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Raising the Cost of Using Title III Wiretap Evidence

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I. INTRODUCTION

There has been a dramatic increase over the last decade in the number of federal wiretaps authorized under Title III— the federal wiretap statute. This trend is highlighted against a backdrop of increasing unease with covert government surveillance among privacy advocates and society-at-large. From the government’s perspective, using more wiretaps makes sense because wiretaps can yield extremely valuable and damaging evidence against an accused individual. More to the point, the benefits of wiretap evidence are substantial in any prosecution and almost always outweigh the costs of securing and implementing the wiretap order.

Wiretaps have always been an effective means of gathering evidence, however, so that cannot provide a satisfactory explanation as to why wiretaps are increasingly a preferred investigative tool instead of a default tool when other investigative techniques have failed. It could be that the government is better at meeting the requirements of Title III, such as the required showing of probable cause and necessity, before obtaining a wiretap authorization from a
federal district court judge. Another explanation for at least part of this increase in authorized wiretaps is that the costs to the government of using wiretap evidence are artificially low in many cases.

One cost of using wiretap evidence at trial is the extensive discovery obligations imposed by Title III. The government is required to produce the contents of the wiretap application to the accused before using any evidence derived from the wiretap at trial. Through this discovery, the government often lays bare months, sometimes years, of investigative work by federal agents, local police, undercover agents, and confidential informants (“CI”). This article will focus on those discovery requirements as they relate to the government’s use of CI information to establish probable cause and necessity in wiretap applications, which is often the case in drug investigations. More specifically, this article aims to shine a light on the government’s use of CIs in obtaining wiretap authorizations, while simultaneously shielding information about the CI from the accused during the discovery process. By having it both ways—using CI information without having to disclose that information in discovery in order to use that CI for additional investigative work—the government’s decision to seek a wiretap becomes easier. In effect, the government can avoid one of the key costs of obtaining a wiretap, making it more likely that a wiretap will be pursued because of the extensive benefits of wiretap evidence at trial.

Much has been written about the skewed incentives and possibility for error when the government relies on confidential informants and when law enforcement officers establish long-term relationships with “career” informants, especially in drug trafficking

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7. For a brief discussion of the requirements for obtaining a wiretap under Title III, see infra Part I.B.1 and accompanying footnotes. While outside the scope of this Article, subsequent articles will analyze the interpretation of the probable cause and necessity requirements for wiretaps by federal authorizing judges and propose alternatives to the current process by which the government obtains wiretap authorization orders.


10. See United States v. Forrester, 616 F.3d 929, 942 (9th Cir. 2010) (holding that the government may redact CI information from a wiretap affidavit when the government does not use that information to defend the legality of the wiretap authorization order in response to a motion to suppress).
and organized crime investigations.\textsuperscript{11} However, what has gone unexamined in the scholarship is the intersection between the government’s use of confidential informants and the authorization process for a wiretap, and more specifically, how courts have allowed the government to shirk its discovery obligations under Title III to maintain relationships with CIs. This article argues that requiring broader disclosure of CI information under Title III would raise the cost of obtaining a wiretap in many cases, thereby reserving wiretaps for extraordinary circumstances only—as envisioned by the statute and courts.

This article makes the case for broad disclosure of CI information in wiretap prosecutions in three parts. Part I will provide necessary background information related to the government’s use of wiretaps and Title III’s statutory scheme relating to discovery. Part II will examine the government’s current cost-benefit analysis when considering whether to use a wiretap and concludes that the benefits to the prosecution almost always outweigh the costs. In Part III, this article argues that courts, despite their reluctance in the few reported cases on the issue, should raise the costs of using wiretap evidence by requiring broader disclosure of CI information in wiretap cases. This broader approach to discovery would affect many drug investigations, which comprise the largest percentage of authorized wiretap orders.\textsuperscript{12} Moreover, Part III observes that such an approach by courts in enforcing Title III’s discovery obligations may produce additional benefits such as reducing the government’s use of “career” confidential informants and enabling a more rigorous judicial review of wiretap investigations.

II. THE GOVERNMENT’S USE OF WIRETAPS UNDER CURRENT APPLICATION OF

\textsuperscript{11} See, e.g., Andrew E. Taslitz, Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example, 37 Sw. L. Rev. 1091 (2008) (analyzing how the government’s use of informants can lead to wrongful convictions based on racial bias and suggesting that race sometimes contributes to the conviction of innocent defendants); Clifford S. Zimmerman, Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform, 22 Hastings Const. L.Q. 81, 83 (1994) (proposing reforms to the process by which law enforcement officers manage relationships with confidential informants); Evan Haglund, Note, Impeaching the Underworld Informant, 63 S. Cal. L. Rev. 1405 (arguing for amendments to the Federal Rules of Evidence to allow for greater opportunities for defendants to impeach informants’ testimony at trial).

\textsuperscript{12} U.S. Courts, supra note 1.
TITLE III

Congress passed the Omnibus Crime Control and Safe Streets Act in 1968. Title III of the Act was intended as a privacy measure to protect the “privacy of wire and oral communications,” while providing a process to authorize lawful interceptions by law enforcement officials. To accomplish this, Title III generally prohibited wiretapping and electronic surveillance. The statute, however, carved out an exception for use by authorized law enforcement officers investigating specific crimes if the officers had made a showing of both probable cause and necessity in seeking a court order to authorize a wiretap.

