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Eavesdropping at the Government's Discretion-First Amendment Implications of the National Security Eavesdropping Power

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EAVESDROPPING AT THE GOVERNMENT'S DISCRETION—FIRST AMENDMENT IMPLICATIONS OF THE NATIONAL SECURITY EAVESDROPPING POWER

Title III of the Omnibus Crime Control and Safe Streets Act of 1968[1] regulates the use of wiretapping and eavesdropping devices by federal and state law enforcement agencies. Although the statutory scheme broadly validates eavesdropping in criminal investigations,[2] it establishes a judicial intermediary to safeguard constitutionally-protected rights from overzealous investigation.[3] The investigator is usually required to obtain judicial permission to initiate eavesdropping,[4] and

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1 18 U.S.C. §§ 2510-20 (Supp. IV, 1969).

2 The Attorney General may authorize applications for eavesdropping warrants in the investigation of Atomic Energy Act violations, espionage, sabotage, treason, riots, murder, kidnapping, robbery, extortion, hijacking, interstate gambling and racketeering, presidential assassination, counterfeiting, bankruptcy fraud, narcotics offenses, and conspiracy to commit any of these offenses. *Id.* § 2516(1). State authorities have even more latitude, since any crime "dangerous to life, limb, or property, and punishable by imprisonment for more than one year" will support an eavesdropping warrant. *Id.* § 2516(2).

The Act has been criticized for being overbroad. Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455, 481-82 (1969).

3 18 U.S.C. § 2518 (Supp. IV, 1969). The judicial intermediary was made a prerequisite to eavesdropping by the Supreme Court in Berger v. New York, 388 U.S. 41 (1967). The Court felt that unsupervised eavesdropping constituted an unreasonable search and seizure proscribed by the fourth amendment. Judicial control was designed to insulate the public from unreasonable eavesdropping; the Court indicated that proper supervision should approve only a single electronic intrusion to seize a specific conversation relating to a particular crime immediately affecting the administration of justice. *Id.* at 54-58. By intervening, the court was to remove all discretion to infringe upon fourth amendment rights from the investigator. *Id.* at 59.

The Court further refined the rules for eavesdropping in Katz v. United States, 389 U.S. 347 (1967), by holding that under the fourth amendment each person carries with him the right to privacy. *Id.* at 351-52.

It has been argued that *Berger* and *Katz* do not go far enough, and that eavesdropping is per se unconstitutional. Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969).

4 The warrant application must specify: the details of the offense (which may have yet to occur); the location of the proposed eavesdrop; the type of communication to be seized; the identities of the parties, if known; a statement of why alternative investigative techniques are not feasible; and the proposed duration of the eavesdrop. Any warrant issued states the place, time, and purpose of the eavesdrop and expires in 30 days. Extensions may be obtained by separate application and justification. 18 U.S.C. §§ 2518(1)-(5) (Supp. IV, 1969).

the investigation remains subject to the control of the court.[5]

In cases involving the national security, however, section 2511(3) reserves to the President the power to authorize eavesdropping free from any court supervision.[6] If this national security eavesdropping is "reasonable," its fruits are admissible.[7] The obvious danger with such

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[5] After completion of the eavesdrop the court takes custody of all recordings. Persons subject to eavesdropping do not receive prior notice, but they are to be notified within 90 days after initial application. However, upon a showing of good cause, even this deferred notice may be postponed. Whether the parties subject to the eavesdropping are notified of the content of the seized information is purely discretionary with the court. *Id.* § 2518(8)(d). Evidence gathered is admissible (*id.* § 2517(3)), but if the warrant is defective or the evidence is outside the scope of the warrant, it may be suppressed (*id.* § 2518(10)). The government may appeal both the denial of a warrant and the granting of a motion to suppress. *Id.*

It has been argued that the statutory safeguards do not comply with the *Berger* criteria. Schwartz, *supra* note 2, at 461-66; Spritzer, *supra* note 3, at 176-77. Although the Court has not directly reviewed the statutory provisions, it has referred approvingly to some of Title III's eavesdropping safeguards. *See* Alderman v. United States, 394 U.S. 165, 175 (1969).

