

# ARTICLE

## WHEN “GOOD FAITH” MAKES GOOD SENSE: APPLYING *LEON*’S EXCEPTION TO THE EXCLUSIONARY RULE TO THE GOVERNMENT’S REASONABLE RELIANCE ON TITLE III WIRETAP ORDERS

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*The good faith exception to the exclusionary rule, as set out by the Supreme Court in United States v. Leon, is well established when the government relies on a traditional search warrant. Its applicability to the government’s reliance on wiretap orders issued under Title III, the federal wiretap law, remains an open question, however. While there is a circuit split on the issue, commentators have uniformly opposed application of the good faith exception in Title III cases. By contrast, this Article makes a comprehensive case for a good faith exception for the government’s reasonable reliance on Title III wiretap orders. First, this Article briefly outlines Title III’s suppression remedy, the law related to the exclusionary rule outside the wiretap context, and the circuit split over application of the good faith exception in Title III wiretap cases. Next, this Article analyzes the current divide in the courts and considers the arguments of commentators opposed to a good faith exception in wiretap cases. It concludes that the text and legislative history of Title III support application of the good faith exception but acknowledges that outcome is not clear under the current version of the statute. Thus, this Article concludes by examining the normative and practical implications of a good faith amendment to Title III. It argues that the good faith exception is more applicable to reliance on wiretap orders than reliance on traditional search warrants, in part due to the more detailed requirements for the government to obtain authorization for electronic surveillance. It also addresses specific concerns raised by courts and commentators and explains why inclusion of a good faith amendment in Title III will not lead to increased government wiretapping or an erosion of Title III’s suppression remedy.*

### I. INTRODUCTION

Consider the following two cases in which the government argues for application of the “good faith exception”<sup>1</sup> to the exclusionary rule to avoid

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<sup>1</sup> See *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the Court determined that exclusion of evidence in cases where officers acted with “objective good faith” to obtain a search warrant would not deter Fourth Amendment violations. *Id.* at 920. Thus, the Court held that the exclusionary rule does not apply when the police act in “objectively reasonable reli-

suppression of evidence. In the first case, a federal agent, working with an Assistant United States Attorney (“AUSA”), drafts an affidavit seeking a federal search warrant pursuant to Rule 41.<sup>2</sup> The agent and AUSA draft the affidavit over the course of several hours one morning, relying on information obtained in the previous week in a narcotics investigation. That afternoon, without further review of the affidavit by the agent’s or prosecutor’s supervisors, the agent swears out the affidavit before a federal magistrate judge. The magistrate judge issues the search warrant authorizing the agents to search a suspect’s apartment for evidence of drug trafficking activity. The agents seize large amounts of cocaine, guns, and other evidence of drug distribution during the search. The suspect is immediately arrested and detained to await indictment. A grand jury returns an indictment one week later, charging the defendant with various federal narcotics offenses and unlawful possession of a firearm by a convicted felon. After the government produces discovery in the following weeks, the defendant moves to suppress all of the evidence seized during the search pursuant to the warrant, arguing that the warrant affidavit did not sufficiently establish probable cause for the search of his residence.<sup>3</sup>

In the second case, a federal agent, working with an AUSA, drafts an affidavit over the course of a week in support of an application seeking an order from a federal district court judge pursuant to Title III, the federal wiretap statute,<sup>4</sup> authorizing the agents to intercept a suspect’s cell phone calls. The affidavit includes a detailed recitation of other investigative techniques that had been attempted unsuccessfully in the criminal investigation over the preceding four months. Pursuant to the requirements of Title III, the AUSA sends the affidavit and application to the Department of Justice (“DOJ”) to seek approval to file the application with a federal district court judge. One week later, following a review by a statutorily authorized official at DOJ, the AUSA receives authorization to file the wiretap application. A district court judge issues a wiretap order. The wiretap portion of the investigation continues for three months, authorized by orders from the district court judge extending the interception period for the suspect’s telephone. Based on intercepted calls during the three-month period, agents seize large

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ance” on a facially valid search warrant that is subsequently invalidated for lack of probable cause. *Id.* at 922–23.