Despite year-to-year fluctuations, there has been a marked increase in federal wiretap authorization orders since 2007, as outlined in the reports of wiretap activity filed annually by the Administrative Office of the U.S. Courts. In addition to highlighting the data relevant to the federal government’s increased wiretap authorizations, this Part will provide background on the ex ante procedural requirements the statute imposes on the government for obtaining a wiretap, as well as the statutory procedures to litigate the validity of a wiretap ex post through discovery and suppression motions. This procedural background will better inform the argument in Parts II and III for stricter adherence to Title III’s discovery requirements as a means of checking the use of wiretaps by the government.

15. S. Rep. No. 90-1097, at 66 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153; see also CARR & BELLA, supra note 9, at §2:37 (arguing that congressional action in the form of Title III, as opposed to case-by-case judicial guidance on lawful wiretap procedures, was needed to promote uniformity of crimes that the government could investigate through wiretapping and procedural controls regulating electronic surveillance).
A. Increased Use of Title III Wiretaps

The use of Title III wiretaps by federal law enforcement officials has been on the rise over the past decade. Despite a slight dip in 2008 and 2011, federal wiretap authorizations have increased over 400 percent—from 457 in 2007 to 2,013 in 2017—the last year for which data is available. Moreover, when government agents apply for a wiretap authorization, they are overwhelmingly successful. From 2007 to 2017, nine out of a total of 34,064 wiretap applications were rejected by federal or state judges—only .0003% of cases.

The government may only seek a wiretap in investigations for offenses enumerated in Title III. The data compiled by the United States Courts does not differentiate between federal and state wiretaps when breaking down authorizations by offense type. In looking at the combined state and federal authorizations, however, it is clear that narcotics investigations make up the majority of wiretap authorizations. Last year, narcotics investigations constituted only 53% of wiretap investigations, but in many previous years over 80% of wiretaps have been in narcotics cases. Narcotics investigations accounted for 89% of all wiretap authorizations in 2014 and 81% in 2015.

B. Current Procedural Requirements for Use of Wiretaps

Title III’s statutory scheme provides for procedural checks on the government’s use of wiretaps ex ante by requiring agents and prosecutors to vet applications internally in the Department of Justice (DOJ) and request a wiretap authorization order from a federal

19. Id.
20. Id. The data does not differentiate between state and federal wiretap applications.
23. See id.
24. See id.
25. See id.
judge\textsuperscript{26}—and ex post through discovery requirements and evidentiary hearings.\textsuperscript{27}

1. \textit{Ex Ante: Compliance with Title III Statutory Scheme}

Before the government may seek a wiretap authorization order from a district court judge, Title III requires a designated high-level DOJ official to review and authorize submission of the wiretap application.\textsuperscript{28} To comply with the DOJ procedure, federal prosecutors must submit wiretap applications to a specific division within the DOJ.\textsuperscript{29} These application packets must include several documents: (1) the affidavit of an authorized law enforcement agent; (2) the application by the Assistant United States Attorney, which is used to provide the jurisdictional basis for the court's wiretap order; and (3) the proposed wiretap order to be signed by the court.\textsuperscript{30} Finally, the submission must be reviewed and the cover page signed by a supervising attorney.\textsuperscript{31}

Title III also requires specific information be included in the government's wiretap application.\textsuperscript{32} Given the statute's DOJ vetting requirement, the application must identify the law enforcement officer making the application and the DOJ official who authorized it.\textsuperscript{33} The application also must include a “full and complete statement” regarding other facts and circumstances that seek to justify a wiretap


\textsuperscript{27} 18 U.S.C. § 2517(5).

\textsuperscript{28} Id. § 2516(1). Under Title III, the United States Attorney General, or more typically a designated Deputy or Assistant Attorney General in the Criminal or National Security Divisions, authorizes an application for wire or oral communications. Id.

\textsuperscript{29} U.S. Dep’t of Justice, supra note 26. The division within DOJ that reviews wiretap applications is the Electronic Surveillance Unit of the Office of Enforcement Operations in the Criminal Division. Id.

\textsuperscript{30} Id.

\textsuperscript{31} Id.

\textsuperscript{32} 18 U.S.C. § 2518(1).

\textsuperscript{33} Id. § 2518(1)(a).
order, including (1) details of the alleged offense;\(^\text{34}\) (2) a particular description of the facilities from which interceptions will occur;\(^\text{35}\) (3) a particular description of the type of communications to be intercepted;\(^\text{36}\) (4) identity of the person, if known, committing the offense and whose communications are to be intercepted;\(^\text{37}\) (5) other investigative techniques that have failed or are likely to fail;\(^\text{38}\) (6) requested time period for interception, including facts establishing probable cause for ongoing interception of communications;\(^\text{39}\) and (7) a statement of all previous wiretap applications involving the same person or facilities.\(^\text{40}\)

Before issuing a wiretap order authorizing interception under Title III, a court must make specific findings that the application has established (1) probable cause that the alleged offense enumerated in Title III is or will be committed;\(^\text{41}\) (2) probable cause that interception will yield communications about the offense;\(^\text{42}\) (3) a wiretap is necessary because normal investigative procedures have failed or are likely to fail;\(^\text{43}\) and (4) the facility from which communications will be intercepted, has been, or will be used in connection with the alleged offense.\(^\text{44}\) If a judge makes the statutorily required findings, the judge may require the government to submit progress reports\(^\text{45}\) and

\(^{34}\) Id. § 2518(1)(b)(i).