[6] Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence . . . essential to the security of the United States, or to protect . . . against foreign intelligence activities. Nor shall anything . . . [so] limit . . . the constitutional power of the President to take such measures . . . to protect the United States against the overthrow of the Government by force or other unlawful means, *or against any other clear and present danger to the structure or existence of the Government.* The contents of . . . [the] communication [intercepted under this subsection] . . . may be received in evidence . . . only where such interception was *reasonable*, and shall not be otherwise used . . . .

18 U.S.C. § 2511(3) (Supp. IV, 1969) (emphasis added).

This national security exception must be distinguished from another minor exception to prior judicial approval. The statute permits retroactive judicial validation within 48 hours when an organized crime or national security emergency necessitated immediate eavesdropping. *Id.* § 2518(7).

[7] The term "reasonable" as used in § 2511(3) is ambiguous. It may be the President's initial apprehension of a threat to the national security that must be reasonable, or it may be that the use of eavesdropping must be reasonable. Nor does the statute indicate whether reasonableness, however construed, is a question of law or of fact.

A further complicating factor is that "national security" itself is a term that has defied congressional, executive, and judicial definition. Congressional enactments such as the Subversive Activities Control Act are chiefly directed at a rather amorphous Communist threat. The Subversive Activities Control Board, for example, is charged with monitoring groups to determine the extent of control by foreign powers, their place in the "World Communist Movement", the frequency of advocacy of typical Communist dogma, the number of reports and visits by group members to foreign powers, and whether such groups maintain secret membership lists. 50 U.S.C. §§ 792(e)-(f) (1964), *as amended*, 50 U.S.C. § 792(f) (Supp. IV, 1969). In the executive departments, the Attorney General compiles a list of groups that are "totalitarian, fascist, communist, or subversive, or [have] adopted a policy of advocating or approving the commission of acts of force or

a broadly-worded power is that the government may use it to monitor persons feared only because they advocate unpopular ideologies; indeed, the Justice Department has admitted utilizing section 2511(3) powers in the investigation of radical dissident groups.[8] The freedom of association—drawn from the cumulation of the express freedoms of religion, speech, press, petition, and assembly—has been recognized by the Supreme Court to be a fundamental right fully protected by the first amendment.[9] Eavesdropping against associations destroys the privacy that the Court has stated is a prerequisite of effective exercise of the

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violence to deny other persons their rights under the Constitution . . . , or [seek] to alter the form of government of the United States by unconstitutional means." Exec. Order No. 9835, 3 C.F.R. 627, 630 (1943-48 Comp.). *See* Note, *The Bill of Attainder Clauses and Legislative and Administrative Suppression of "Subversives,"* 67 COLUM. L. REV. 1490 (1967). The Supreme Court has never tried to define what are legitimate concerns of national security. *See, e.g.*, Cole v. Young, 351 U.S. 536, 544 (1956).

The assumption seems to be that threats to the national security are either of Communist or foreign origin. *See, e.g.*, Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 12-13 (1961). Nowhere, however, is it clearly indicated that the government may not perceive a threat to national security from a purely domestic source. *See* Comment, *The Right of Association and Subversive Organizations: In Quest of a Concept*, 11 VILL. L. REV. 771, 782 n.62, 789 & n.118, 793 (1966).

8 The first indication of such use came in an announcement by Attorney General Mitchell that he considered the national security eavesdropping power to be available against radical domestic dissident groups. N.Y. Times, July 22, 1969, at 12, col. 1. Subsequently, the FBI revealed it had used this power in an intensive national investigation of the Black Panther Party. *Id.*, Dec. 14, 1969, at 1, col. 1. Eavesdropping on radicals also played a prominent role in the recent "Chicago Seven" riot conspiracy trial. *Id.*, Feb. 21, 1970, at 1, col. 1.