<sup>2</sup> Under Rule 41, a federal magistrate judge “must issue the warrant if there is probable cause to search for and seize a person or property . . . .” Fed. R. Crim. P. 41(d)(1).

<sup>3</sup> This scenario, which is not uncommon in criminal prosecutions, is based on the facts of *United States v. Stearn*, 597 F.3d 540 (3d Cir. 2010), with some modifications.

<sup>4</sup> 18 U.S.C. §§ 2510–20 (2006 & Supp. IV 2010). This Article will refer to the federal wiretap statute as Title III, which is the commonly used name for the statute in federal criminal practice derived from its place in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90–351, § 802, 82 Stat. 212. See *infra* notes 20–21 and accompanying text. Under Title III, the government must satisfy detailed procedural requirements within the Department of Justice and make a showing of probable cause and necessity to a U.S. district court to receive a wiretap order. For a detailed discussion of Title III’s requirements, see *infra* Part III.A.2.

amounts of drugs from individuals in the suspect's alleged drug trafficking organization, as well as various guns and ammunition. A grand jury returns an indictment charging the suspect, now a criminal defendant, and several alleged co-conspirators on federal drug and weapons charges. Government agents arrest the defendant several months after the expiration of the final wiretap order. Following arraignment and assignment of the case to a different district court judge for trial, the government produces discovery, including transcripts and recordings of the intercepted telephone calls. After reviewing the discovery over the course of two months, the defendant moves to suppress all of the evidence seized as a result of the wiretap, arguing that the affidavit filed with the initial wiretap application failed to establish probable cause or necessity for the interception of his telephone calls.<sup>5</sup>

May the judge in each case consider the agents' good faith reliance on the search warrant or wiretap order when ruling on the motion to suppress? In the Rule 41 search-warrant case, it is well-settled that the good faith exception would apply if the agents' reliance on the magistrate's probable cause determination was objectively reasonable.<sup>6</sup> In the wiretap case, the answer is unclear, surprisingly so, given that over twenty-five years have passed since the Supreme Court formulated the good faith exception in *Leon*.<sup>7</sup> Some courts have refused to apply the good faith exception to agents' reliance on Title III wiretap orders,<sup>8</sup> while other courts have applied the exception in Title III wiretap cases.<sup>9</sup> Still other courts have adopted a partial good faith exception in electronic surveillance cases, applying it only to violations of Title III that are of a constitutional magnitude.<sup>10</sup> While scholars have devoted a significant amount of scholarship to examining the courts' expansion of the good faith exception to situations beyond mere reliance on a later-invali-

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<sup>5</sup> This scenario is based on the facts of *United States v. Brewer*, 204 F. App'x 205 (4th Cir. 2006), with the addition of some facts that are common to federal drug cases.

<sup>6</sup> See *Leon*, 468 U.S. at 922.

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., *United States v. Rice*, 478 F.3d 704, 711 (6th Cir. 2007) (holding that the good faith exception is not applicable to wiretap orders obtained under Title III); *United States v. Ward*, 808 F. Supp. 803, 807-08 (S.D. Ga. 1992) (same).

<sup>9</sup> See, e.g., *United States v. Moore*, 41 F.3d 370, 376-77 (8th Cir. 1995) (relying on good faith exception to overturn district court's order granting motion to suppress wiretap evidence); *United States v. Malekzadeh*, 855 F.2d 1492, 1497 (11th Cir. 1988) (applying good faith exception to uphold denial of suppression motion in wiretap case).

<sup>10</sup> See, e.g., *United States v. Ambrosio*, 898 F. Supp. 177, 187-89 (S.D.N.Y. 1995) (holding that the good faith exception applies to violations of Title III of a "constitutional magnitude"); *United States v. Ferrara*, 771 F. Supp. 1266, 1273 (D. Mass. 1991) (holding that the provisions of Title III that enacted requirements of the Fourth Amendment are subject to good faith exception, but exception is not applicable to provisions of statute that are "supplements" to Fourth Amendment requirements).

dated Rule 41 search warrant,<sup>11</sup> they have not given the applicability of the exception to reliance on wiretap orders much attention.<sup>12</sup>

This Article attempts to resolve the open question of whether the good faith exception applies to reliance on Title III orders in three main Parts following this Introduction.<sup>13</sup> Part II briefly outlines the law relating to Title III's suppression provision, the current scope of the good faith exception to the exclusionary rule outside the wiretap context, and the circuit split regarding application of the good faith exception in Title III wiretap cases.