\(^{35}\) Id. § 2518(1)(b)(ii).

\(^{36}\) Id. § 2518(1)(b)(iii).

\(^{37}\) Id. § 2518(1)(b)(iv).

\(^{38}\) Id. § 2518(1)(c). Courts generally refer to this provision as the “necessity requirement.” See, e.g., United States v. Blackmon, 273 F.3d 1204, 1207 (9th Cir. 2001) (stating that the provision is “[d]ubbed the ‘necessity requirement . . . ’”).


\(^{40}\) Id. § 2518(1)(e). The government may seek to extend the initial wiretap interception period by submitting an application that sets forth the results obtained, or an explanation of the failure to obtain results, from the prior interception. Id. § 2518(1)(f).

\(^{41}\) Id. § 2518(3)(a).

\(^{42}\) Id. § 2518(3)(b).

\(^{43}\) Id. § 2518(3)(c).

\(^{44}\) Id. § 2518(3)(d).

\(^{45}\) Id. § 2518(6). The statute provides that these progress reports are to be made at intervals as required by the judge. Id. These reports, however, have come to be known as “ten-day reports” because judges commonly request these reports every ten days. See, e.g., United States v. Roybal, 46 F.Supp.3d 1127, 1134 n.2 (D.N.M. 2014) (stating that parties and case law have “referred to these reports interchangeably as ‘ten-day reports,’ ‘ten-day progress reports,’ and ‘progress reports.’”); United States v. Bustamante, 493 F.3d 879, 888 (7th Cir. 2007) (describing use of “ten-day reports” in a telephone wire tap to monitor criminal activity).
monitor the government’s requirement to intercept only communications authorized by the order.46

Upon expiration of the wiretap order, the government must take steps to preserve the integrity of the intercepted communications as evidence. Thus, Title III requires that “immediately” upon expiration of a wiretap order, the government must seal the recordings of intercepted communications under the direction of the judge who authorized interception.47 The government may make duplicate recordings for use in its continuing investigation or prosecution of crimes discovered through use of the wiretap.48

2. Ex Post: Discovery and Suppression Motions

In addition to the ex ante process for obtaining a wiretap, Title III contains ex post checks on the use of wiretap evidence at trial by mandating discovery of wiretap information by the defendant and including an evidentiary exclusion provision.

A defendant’s right to discovery of information related to a wiretap actually stems from two sources: a more limited right to discovery under the Federal Rules of Criminal Procedure and a broader right to discovery under Title III. First, under Federal Rule of Criminal Procedure 16, a defendant, upon making a request for discovery, has the right to receive any item “within the government’s possession, custody, or control” that is “material to preparing the defense.”49 However, the defendant is only entitled to discovery of material items if “the government intends to use the item in its case-in-chief at trial.”50

Under Title III, wiretap applications are made in camera, and the applications and resulting authorization orders are kept under seal by the district court judge.51 The judge has discretion, upon a showing of good cause, to disclose the applications and orders.52 Also, after a party intercepted under the wiretap files a motion, the judge has discretion to “make available to such person or his counsel for inspection such portions of the intercepted communications,
applications and orders as the judge determines to be in the interest of justice."  

In addition to discretionary discovery, a defendant is entitled to mandatory discovery under Title III. The government must provide: 

“(1) the fact of the entry of the order or the application; (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and (3) the fact that during the period wire, oral, or electronic communications were or were not intercepted” within ninety days of “the termination of the period of an order.”

More broadly, a defendant is entitled to receive all of the wiretap applications and orders, if the government plans to introduce intercepted communications into evidence at trial:

The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.

Title III also includes a specific evidentiary exclusion provision to prevent the use of unlawfully intercepted wiretap communications. Under the statute, a person who had wire or oral communications intercepted or “against whom the interception was directed[,]” may

53. Id. § 2518(8)(d).
54. Id.
55. Id.
56. Id. § 2518(9).
57. Id. § 2515 (“Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial...if the disclosure of that information would be in violation of this chapter.”) Congress indicated that § 2515 needed to be read in conjunction with § 2518(10), “which defines the class entitled to make a motion to suppress.” S. Ref. No. 90-1097 at 66 (1968), reprinted in 1968 U.S.C.C.A.N., 2112, 2185.
58. 18 U.S.C. § 2510(11); see also United States v. Gallo, 863 F.2d 185, 192 (2d Cir. 1988) (holding that a motion to suppress wiretap evidence under Title III is construed in accordance with standing requirements usually applied to suppression claims under the Fourth Amendment, i.e., standing is limited to those whose rights
move to suppress direct or derivative wiretap evidence on the
grounds that the communication was “unlawfully intercepted,” the
order authorizing interception was “insufficient on its face[,]” or the
interception was not made “in conformity with the order of
authorization or approval.” If the judge grants the motion to
suppress, the intercepted communications will be deemed “as having
been obtained in violation” of Title III and excluded in full from any
judicial proceeding. The government may not use the recorded
communications as evidence at trial or in a grand jury proceeding,
and the illegally obtained communications cannot be used in any
federal or state proceeding, whether it be criminal, civil, regulatory,
or legislative.