The legislative history of § 2511(3) makes it clear that domestic threats to the national security were a primary concern of its proponents. Responding to an amendment that would have limited extraordinary eavesdropping powers to organized crime investigations, Senator McClellan, a key supporter of Title III, replied:

> There is, for example, no relationship between organized crime and the Atomic Energy Act, espionage, sabotage, or treason. There is no relation between organized crime and riots. You could not bug a room or a hall in which Carmichael was meeting, in which Rap Brown was meeting, where they were inciting to riot, telling people to get their guns, "Go get whitey," and do this and do that. Do you want to take that out of the bill?

114 CONG. REC. 14702-03 (1968).

9 Explicit recognition of association as a fundamental first amendment freedom was made in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958):

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has . . . recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61. For a sound analysis of the early association decisions, see Emerson, *The Freedom of Association and the Freedom of Expression*, 74 YALE L.J. 1 (1964). *Cf.* Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842, 851 (1969).

freedom of association.[10] If the free exercise of the right of association can be impaired by the use of section 2511(3) powers, the section may be in conflict with the first amendment.[11]

I

THE DETERRENT EFFECT OF POTENTIAL EAVESDROPPING ON FREEDOM OF ASSOCIATION

When the police power of government is exercised pursuant to vague or overbroad legislation, so that citizens are in doubt as to what activity is unlawful or otherwise subject to unfavorable official action, those citizens may be deterred from pursuing legal or even constitutionally-protected activities. When a vague or overbroad statute deters the exercise of protected first amendment rights it is said to have a "chilling effect" on those rights.[12]

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10 "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958). The association has standing to assert the first amendment rights of its members, on the theory that the members have chosen the association as a vehicle to advocate their beliefs. *Id.* at 458-59.

11 The Court has recognized that unrestrained use of investigative and police power has a destructive effect upon the exercise of fundamental freedoms. Cramp v. Board of Pub. Instr., 368 U.S. 278, 283 (1961); Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957). The Court has also found infringement of the first amendment right of association in various forms of state and federal action. United States v. Robel, 389 U.S. 258 (1967) (denial to Communist Party member of employment at defense facility); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (requirement of loyalty oath for teachers); Elfbrandt v. Russell, 384 U.S. 11 (1966) (public employee loyalty oath requirements); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (travel restrictions on Communist Party members); Baggett v. Bullitt, 377 U.S. 360 (1964) (teacher oath); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964) (ouster of organization from the state); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964) (proscription of cooperative legal activities); NAACP v. Button, 371 U.S. 415 (1963) (same); Cramp v. Board of Pub. Instr., 368 U.S. 278 (1961) (teacher oath); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961) (forced disclosure of membership lists); Shelton v. Tucker, 364 U.S. 479 (1960) (teacher oath); Bates v. Little Rock, 361 U.S. 516 (1960) (forced disclosure of membership lists); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (same).

Obviously § 2511(3) is open to attack on fourth amendment grounds in light of the statement in the *Berger* majority opinion that all eavesdropping is subject to the requirements of the fourth amendment. Berger v. New York, 388 U.S. 41, 62-64 (1967). However, the section has not yet been tested, and a fourth amendment attack is not necessarily available to all members of an association. The Court has held that fourth amendment rights are personal and may not be vicariously asserted. Thus, one affected by an eavesdrop cannot assert a fourth amendment violation if he was not directly subjected to eavesdropping. Alderman v. United States, 394 U.S. 165, 174 (1969); *cf.* Jones v. United States, 362 U.S. 257, 261 (1960).