Part III addresses the current divide in the courts in more detail. It concludes that the text and legislative history of Title III support application of the good faith exception to agents' objectively reasonable reliance on facially valid Title III wiretap orders. It offers a rebuttal to the determination of some courts,<sup>14</sup> and commentators,<sup>15</sup> that the statutory suppression remedy in Title III precludes application of the good faith exception in wiretap cases. This Part acknowledges that the resolution of this circuit split under the current version of Title III is not clear, however, which necessitates congressional action.

Consequently, Part IV shifts the Article's focus to Congress. This Part examines the normative and practical implications of an amendment to the federal wiretap law explicitly authorizing the application of the good faith exception for objectively reasonable reliance on a court order authorizing electronic surveillance. While one commentator has taken the opposite position,<sup>16</sup> such an amendment to Title III is necessary to harmonize suppression of evidence involving wiretap orders, which entail rigorous procedural steps and a showing of probable cause and necessity, with suppression of evidence involving more easily obtained search warrants under Rule 41. Moreover,

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<sup>11</sup> See, e.g., Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077 (2011) (arguing that the Supreme Court should side with lower courts that have rejected a good faith exception for reliance on overturned case law); Ross M. Oklewicz, *Expanding the Scope of the Good-Faith Exception to the Exclusionary Rule to Include a Law Enforcement Officer's Reasonable Reliance on Well-Settled Case Law That Is Subsequently Overruled*, 59 AM. U. L. REV. 1715 (2010) (arguing for good faith exception for reliance on overturned case law).

<sup>12</sup> At least two commentators have addressed directly whether the good faith exception applies to reliance on Title III wiretap orders, and both argued that courts should not apply the good faith exception under the current version of Title III. See Michael S. Leib, *E-Mail and the Wiretap Laws: Why Congress Should Add Electronic Communication to Title III's Statutory Exclusionary Rule and Expressly Reject a "Good Faith" Exception*, 34 HARV. J. ON LEGIS. 393, 431–32 (1997); Brian Boerman, Note, *Beyond the Wire: An Analysis of Non-Telephonic Conversations Under Title III*, 3 N.Y.U. J.L. & LIBERTY 599, 627 (2008).

<sup>13</sup> See *United States v. Heilman*, 377 F. App'x 157, 188 n.21 (3d Cir. 2010) (noting circuit split as to whether good faith exception applies to reliance on wiretap orders); 2 JAMES G. CARR & PATRICIA L. BELLIA, *THE LAW OF ELECTRONIC SURVEILLANCE* § 6:40 (2009) (noting that "[a] division in authority continues to exist on whether a good faith exception applies" in Title III cases).

<sup>14</sup> See, e.g., *United States v. Rice*, 478 F.3d 704, 712–13 (6th Cir. 2007).

<sup>15</sup> See Leib, *supra* note 12, at 425; Boerman, *supra* note 12, at 627.

<sup>16</sup> See Leib, *supra* note 12, at 434–38 (arguing that Congress should amend Title III to explicitly reject a good faith exception).

the significant resource expenditures devoted to wiretap investigations, both in direct and opportunity costs, and the efficacy of wiretap evidence in securing convictions in cases involving large-scale and oftentimes violent criminal organizations, tips the costs of exclusion well past any potential deterrence of noncompliance with federal wiretap laws.<sup>17</sup>

To be true to the deterrence rationale of the good faith exception in the Rule 41 context, however, any amendment to Title III should specify that the good faith exception will apply to the government’s objectively reasonable reliance on a wiretap order in initiating interception only. That limitation will ensure that the exception does not extend to government non-compliance with statutory requirements regarding the manner of interception or the proper disclosure of recordings of intercepted conversations, neither of which entail government reliance on a judicial determination later found to be in error. Finally, this Part concludes that amending Title III will not lead to an increased use of wiretapping by the government or drain Title III’s statutory suppression remedy of all meaning.