In considering whether an error in the application process merits
exclusion, the Supreme Court has determined, “Congress intended to
require suppression where there is failure to satisfy any of those
statutory requirements that directly and substantially implement the
congressional intention to limit the use of intercept procedures to
those situations clearly calling for the employment of this
extraordinary investigative device.”

III. THE CURRENT COST-BENEFIT ANALYSIS FAVORS THE USE OF WIREDAPS

This Part discusses the government’s current cost-benefit analysis when considering whether to pursue a wiretap. Despite the

were violated by the search itself) (citing Alderman v. United States, 394 U.S. 165, 175–76 & n.9 (1969)).

60. Id. § 2518(10)(a)(ii).
61. Id. § 2518(10)(a)(iii).
62. Id.
63. Id. § 2515.
64. Id.
65. United States v. Giordano, 416 U.S. 505, 527 (1974) (suppressing wiretap evidence where the government’s application was authorized by the Attorney General’s Executive Assistant rather than one of the specifically designated DOJ officials in Title III who may authorize applications). Conversely, the Supreme Court has declined to suppress evidence for non-substantive errors in the wiretap application process. See, e.g., United States v. Chavez, 416 U.S. 562, 572–73 (1974) (holding suppression is not warranted where the government’s application misidentified the authorizing DOJ official); United States v. Donovan, 429 U.S. 413, 435–46 (1977) (holding suppression is not warranted where the government failed to identify all persons likely to be intercepted and failed to provide notice to persons who were intercepted).
significant *ex ante* and *ex post* costs of a wiretap, the substantial evidentiary benefits derived from a wiretap investigation, as argued below, would seem to almost always favor the use of a wiretap by the government in many investigations. An examination of this cost-benefit analysis is essential to the proposal in Part III that one method of stemming the use of wiretaps by the government is to raise the cost of using wiretap evidence at trial.\textsuperscript{66}

### A. Wiretap Costs to the Government

In discussing the costs associated with the government’s decision to use a wiretap, it is important to differentiate between three types of costs: (1) obtaining the wiretap order; (2) implementing the wiretap order; and (3) using the wiretap evidence at trial.

1. **The Cost of Obtaining a Wiretap Order**

   The costs of obtaining a wiretap order are imposed by Title III’s *ex ante* procedural requirements, as outlined in Part I.\textsuperscript{67} Much of that cost—both in terms of the time spent by agents and prosecutors and the decision as to whether to seek a wiretap order—stems from the statute’s requirement that the government prove that it has already exhausted other investigative means making a wiretap necessary. Under the statute, a judge may authorize a wiretap only when “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.”\textsuperscript{68} Commonly referred to as the “necessity requirement,” courts interpret this provision as requiring the government to show that a wiretap must be used because information gleaned from more traditional investigative techniques—such as surveillance, pen registers, trash pulls, confidential informants, and undercover agents—is not sufficient to accomplish the goals of the investigation.\textsuperscript{69}

   While courts have not interpreted this necessity requirement as an insurmountable barrier for prosecutors seeking a wiretap,\textsuperscript{70} courts

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\textsuperscript{66} See infra Part III.

\textsuperscript{67} See infra Part I.

\textsuperscript{68} 18 U.S.C. § 2518(3)(c).

\textsuperscript{69} United States v. Forrester, 616 F.3d 929, 943 (9th Cir. 2010).

\textsuperscript{70} See United States v. Canales-Gomez, 358 F.3d 1221, 1225–26 (9th Cir. 2004) (“Though ‘the wiretap should not ordinarily be the initial step in the investigation,…law enforcement officials need not exhaust every conceivable
have noted that the "necessity requirement exists in order to limit the 
use of wiretaps, which are highly intrusive."\textsuperscript{71}

2. \textit{The Cost of Implementing a Wiretap Order}

While not prohibitive, the monetary costs of implementing a 
wiretap are not insignificant. The average cost of a federal wiretap in 
2017 was $61,234.\textsuperscript{72} This average masks a wide-range of wiretap 
expenses depending on the complexity and length of the investigation. 
For example, one federal wiretap in Montana cost only $2,000, while 
the most expensive wiretap in 2017 in the Northern District of 
California cost more than $2 million.\textsuperscript{73}