12 Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965); *see* Comment, *Right of Asso-*

The freedom of association is particularly vulnerable to "chilling": the threat of unrestrained government action against a group may occasion a decline in membership or financial contributions and even loss of the community tolerance necessary for the group's effective operation.[13] Where government power to eavesdrop is virtually unchecked, as it is in section 2511(3) national security cases, the slightest unfavorable attention from the government toward an unpopular dissident group may arouse among its membership a fear of eavesdropping. The concomitant fear that the privacy of the group will be destroyed may activate all the harmful effects of chilling.[14]

For many years, when confronted by an exercise of the police power that conflicted with the freedom of association, the Supreme Court resolved the conflict by "balancing" the respective interests.[15] If a statute was vague or overbroad, the Court often "rewrote" it, construing it to conform to the first amendment.[16] In *United States*

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ciation Extended To Curtail Harassment of Political Associations Through Criminal Investigations, 1969 UTAH L. REV. 383. *See also* Note, *HUAC and the "Chilling Effect": The Dombrowski Rationale Applied*, 21 RUTGERS L. REV. 679 (1967).

State action may exert a chilling effect indirectly; the passage of a vague or overbroad statute may be sufficient in itself to discourage the exercise of constitutional rights. The Supreme Court has been sensitive to indirect threats to first amendment guarantees. *See* United States v. Robel, 389 U.S. 258, 263 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); Elfbrandt v. Russell, 384 U.S. 11, 19 (1966); Dombrowski v. Pfister, *supra*; Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 557 (1963); NAACP v. Button, 371 U.S. 415, 435-36 (1963); Shelton v. Tucker, 364 U.S. 479, 485-86 (1960). *See also* Comment, *Judicial Rewriting of Overbroad Statutes: Protecting the Freedom of Association from Scales to Robel*, 57 CALIF. L. REV. 240 (1969).

13 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459-63 (1958). The destructive effect of governmental action is magnified when an association is affected, because many members may be denied not only the right to associate, but also the effective exercise of express first amendment guarantees.

14 Eavesdropping under § 2511(3) occurs without notice. Thus, the chilling effect results not from eavesdropping itself but from the likelihood that it will occur. The likelihood is strong when a group undertakes activities or programs that create strong governmental displeasure. *See* Note, *supra* note 12, at 679; *cf.* Brown v. Louisiana, 383 U.S. 131, 139 (1966); Wright v. Georgia, 373 U.S. 284 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963). *See also* Note, *The Bill of Attainder Clauses and Legislative and Administrative Suppression of "Subversives,"* 67 COLUM. L. REV. 1490 (1967); Note, *Riots and the Fourth Amendment*, 81 HARV. L. REV. 625, 636 (1968).

15 *E.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958). Balancing in this type of situation was first used by the Court in American Communications Ass'n v. Douds, 339 U.S. 382, 393-404 (1950). *See also* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 88-105 (1961).

Balancing has been defined as the evaluation of two interests in irreconcilable conflict, with the total rejection of the one less favored. Note, *supra* note 12, at 704.

16 The Court read into one statute a "finding" that the Communist Party in the United States has presumptively unlawful goals. American Communications Ass'n v. Douds, 339 U.S. 382, 393 (1950). Sections 2 and 3 of the Smith Act, 18 U.S.C. §§ 2385, 2387

v. Robel,[17] however, the Court indicated that when a statute is not drawn with sufficient precision to avoid imposing a "substantial burden" on freedom of association, balancing legitimate national security interests against first amendment rights is inappropriate.[18] Thus, if proposed governmental activity threatens to jeopardize associational rights, Congress *must* find narrower means to accomplish its goals.[19]

Robel does not destroy the government's ability to investigate or prosecute alleged criminal conspiracies; it merely forces the government to concentrate solely on those aspects of concerted actions that are unlawful.[20] Inasmuch as government has no interest in preventing legal, much less constitutionally-protected, conduct, the Court has made association a right that cannot be denied to anyone, even violent revolutionaries. Forms of antisocial conduct pursued by dissidents may be proscribed, but association per se must not be impaired by that proscription and its enforcement.[21]

(1964), were judicially rewritten to include a requirement that advocates of violent overthrow possess specific intent to bring about that result. Dennis v. United States, 341 U.S. 494, 502 (1951). In another Smith Act case, the Court held both that Congress could criminalize only certain qualitative degrees of membership in the Communist Party, and that the membership clause of the statute (18 U.S.C. § 2385 (1964)) actually incorporated these rules. Scales v. United States, 367 U.S. 203, 222-30 (1961).

