title III, any district court authority, statutory or inherent, for entry of such an order.
\end{quote}

Application of United States, 427 F.2d 639, 644 (9th Cir. 1970). Thus, although Title III was amended in 1970 so as to require cooperation with wiretap orders (\textit{see} 18 U.S.C. \textsection 2518(4) (Supp. III 1973)), the telephone company apparently may refuse to assist in the installation of pen registers. This issue is currently pending before the Court of Appeals for the Fifth Circuit in Southern Bell Telephone and Telegraph Co. v. United States, No. 74-3357 and No. 74-3358 (5th Cir., filed Sept. 16, 1974).

Title III, in expressly protecting those who act in good faith pursuant to wiretap orders from civil liability (18 U.S.C. \textsection 2520 (Supp. III 1973)), identifies the reason that telephone
Furthermore, the merits of an argument that the dial pulses are seized by the pen register and thus may be subjected to an unreasonable search and seizure are far from clear. Although Katz reiterated the holding in *Wong Sun v. United States*\(^9\) that fourth amendment protection is not limited to tangible objects,\(^9\) the class of protected intangibles has not been expanded beyond substantive communications.

Some additional support for the conclusion that the pen register is not subject to the fourth amendment can be obtained by examining the similarity between the pen register and the mail cover. To date, the fourth amendment has not been held to bar the operation of a mail cover when no substantial delay in delivery is involved.\(^10\) By way of analogy, just as the mail passes through the postman's hands as he copies the information written on the envelopes, the pen register has no delaying effect on the dial pulses as they pass through the device.

Lastly, it should be noted that if the "reasonable expectation of privacy" standard is accepted as the primary determinant of whether a particular activity is a search and seizure, then all other policy considerations are irrelevant to the question of the *applicability* of the fourth amendment. These considerations are relevant, however, to the *reasonableness* of a particular search and seizure (if the fourth amendment were found to be applicable). This inquiry ordinarily entails balancing the government's need to search against the seriousness of the intrusion.\(^10\)

The question of the companies often hesitate to cooperate with law enforcement authorities. It is therefore suggested that a telephone company which is somehow doubtful of the propriety of the government's action and is desirous of avoiding civil liability (possibly based upon a breach of a subscriber's telephone contract) should insist upon the government obtaining a search warrant to authorize the pen register, even though such a warrant is not necessarily required. It is well settled that a valid warrant will protect an officer and his agents from civil liability (see W. Prosser, *Law of Torts* § 25 (4th ed. 1971)), and indeed, the warrant originally evolved largely for that purpose. See J. Stephen, *History of the Criminal Law of England* 190-93 (1883).

However, a search warrant for a pen register sought or issued under Fed. R. Crim. P. 41 is likely to encounter serious difficulties. See note 103 infra. A federal court may instead wish to consider issuing an authorization pursuant to Fed. R. Crim. P. 57(b), as was done in *Osborn v. United States*, 385 U.S. 323 (1966). Rule 57(b) allows the court to fashion new rules not inconsistent with the other rules, but the extent to which R. 57(b) is free of the problems attendant to R. 41 is as yet unclear.

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99 In *Wong Sun*, the Supreme Court approved a circuit court decision that information obtained visually was within the scope of the fourth amendment; *Katz* extended the protection to oral statements as well.
100 Lustiger v. United States, 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968).
reasonable of a search and seizure, regardless of its resolution, would pose no additional threat of limitation on the use of the pen register. Even if the device is found to constitute an unreasonable search and seizure within the fourth amendment and thereby subject to the warrant requirement,\textsuperscript{102} the consent doctrine would nevertheless authorize the use of a pen register without a search warrant and without probable cause.\textsuperscript{103} The telephone company may be characterized as a party to at least that portion of the telephone call that includes the dial pulses. Thus, by acquiescing to a police request for a compilation of dial numbers, the telephone company is, in effect, giving its consent to a search.

\section*{Conclusion}

In determining the proper legal status of the pen register, it has been necessary to examine the legislative history of section 605, the language of the statute itself, and the fourth amendment

\textsuperscript{102} See note 85 and accompanying text supra.

\textsuperscript{103} In United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (woman consenting to a search of a shared bedroom), the Supreme Court explained that the relationship or authority required to justify a third-party consent search is a “mutual use of the property by persons generally having joint access or control for most purposes…” See also Frazier v. Cupp, 394 U.S. 751, 740 (1969) (valid consent given by one joint user of duffel bag because each user has assumed the risk that the other would allow someone else to look inside).

In any event, further problems arise with respect to the availability of a search warrant under \textit{Fed. R. Crim. P. 41}. This rule authorizes the search for and seizure of property under certain circumstances. The term “property” is used in this rule to include documents, books, paper, and other tangible objects. Rule 41(b). It is not clear whether the dial pulses detected by the pen register are “property” within Rule 41. Moreover, if they are property, do they belong to the person who dialed the phone, the telephone company whose equipment is used to generate, transmit and receive the pulses, or to the intended recipient of the telephone call? Cf. People v. Stewart, 73 Misc. 2d 399, 342 N.Y.S.2d 127 (Kings County Crim. Ct. 1973) (possible unavailability of New York State search warrant).

Furthermore, a search warrant authorizing the use of a pen register may be of doubtful utility. Rule 41(d) requires prompt return of the search warrant accompanied by a written inventory of any property taken and Rule 41(e) establishes a ten day time limit for execution of the warrant itself. Although several cases have stated that the return and inventory requirements are ministerial in nature and that any inadvertent failure therein does not invalidate the warrant (see, \textit{e.g.}, United States v. Hooper, 320 F. Supp. 507 (D.C. Tenn. 1969), \textit{aff'd}, 438 F.2d 968 (6th Cir.), \textit{cert. denied}, 400 U.S. 929 (1970)), the court in United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972), held that the proper sanction for a conscious disregard of a similar inventory requirement in Title III is suppression of evidence so obtained. Thus, by analogy to the wiretap statute, the effective lifetime of a pen register operated pursuant to a search warrant appears to be ten days, after which time the existence of the surveillance must necessarily be disclosed. Unlike Title III, Rule 41 on its face makes no provision for an order of postponement of the inventory requirement. Although such an order might be within the court’s discretion under \textit{Fed. R. Crim. P. 57(b)}, a question then arises as to whether a postponement is truly consistent with the specific prescriptions of Rule 41.
standards as expounded by the Supreme Court. Accordingly, the following scheme emerges: Neither the fourth amendment nor the federal statutes, both present and past, constitute a legal constraint upon the pen register when used to aid a legitimate criminal investigation. This proposition, as an additional consequence, injects a measure of uniformity into the treatment accorded ordinary surveillance techniques. Reflecting the similarity of the concomitant intrusions, the pen register, toll call records, and mail cover would stand on equal footing. Unrealistic implications that different levels of privacy are involved would thereby be avoided. However, this scheme can be effectuated only if the courts consciously recognize and remove their unfounded restraints on the use of the pen register.

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