Not surprisingly, more populous districts with better 
investigative resources, in terms of federal agents, and prosecutorial 
resources, in terms of federal prosecutors in the United States 
Attorney's Office, tend to seek and implement more wiretap orders. 
These districts also tend to be points of entry into the United States 
for drugs that originate in other countries. Thus, the Central District 
of California and the Southern District of New York implemented 112 
and 82 wiretaps, respectively, in 2017.\textsuperscript{74} By contrast, the District of 
North Dakota did not implement any wiretaps in 2017.\textsuperscript{75}

3. \textit{The Cost of Using Wiretap Evidence at Trial}

The cost of using wiretap evidence at trial stems in large part 
from Title III's discovery obligations. As touched on in Part I of this 
article, the entire process of obtaining a federal wiretap is done ex 
parte and \textit{in camera}.\textsuperscript{76} That makes sense because the target of an 
investigation could simply stop using his telephone if he were aware 
that his communications were being intercepted by federal agents. 
This confidentiality often will extend past the time a wiretap is taken 
down because federal prosecutors typically will obtain grand jury

\textsuperscript{71} See United States v. Blackmon, 273 F.3d 1204, 1207 (9th Cir. 2001); see also 
United States v. Giordano, 416 U.S. 505, 527 (1974) (describing a wiretap as an 
"extraordinary investigative device").

\textsuperscript{72} U.S. Courts, supra note 1, at tbl. 5.

\textsuperscript{73} Id. The precise cost was $2,214,154 for a wiretap that resulted in seven 
arrests and no convictions. See id.

\textsuperscript{74} U.S. Courts, supra note 1, at tbl. 2.

\textsuperscript{75} Id.

\textsuperscript{76} See supra Part I.B.
indictments under seal to better effectuate arrests and prevent defendants from fleeing a jurisdiction.\footnote{See Fed. R. Crim. P. 6(e)(4).} From the government’s perspective, the first time targets of an investigation should become aware of the wiretap is after arrest and indictment, when the government is producing wiretap applications during discovery. Thus, federal agents and prosecutors usually wait to end a wiretap and “take down” the investigation’s targets until after enough evidence has been gathered to secure indictment and conviction at trial. The Title III discovery process will reveal numerous details of the investigation to the targets and their associates.\footnote{See United States v. Danovaro, 877 F.2d 583, 585–86 (7th Cir. 1989) (describing “overpowering” evidence resulting from a wiretap investigation).}

In relation to drug investigations, agents and prosecutors know that taking down the wiretap effectively ends their opportunity to investigate that particular drug trafficking organization.\footnote{See Matt Dinger, Wiretaps Crucial in Unraveling Criminal Enterprises, NewsOk, (May 11, 2014), https://newsok.com/article/4748154/wiretaps-crucial-in-unraveling-criminal-enterprises [https://perma.cc/YC83-NUUA]; see also Peter J. Henning, Wiretaps Remain Crucial Evidence, N.Y. Times (May 2, 2012), https://dealbook.nytimes.com/2012/05/02/wiretaps-remain-crucial-evidence/ [https://perma.cc/PW8L-M3ST].} Once the wiretap applications and orders are produced in discovery, any information about potential phone numbers, and possibly future targets of investigations, will cease to be meaningful; anyone with knowledge of the investigation will likely change phone numbers, criminal tactics, and any interactions with individuals now-revealed to be undercover government agents or confidential informants. In this way, the cost of using wiretap evidence at trial is significant because the targets of the investigation, and in theory any member of the public, will become privy to the investigatory methods used—including the identities of confidential informants. Of course, once the informant’s identity is revealed, the government must take steps to protect the informant from retaliation and will not be able to use that informant in any future investigations.\footnote{See U.S. Dep’t of Justice, supra note 26, at 9-21.000-Witness Security, available at https://www.justice.gov/jm/jm-9-21000-witness-security [https://perma.cc/LFD8-V6XD].}
B. Wiretap Benefits for the Government

The government reaps substantial benefits from the use of a Title III wiretap in an investigation in the form of intercepted communications (often with a defendant's own voice making incriminating statements), physical evidence such as drug seizures or other contraband, and the locations of criminal activity—which can allow agents to photograph or witness criminal activity.

1. Efficacy of Wiretap Evidence

Intercepted communications often allow agents and prosecutors a front-row seat to the operation of a criminal organization. With this inside knowledge, agents are able to set up surveillance on locations they know will be the focus of criminal activity at specific times, eliminating countless hours of surveillance and non-fruitful leads. Through this focused surveillance, agents are able to photograph and witness criminal activity, as well seize contraband such as drugs.81

Those evidentiary benefits to the government, as great as they are, pale in comparison to the windfall that results from incriminating voice recordings of a defendant. The ability to play a recording with a defendant speaking about criminal activity is probably the most powerful evidentiary tool for a prosecutor to obtain a guilty plea or a conviction at trial.82 The defendant is placed in the unenviable position of choosing between bad options: (1) having his defense counsel argue to the jury that the recordings are innocuous or do not mean what the government claims; or (2) choosing to testify, and being subjected to cross-examination in order to explain the recordings in a way that does not implicate the defendant in criminal activity.

Moreover, the government also may be able to use incriminating wiretap recordings to convince a defendant to provide information about other associates in a criminal organization, often giving the government details about the organization’s operations or leaders. This information may lead to further spin-off investigations and arrests.