17 389 U.S. 258 (1967). The case involved a prosecution under § 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. § 784(a)(1)(D) (1964), which made it unlawful for any Communist Party member to be employed at a defense installation after a final registration order was entered against the Party.

18 389 U.S. at 264–68 & n.20.

19 It has been suggested that this case should be decided by "balancing" the governmental interests . . . against the First Amendment . . . . This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important . . . . Faced with a clear conflict between . . . the interests of national security and . . . First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.

Id. at 268 n.20. *Cf.* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

20 389 U.S. at 267.

21 This dichotomy was recognized by the Court as early as 1937 when it held that a criminal syndicalism statute could not proscribe a meeting of Communists, but could proscribe actual illegal activity by the participants. DeJonge v. Oregon, 299 U.S. 353, 365 (1937). More recently, the Court held that even if a group as a whole espoused illegal goals, government action should not adversely affect persons who were not knowing, active members with specific intent to accomplish the group's unlawful objectives. Scales v. United States, 367 U.S. 203, 222-30 (1961). Subsequently, first amendment protections were

Unsupervised eavesdropping power clearly has the potential to deter the protected right of association by placing persons in fear that the privacy of their associations will be invaded. No less than other forms of State investigative or prosecutorial power, eavesdropping must be narrowly confined by statute within limits that avoid conflict with the unfettered exercise of civil liberties.[22] The investigator must be limited to electronic seizure of evidence of specific criminal conduct and denied the discretion to monitor groups at random or in disregard of the rights of those members pursuing lawful conduct. Even the most radical association may harbor at once both criminal conspirators and those without specific intent to participate in proscribed activity;[23] eavesdropping is only tolerable when directly limited to the former.[24]

The remaining question is whether eavesdropping as permitted by section 2511(3) is sufficiently narrow to avoid conflict with the first amendment right of association. Section 2511(3) is the congressional attempt to circumvent the fourth amendment standards of *Berger v. New York*[25] in national security eavesdropping cases. *Robel*,[26] however,

granted even knowing, active members who lacked specific intent. Elfbrandt v. Russell, 384 U.S. 11, 12-19 (1966). In a later case, the Court explained the *Elfbrandt* rationale by pointing out that, prior to *Elfbrandt*, a person accused of participating in illegal concerted action had only three defenses: (*1*) that he was not a member of the group; (2) that the group did not act illegally; or (*3*) that he was ignorant of the illicit activity. After *Elfbrandt* he could also claim that he did not participate in the unlawful behavior. Keyishian v. Board of Regents, 385 U.S. 589, 608 (1967). *Robel* creates a presumption that within any association there are members who do not share the group's goals. Thus, association with conspirators does not in itself justify government action against the individual. 389 U.S. at 266.

22 The test seems to be whether the statute or regulation is sufficiently clear on its face so that the lawmaking power is not delegated by default to the investigator or policeman. *See* Gregory v. Chicago, 394 U.S. 111, 120 (1969) (Black, J., concurring).

It is no excuse for a sweeping application of the law that the administrative burden of isolating criminal activity is too great. *Cf.* Velvel, *Protecting Civil Disobedience Under the First Amendment*, 37 GEO. WASH. L. REV. 464, 471 (1969).

23 The Court has squarely held that the goals of some members of an association, or the association itself, may not be imputed to all members. Elfbrandt v. Russell, 384 U.S. 11, 17 (1966); *cf.* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958).

The point is significant because the Court at one time had accepted a congressional "finding" that all members of the Communist Party shared its per se illegal goals. American Communications Ass'n v. Douds, 339 U.S. 382, 393 (1950).