## II. THE LAW OF EVIDENCE EXCLUSION AND THE CIRCUIT SPLIT REGARDING APPLICATION OF GOOD FAITH EXCEPTION TO RELIANCE ON WIRETAP ORDERS

Defendants seeking to suppress evidence of wire and oral communications<sup>18</sup> obtained pursuant to a Title III wiretap order may rely on Title III’s statutory suppression provision for violations of the substantive portions of the statute, whether or not these violations are of a constitutional magnitude. In cases involving a traditional search warrant under Rule 41, a defendant’s suppression remedy for evidence obtained in violation of the Fourth Amendment is the judicially created exclusionary rule. While the government’s objectively reasonable reliance on a facially valid search warrant issued under Rule 41 will preclude exclusion of evidence under the good faith exception, courts remain divided as to whether the good faith exception should apply to the government’s reasonable reliance on a Title III wiretap order to collect evidence of wire and oral communications.

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<sup>17</sup> See *Herring v. United States*, 555 U.S. 135, 141 (2009) (citing *United States v. Leon*, 468 U.S. 897, 910 (1984)) (holding that, in applying the exclusionary rule, “the benefits of deterrence must outweigh the costs”); see also *Kerr*, supra note 11, at 1079 (noting that the Supreme Court has “repeatedly emphasized” that application of exclusionary rule requires “objective weighing of costs and benefits of suppression”).

<sup>18</sup> Congress defined “wire communications” as “any aural transfer” made by use of wire or cables, and “oral communications” as any oral communication made with a justifiable expectation that it would not be intercepted. 18 U.S.C. § 2510(1)–(2) (2006). As discussed later in this section, Congress did not include violations of the statute related to the interception of “electronic communications” under Title III, which include email and other electronic data, 18 U.S.C. § 2510(12) (2006), in the statute’s suppression provision.

A. *Suppression of Evidence under Title III*

In 1968, Title III was passed by Congress as part of the Omnibus Crime Control and Safe Streets Act.<sup>19</sup> Title III pertained to wiretapping and electronic surveillance and aimed to protect the “privacy of wire and oral communications” while providing a uniform structure for authorization of lawful interceptions.<sup>20</sup> In balancing those twin goals, Congress sought to prohibit wiretapping and electronic surveillance, except by authorized law enforcement officers investigating specified crimes who had made a showing of probable cause and received a court order.<sup>21</sup>

Congress passed Title III following the Supreme Court’s decisions in *Berger v. New York*,<sup>22</sup> which invalidated a New York eavesdropping statute for failure to satisfy minimum constitutional safeguards, and *Katz v. United States*,<sup>23</sup> in which the Court overruled *Olmstead v. United States*<sup>24</sup> by holding that wiretapping without court approval violated the Fourth Amendment as an unlawful search and seizure. The Court previously held in *Olmstead* that the wiretapping of telephone lines to intercept conversations of co-conspirators was not a search or seizure and did not violate the Fourth Amendment.<sup>25</sup> The Court reasoned in *Olmstead* that a “search” must be of material items or involve entry into a structure, and did not include listening over telephone lines.<sup>26</sup> In *Katz*, the Court rejected this “trespass” theory approach to Fourth Amendment violations.<sup>27</sup> By enacting Title III, Congress intended to satisfy the constitutional standards for lawful electronic surveillance laid out by the Court in *Berger* and *Katz*.<sup>28</sup>

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<sup>19</sup> Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 2510–2520 (2006 & Supp. IV 2010)).

<sup>20</sup> S. Rep. No. 90-1097, at 66 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153. See also 1 JAMES G. CARR & PATRICIA L. BELLIA, THE LAW OF ELECTRONIC SURVEILLANCE § 2:37 (2009) (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 which the government could investigate through wiretapping and procedural controls regulating electronic surveillance).

<sup>21</sup> S. REP. NO. 90-1097, at 66, reprinted in 1968 U.S.C.C.A.N. at 2153.

<sup>22</sup> 388 U.S. 41, 58–60 (1967).

<sup>23</sup> 389 U.S. 347, 353 (1967).

<sup>24</sup> 277 U.S. 438 (1928).

<sup>25</sup> *Id.* at 464–65.