81. See Danovaro, 877 F.2d at 585–86 (describing “overpowering” evidence obtained during wiretap investigation, including “[t]apes, 11 kilos of cocaine, records and drug paraphernalia, fingerprints on evidence, telltale photographs, and more”).

82. See generally U.S. COURTS, supra note 1.
2. Arrests and Convictions Resulting from Wiretaps

Not surprisingly, wiretap investigations often lead to arrests and convictions of numerous defendants. In 2017, there were 1,759 arrests resulting from federal wiretaps.\textsuperscript{83} While these arrests resulted in only ninety convictions that year, the federal wiretap report notes that convictions often do not result in the year in which the wiretap was authorized.\textsuperscript{84} This is likely because wiretap investigations may be complex and involve multiple defendants, which often means more time is required to resolve those cases by guilty plea or at trial.

While not the focus of this article, a brief look at the data from state wiretaps provides an even fuller picture of the power of wiretap evidence in securing arrests and convictions. In 2017, state law enforcement authorities arrested 7,806 individuals in wiretap investigations, resulting in 1,846 convictions.\textsuperscript{85}

C. Wiretap Benefits Typically Outweigh Costs

The costs of a Title III wiretap are significant in terms of investigative hours, money, and the opportunity costs of future investigations. Despite these costs, the benefits to the government of wiretap evidence are so substantial as to outweigh those costs in virtually every case.\textsuperscript{86} The ability to obtain a conviction by guilty plea or jury verdict when the government possesses incriminating statements by the defendant is a benefit that cannot be overstated. In addition, the willingness of defendants to cooperate with government investigators to provide information about criminal activity in order to reduce sentencing exposure is a tremendous benefit to spin-off investigations stemming from the initial wiretap.

As argued more fully below, the costs associated with a wiretap are not fixed. By raising the cost of using wiretap evidence at trial through broader disclosure of the details of the underlying investigation, courts can shift the balance and make the government consider more carefully whether a wiretap is necessary in a particular investigation.

IV. Raising the Cost of Using Wiretap Evidence by Requiring Broader Disclosure

\textsuperscript{83} Id. at tbl. 6.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} See id. at tbl. 7.
DISCLOSURE OF CI INFORMATION

As described in Part I, the government has increasingly relied on wiretap investigations in recent years. This increase in the use of Title III wiretaps is not objectively bad, but it does raise concerns that wiretaps have gone from the last step in an investigation to a foregone conclusion, especially in narcotics investigations. The aim of this article’s proposal is not to prevent the government from obtaining a wiretap; rather, the goal here is to affect the government’s cost-benefit calculus to make the government think harder about whether a wiretap is necessary, and more specifically, whether the benefits of a wiretap are worth the costs. In short, the idea is to change a wiretap order from the default conclusion of an investigation to a more considered and deliberate choice. As argued below, the most effective way to accomplish that, given that the enormous benefits of wiretap investigations will likely remain unchanged, is to raise the cost of using wiretap evidence at trial.

A. Benefits of a Wiretap Are Fixed, But Costs Are Not

There are not many feasible ways to decrease the benefits of wiretap evidence to the government. In theory, Congress could limit the statutory offenses for which the government may obtain a wiretap. The only way to really impact the numbers, however, would be to eliminate or severely restrict investigations of narcotics trafficking offenses under 21 U.S.C. § 841. This statutory approach seems implausible because, as discussed in Part II, wiretaps are a highly effective investigative tool to infiltrate large drug trafficking organizations. Thus, the success of wiretaps in drug prosecutions makes it politically untenable to take away this investigative tool, even in this era where elected officials are starting to question the war on drugs and high incarceration rates, in particular, with regard to mandatory sentencing schemes. Because the benefits to the
government from wiretap investigations are likely to remain unchanged, the most viable way to affect the government’s cost-benefit analysis is to raise the costs to the government—either in terms of the cost of obtaining a wiretap order or the costs of using wiretap evidence at trial. A proposal to raise the cost of obtaining a wiretap order—either through more stringent judicial review of the probable cause or necessity requirements—is outside the scope of this article. One author has argued for a more stringent necessity requirement as a means of limiting the use of wiretaps in white collar criminal prosecutions. Indeed, an analysis of the current application of the necessity requirement in all wiretap applications and proposals for reform would be a fruitful topic for a future article.

Thus, this article focuses on raising the costs of a wiretap by making wiretap evidence more “expensive” to use at trial through broader disclosure of CI information used in wiretap applications. While this discovery-based remedy is applied ex post, it would likely inform and impact the government’s ex ante decision as to whether to obtain a wiretap order.

B. Courts Should Order Broader Title III Discovery as a Means of Ensuring Wiretaps Used as Last Resort

The issue of how much CI information should be disclosed during discovery is not theoretical and has been litigated in at least several reported cases. Courts have consistently limited discovery of CI information in wiretap cases, thus allowing the government to avoid a key cost of using wiretap evidence at trial. Reversing this trend in the courts and allowing for broader discovery of CI information would recalibrate the government’s cost-benefit analysis in considering whether a wiretap is necessary in a particular case.