24 Analogy can be made to the express first amendment freedoms which are absolutely protected, but for which the protection does not extend to related conduct that the state may proscribe. For example, the first amendment protects religious *belief*, but not certain religious *activity*. Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878). Speech is protected but not when it entails antisocial conduct. Redrup v. New York, 386 U.S. 767 (1967); Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957); Feiner v. New York, 340 U.S. 315 (1951).

25 388 U.S. 41, 62-63 (1967).

26 389 U.S. at 264-68 & n.20; *see* notes 15-19 and accompanying text *supra*.

indicates that Congress cannot subvert the requirements of the first amendment by any means or for any reason.

II

THE OVERBREADTH OF SECTION 2511(3)

Under section 2511(3), the preliminary decision of the investigator to initiate eavesdropping is exempt from the requirement of neutral judicial approval, and there is nothing to restrain the overzealous investigator. For protection against the threat of constitutionally-offensive eavesdropping, associations must depend upon the self-imposed discretion of the eavesdropper or upon ultimate review by a trial court of the admissibility of evidence gathered by eavesdropping. At trial the courts might utilize the reasonableness requirement of section 2511(3) to force the government to justify the eavesdropping by describing the specific unlawful conduct against which evidence was sought. Trial, however, may come too late to prevent irreparable damage to the association.[27] The statute neither authorizes nor forbids the blanket use of eavesdropping against *associations* thought to menace national security, and the definition of acts and situations dangerous to national security is left substantially to the discretion of the executive. There are no standards to guide even the conscientious investigator's conduct toward associations.[28] Therefore, section 2511(3) is offensive to the first amendment because it is overbroad[29]—it allows too great an intrusion upon associational privacy. Only by invalidating section 2511(3) can freedom of association be accorded the full protection guaranteed by the Court in cases since *NAACP v. Alabama ex rel. Patterson*.[30]

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27 The Supreme Court has rejected the suggestion that the proper forum for vindication of rights is necessarily a criminal prosecution on the merits under the offending statute, on the ground that, if such were the case, only the hardiest would dare exercise their rights. Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965).

28 Lack of standards to guide the investigator or prosecutor has been a determinative factor in many first amendment cases, especially those involving association. *See* United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring); Dombrowski v. Pfister, 380 U.S. 479, 494 (1965); Baggett v. Bullitt, 377 U.S. 360, 366 (1964); Cramp v. Board of Pub. Instr., 368 U.S. 278, 286 (1961); Sweezy v. New Hampshire, 354 U.S. 234, 253-54 (1957); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

Lack of standards formed the basis for the eavesdropping rules under the fourth amendment. Berger v. New York, 388 U.S. 41, 59-60 (1967).

29 United States v. Robel, 389 U.S. 258, 259-61, 265 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 602-10 (1967); Elfbrandt v. Russell, 384 U.S. 11, 12-19 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296-97 (1961); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960).

30 357 U.S. 449 (1958).

The alternatives to invalidation are not satisfactory. Perhaps the courts could exclude evidence against associations[31] gathered by eavesdropping under section 2511(3) where it is found that the investigator did not limit the scope of eavesdropping to particular unlawful acts; *i.e.*, he acted unreasonably. This solution, however, is clearly inadequate. It is not certain that the exclusionary rule would be available in a case not arising directly under the fourth amendment, and even if the rule does apply, the exclusion would operate only after the "chilling" damage had occurred. First amendment rights are not amenable to such uncertainty. The exclusionary rule deters only good faith investigators; it would not affect an investigator merely gathering information on a group or harassing it without any intent to gather evidence. Finally, the exclusionary rule in eavesdropping cases is only available to those directly subject to the violation—those whose premises are intruded upon or whose conversations are overheard.[32]

Since the issue of standing is not a problem in first amendment

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31 The exclusionary rule normally operates to exclude evidence gathered in contravention of the fourth amendment. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914). The fruits of such evidence are also barred. Silverthorn Lumber Co. v. United States, 251 U.S. 385 (1920).