<sup>26</sup> *Id.*

<sup>27</sup> *Katz*, 389 U.S. at 351–52 (“For 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.”) (internal citations omitted).

<sup>28</sup> According to the Senate Report accompanying Title III, Congress passed the legislation to respond to two perceived problems. The first was the unauthorized “use and abuse of electronic surveillance” to conduct “employer-labor espionage,” which had made it “increasingly difficult to conduct business meetings in private.” S. REP. NO. 90-1097, at 67 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2154. The second was to clarify the existing state of federal wiretap law—described in the Senate Report as “extremely unsatisfactory”—and to conform to the constitutional standards for government electronic surveillance laid out in *Berger* and *Katz*. *Id.* at 66–67, reprinted in 1968 U.S.C.C.A.N. at 2153–54. Prior to the passage of

Congress included an evidentiary exclusion provision in Title III to prevent the use of unlawfully intercepted wire or oral communications in any state or federal judicial proceeding.<sup>29</sup> Congress sought to ensure that anyone who violated the statute, whether a private citizen or law enforcement officer, not be allowed to benefit from that violation.<sup>30</sup> While Congress indicated that the statutory suppression provision was meant to “largely reflect[ ] existing law,” in that it applied to suppression of evidence obtained directly or indirectly by violation of Title III, Congress made clear it had “no intention to change the attenuation rule . . . [n]or generally to press the scope of the suppression role beyond present search and seizure law.”<sup>31</sup> Thus, an “aggrieved person,” defined in Title III as a person who had wire or oral communications intercepted or “against whom the interception was directed,”<sup>32</sup> may move to suppress direct or derivative wiretap evidence on the grounds that the communication was “unlawfully intercepted,”<sup>33</sup> the order authorizing interception is “insufficient on its face,”<sup>34</sup> or the “interception was not made in conformity with the order of authorization or approval.”<sup>35</sup> If the trial judge grants the motion to suppress, then the intercepted communications will be considered “as having been obtained in violation” of Title III,<sup>36</sup> and the interceptions cannot be used as evidence at trial or in any subsequent grand jury proceedings by prosecutors, or in any federal or state proceeding, whether criminal, civil, regulatory, or legislative.<sup>37</sup>

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Title III, Supreme Court precedent and the then-current federal wiretap statute, Section 605 of the Federal Communications Act, Pub. L. No. 73-416, § 605, 48 Stat. 1103 (1934) (codified at 47 U.S.C. § 605 (2006)), “effectively prevented” the use of direct and derivative wiretap evidence in federal or state court. *Id.* at 68, *reprinted in* 1968 U.S.C.C.A.N. at 2155.

<sup>29</sup> “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.” 18 U.S.C. § 2515 (2006). Congress indicated that Section 2515 needed to be read in conjunction with 18 U.S.C. § 2518(10) (2006), “which defines the class entitled to make a motion to suppress.” S. REP. NO. 90-1097, at 96, *reprinted in* 1968 U.S.C.C.A.N. at 2185.

<sup>30</sup> S. REP. NO. 90-1097, at 69, *reprinted in* 1968 U.S.C.C.A.N. at 2156. The Senate Report accompanying Title III makes clear that “[i]t is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications.” *Id.* In addition, the “perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.” *Id.*

<sup>31</sup> S. REP. NO. 90-1097, at 96, *reprinted in* 1968 U.S.C.C.A.N. at 2185 (internal citations omitted). Under the attenuation rule, evidence is not suppressed where the “connection between the lawless conduct of the police and the discovery of the challenged evidence has ‘become so attenuated as to dissipate the taint.’” *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

<sup>32</sup> 18 U.S.C. § 2510(11) (2006). *See also* *United States v. Gallo*, 863 F.2d 185, 192 (2d Cir. 1988) (citing *Alderman v. United States*, 394 U.S. 165, 175–76 & n.9 (1969)) (holding that standing to bring motion to suppress under Title III is analyzed in accordance with standing requirements for Fourth Amendment claims, i.e., standing limited to those whose rights were violated by the search itself).

<sup>33</sup> 18 U.S.C. § 2518(10)(a)(i) (2006).