92. See supra Part II for a discussion of the costs associated with wiretaps.


Courts that have declined to order discovery of CI information in wiretap prosecutions have relied on two primary rationales. First, these courts have determined that the discovery provisions of Title III, requiring disclosure of the wiretap application prior to evidence being used at trial, give way to the government’s long-standing privilege to withhold information to protect confidential informants. Second, these courts have held that the government may redact CI information from a wiretap affidavit produced in discovery if the government is willing to defend the legality of the wiretap without relying on any of the redacted CI information. To their credit, both circuit courts that have addressed the issue stressed that neither was determining whether the government can redact any information in discovery—including information about or provided by a CI—that was essential to the validity of the warrant.

While an in-depth discussion of the government’s privilege to withhold information to protect the safety of confidential informants is beyond the scope of this article, courts’ reliance on what is commonly referred to as the ‘informant’s privilege’ is misplaced in this instance. The privilege was first recognized by the Supreme Court in United States v. Roviaro. As the Court explained, the purpose of the informant’s privilege is the “furtherance and protection of the public interest in effective law enforcement.” In doing so, the privilege “encourages” citizens to perform their “obligation” of communicating knowledge of crimes to law enforcement officials by preserving their anonymity. Confidential informants in wiretap cases no doubt value anonymity, but the Court’s formulation of concerned citizens performing their civic “obligation” to inform on criminal activity does not fit the typical wiretap informant profile. Often this informant is more likely to be informing on criminal associates to lessen their own


96. See Forrester, 616 F.3d at 942; Danovaro, 877 F.2d at 588 (“The privilege to withhold information important to the safety of an informant was established long before Congress enacted Title III.”).

97. See Forrester, 616 F.3d at 942.

98. Id. at 942–43; Danovaro, 877 F.2d at 588.


100. Id.

101. Id.

Moreover, the determination by some courts that the informer’s privilege trumps Title III’s broad discovery obligations seems hasty and conclusory. These courts rely on precedent establishing that statutes that are silent about customary privileges do not override those privileges when requiring disclosure.\footnote{103. Forrester, 616 F.3d at 942; Danovaro, 877 F.2d at 588 (“Statutes requiring disclosure, but silent on the question of privilege, do not override customary privileges.”) (citing Upjohn Co. v. United States, 499 U.S. 383, 397–98 (1981).}

This reasoning overlooks the unique statutory structure of Title III—requiring disclosure of wiretap applications and orders prior to using wiretap evidence—and that Congress preserved other privileges in the statute, specifically carving out an exception to discovery where privileged communications were intercepted.\footnote{104. See 18 U.S.C. § 2517 (4) (2018).}

As one court reasoned in ordering discovery of redacted CI information in a wiretap case, the fact that Congress in Title III “provided for the privilege relative to intercepted communications but did not preserve the government’s privilege to keep its informants confidential...the natural implication is that Congress did not intend for the government privilege to apply.”\footnote{105. United States v. Arreguin, 277 F. Supp. 2d 1057, 1062 (E.D. Cal. 2003).}

Regarding the courts’ second rationale permitting redaction of CI information, the attempt by courts to find a middle ground by distinguishing between essential and non-essential CI information may be admirable, but the effect would seem to tip the balance towards redaction and concealment of CI information in discovery. Given the opportunity, the government’s first inclination most likely would be to defend its wiretap by redacting CI information, despite that information having been presented to the judge authorizing the wiretap.

In this way, the courts further the legal fiction established in another Fourth Amendment evidence suppression context in Murray v. United States, where the Supreme Court held that a search warrant
containing illegally obtained information is not automatically
defective if the warrant affidavit still establishes probable cause after
excising the offending portion of the affidavit after-the-fact.\textsuperscript{106} Indeed,
it may not be a coincidence that the Seventh Circuit decided \textit{Danovaro}
and established that the government could present CI information to
the authorizing judge and later choose to defend the wiretap without
relying on that CI information one year after the Court released its
opinion in \textit{Murray}. Perhaps even more troubling, this distinction by
courts between essential and non-essential information in wiretap
applications when considering whether the government has fulfilled
its discovery obligations under Title III was established despite that,
as one court noted, “the plain language of Title III does not provide for
disclosure of redacted applications and orders . . . .”\textsuperscript{107}

Rather than dabbling in distinctions between the essential nature
of information provided to a judge authorizing a wiretap, the
purposes of Title III would be better served by requiring the
government to disclose un-redacted wiretap applications and orders
when seeking to use wiretap evidence at trial. It bears repeating that
this proposal does not seek to limit the government’s ability to pursue
a wiretap and use that evidence at trial; rather, it simply raises the
cost of using wiretap evidence at trial by requiring strict compliance
with Title III’s discovery obligations. Because the government would
know \textit{ex ante} that disclosure of all investigative information would be
required at trial, it would be able to decide whether a particular
investigation required the use of a wiretap or to forgo a wiretap to
preserve the anonymity of a confidential informant for future
investigations. As one district court noted:

\begin{quote}
I recognize that where the wiretap application and order
contain sensitive information the disclosure of which could
prejudice an ongoing investigation, the government may be
put to a hard choice of either foregoing its proceeding
against the defendant or risking the frustration of its
investigation. But this is a choice which Congress has in
plain language decreed the government must make when it
seeks to deprive a person of his liberty on the basis of
wiretap evidence. In truth it is not much different than a
number of other difficult decisions which the government
must make in pursuing a criminal prosecution, such as when
\end{quote}