The current formulation of the exclusionary rule in eavesdropping cases requires the prosecution to turn over to the defense all transcripts of conversations to which the defendant was a party or that occurred on his premises. The judge is not permitted to screen the transcripts at the government's request to restrict disclosure affecting the national security or third parties. If the exclusionary rule is operative, the prosecution's sole alternatives are full disclosure or dismissal of the case. Alderman v. United States, 394 U.S. 165, 180-85 (1969).

32 In Alderman v. United States, 394 U.S. 165 (1969), Alderman and Alderisio were convicted of transmitting a murderous threat in interstate commerce. After the conviction, it was revealed that Alderisio's business establishment had been subject to FBI eavesdropping during the period of the crime. While remanding the convictions to the district court to determine if the evidence in the case was tainted under *Berger* and *Katz*, the majority extensively reviewed the rules of standing under the fourth amendment:

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.

Id. at 171-72. *Cf.* Wong Sun v. United States, 371 U.S. 471 (1963); Goldstein v. United States, 316 U.S. 114 (1942). One challenging the legality of a search must show that his own privacy was invaded. 394 U.S. at 173; *see* Jones v. United States, 362 U.S. 257, 261 (1960). The Court determined that the purpose of the exclusionary rule—deterrence of unlawful searches—was amply accomplished by allowing the victim alone to raise the defense. 394 U.S. at 174.

Thus, the only persons who can raise fourth amendment objections to eavesdropping are those who are overheard and those who own the invaded premises. *Id.* at 179 & n.11; *cf.* Hoffa v. United States, 385 U.S. 293, 303 (1966). *See also* Mancusi v. DeForte, 392 U.S. 364, 367-70 (1968).

cases,[33] judicial protection for persons who discover that they are subject, or likely to be subject, to eavesdropping may be available in the form of declaratory or injunctive relief against the government. *Dombrowski v. Pfister*[34] involved a Louisiana civil rights organization harassed by spurious and threatened state investigations and prosecutions. The Supreme Court held that the group was entitled to pursue declaratory or injunctive relief[35] rather than await defense of an inconclusive series of prosecutions.[36] By analogy, a dissident group could seek relief upon a showing of its reasons for fearing eavesdropping, the chilling effect made operative by such fear, and the lack of any viable alternatives to such relief. Unless the government could disprove the eavesdropping or justify it, declaratory or injunctive relief should be available.[37] Such an extension of *Dombrowski*, however, offers nothing to groups that fear eavesdropping but cannot substantiate it. Invalidation of section 2511(3) is the only certain resolution of the serious first amendment conflict.

Stephen T. Owen

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33 First amendment rights have been acknowledged by the Court as so critical that one need not show that his rights have been directly invaded; it is enough that State action has adversely affected the one seeking to raise the issue; *e.g.*, by chilling. Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965). Further, the association is permitted to enforce the rights of its members. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 458-59 (1958). The distinction is made because the Court believes that although fourth amendment rights can always be vindicated in court by the injured party, violations of other rights may never reach the trial stage. *Cf.* Barrows v. Jackson, 346 U.S. 249 (1953); Ellis v. United States, 416 F.2d 791, 799 & n.19 (D.C. Cir. 1969).

34 380 U.S. 479 (1965).

35 The Declaratory Judgment Act, 28 U.S.C. § 2201 (1964), permits a declaration of the rights of parties in an actual controversy regardless of whether alternative relief is available. Once declaratory relief is awarded, the court may consider "further necessary or proper relief." *Id.* § 2202. Injunctive relief is also provided for by *id.* §§ 2282, 2284.

36 380 U.S. at 485-86. There would appear to be no significant distinction between oppressive state conduct and oppressive federal conduct.

37 *See* Note, *supra* note 12, at 679; *cf.* Zwickler v. Koota, 389 U.S. 241, 253-55 (1967); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463-66 (1958); Comment, *Right of Association Extended to Curtail Harassment of Political Associations Through Criminal Investigations*, 1969 UTAH L. REV. 383, 389.