\textsuperscript{107} \textit{Arreguin}, 277 F. Supp. 2d at 1062.
it must decide whether to proceed with a case that will require revelation of the identity of an informer.\footnote{108}

Often times this would be a difficult decision. It also is true that requiring the government to disclose CI information in discovery could pose significant risks to the safety of informants and require the government to bolster its efforts to shield those informants from harm. As one court noted, “in the big-time drug business, to inform is to sign one’s death warrant.”\footnote{109} All of this could chill the government’s use of informants, but as argued below, that may not be a bad result of this proposal. In the end, shielding the government from a “hard choice” of proceeding with a prosecution based on wiretap evidence—and revealing its confidential informant in the processor abandoning an investigation against a particular defendant—is not the role of the courts or the purpose of Title III.

C. Ancillary Benefits of Broader CI Disclosure in Wiretap Cases

In addition to raising the cost of using wiretap evidence at trial, and thus, making the government’s choice to pursue a wiretap more deliberate, one ancillary benefit of broader discovery of CI information in wiretap cases may be to lessen use of career informants. Scholars have commented on potential abuses in the use of informants and the dangerous incentive to lie and curry favor with law enforcement officials that permeates the informant-agent relationship.\footnote{110} Faced with the knowledge \textit{ex ante} that using information from a CI to obtain a wiretap will require full disclosure of all wiretap application materials, the government will know up front that a particular CI cannot be used in future investigations. The government may elect to forgo a wiretap or prosecution in some cases to preserve the anonymity and usefulness of a CI for future investigations. Whatever the prosecutors decide, it will be a more deliberate choice by the government to maintain a CI relationship rather than a windfall granted by the courts in allowing redaction of all CI information in wiretap cases.

Indeed, if federal agents and prosecutors adapt their practices to use informants and wiretaps strictly for investigations of more serious drug trafficking crimes, this would serve the function of

\footnotesize
\begin{itemize}
\item \footnote{108. \textit{Id.} at 1062–63 (quoting United States v. Manuszak, 438 F. Supp. 613, 625 (E.D. Pa. 1977)).}
\item \footnote{109. United States v. Danovaro, 877 F.2d 583, 587 (7th Cir. 1989).}
\item \footnote{110. See, \textit{e.g.}, Taslitz, \textit{supra} note 11; Zimmerman, \textit{supra} note 11.}
\end{itemize}
reserving federal mandatory minimum sentences for the worst offenders of federal drug statutes.\textsuperscript{111} Rather than allowing other defendants a free pass, federal agents would likely hand off smaller cases to state authorities for prosecution of more lenient sentencing structures for drug cases.\textsuperscript{112}

Another benefit of broader disclosure of CI information in wiretap cases that do proceed to prosecution may be more rigorous judicial review of wiretap applications, both in the authorization process and during litigation of evidence suppression before trial. Knowing that the information in a wiretap application and order will be discoverable may lead judges to explore into the credibility and veracity of informants that are used to support a wiretap application’s probable cause and necessity elements.\textsuperscript{113}

Perhaps more concretely, a defendant would be on stronger footing to defend against charges brought because of wiretap evidence. By receiving full and un-redacted wiretap applications and orders, a defendant could take full advantage of Title III’s evidence suppression provisions and require the government to fully justify the probable cause and necessity showings in its wiretap application in response to a suppression motion, as required by statute.\textsuperscript{114}

Specifically, a defendant could better attack the information and the veracity of the CI without having to navigate through redacted wiretap applications and orders. Put another way, a district court judge ruling on the legality of a wiretap application in response to a motion to suppress would have the full benefit of the adversarial process in ruling on the admissibility of wiretap evidence. In most cases, this would effectively become a ruling on whether the prosecution will proceed with its case or dismiss charges against a defendant.


\textsuperscript{112} See id. at 175–77.


\textsuperscript{114} See supra Part I.B.2 for a discussion of Title III’s evidentiary suppression provisions.
V. Conclusion

The government has long benefited from artificially low costs of using wiretap evidence at trial. This is because courts continuously allow for the redaction of CI information in wiretap applications produced in discovery, despite the plain language of Title III dictating broad discovery of wiretap applications and orders. This article’s proposal for stricter adherence to Title III’s mandated disclosure requirements would, at a minimum, require the government to consider more deliberately whether a wiretap is necessary in a particular investigation without creating new or unnecessary barriers for the government to obtain a wiretap authorization order. By doing so, the courts could help to restore these “exceptionally intrusive investigative device[s]” to a more extraordinary step in a drug trafficking investigation, rather than a commonplace culmination of an investigation, as the increased use of wiretaps over the last decade would seem to indicate.115

115. United States v. Danovaro, 877 F.2d 583, 587 (7th Cir. 1989).
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