<sup>34</sup> *Id.* § 2518(10)(a)(ii).

<sup>35</sup> *Id.* § 2518(10)(a)(iii).

<sup>36</sup> *Id.* § 2518(10)(a).

<sup>37</sup> *Id.* § 2515.

Not every violation of the procedural requirements set forth in Title III results in suppression of the government's evidence at trial, however.<sup>38</sup> The Supreme Court has determined that "Congress intended 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."<sup>39</sup>

Applying that principle, the Court determined that suppression is not warranted where the government misidentifies the authorizing Department of Justice official in the wiretap application,<sup>40</sup> fails to identify all those individuals likely to be intercepted,<sup>41</sup> or inadvertently fails to provide notice to identifiable persons who were intercepted,<sup>42</sup> because those provisions do not play a central or substantive role in the Title III regulatory scheme.<sup>43</sup> Conversely, suppression is required where the government's application is authorized by the Attorney General's Executive Assistant rather than one of the specifically designated Department of Justice officials in Title III who may authorize applications, because "the provision for pre-application approval was intended to play a central role in the statutory scheme."<sup>44</sup>

In 1986, Congress passed the Electronic Communications Privacy Act ("ECPA"),<sup>45</sup> which amended Title III to include electronic communications, along with previously covered wire and oral communications, in the regulatory protection against unauthorized interception.<sup>46</sup> Congress did not amend the statutory suppression provision in 18 U.S.C. § 2515 to include "electronic communications," however. Instead, Congress expressly exempted electronic communications from suppression for purely statutory violations by providing that "[t]he remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications."<sup>47</sup> The Senate Report accompanying

<sup>38</sup> See *United States v. Chavez*, 416 U.S. 562, 574–75 (1974) ("[W]e did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.' To establish such a rule would be at odds with the statute itself.") For a discussion of Title III's procedural requirements, see *infra* Part III.A.2.

<sup>39</sup> *United States v. Giordano*, 416 U.S. 505, 527 (1974).

<sup>40</sup> See *Chavez*, 416 U.S. at 578–79.

<sup>41</sup> *United States v. Donovan*, 429 U.S. 413, 434–36 (1977).

<sup>42</sup> *Id.* at 434, 438–40.

<sup>43</sup> See *Chavez*, 416 U.S. at 578; *Donovan*, 429 U.S. at 434.

<sup>44</sup> *Giordano*, 416 U.S. at 528. See also *United States v. Reyna*, 218 F.3d 1108, 1111–12 (affirming suppression where district court judge issued wiretap order prior to government receiving authorization for application from senior Department of Justice official).

<sup>45</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

<sup>46</sup> S. REP. NO. 99-541, at 1 (1986), reprinted in 1986 U.S.C.C.A.N. at 3555.

<sup>47</sup> 18 U.S.C. § 2518(10)(c) (2006). See CARR & BELLIA, *supra* note 13, § 6:41 (noting that "most courts" have held that suppression is not available for a statutory violation related to electronic communications).



ECPA reiterated that the amended legislation “does not apply the statutory exclusionary rule contained in Title III . . . to the interception of electronic communications.”<sup>48</sup>

*B. Suppression of Evidence Under Rule 41 and the Good Faith  
Exception to the Exclusionary Rule*

The Supreme Court long ago established an exclusionary rule to prevent the use of evidence at trial obtained in violation of the Fourth Amendment.<sup>49</sup> This suppression remedy for illegally obtained evidence was judicially created because the Fourth Amendment contains no explicit prohibition against the use of evidence obtained in violation of the Constitution.<sup>50</sup> Exclusion is not a necessary result of a Fourth Amendment violation, however, and the exclusionary rule should only apply where the benefits of deterring future Fourth Amendment violations outweigh the “substantial social costs” of “letting guilty and possibly dangerous defendants go free . . . .”<sup>51</sup>

In *United States v. Leon*,<sup>52</sup> the Court held that the exclusionary rule did not apply to exclude evidence when the police acted in “objectively reasonable reliance” on a facially valid search warrant that was subsequently invalidated for lack of probable cause.<sup>53</sup> The Court emphasized that the judicially created exclusionary rule was not a “personal constitutional right of the aggrieved party” but was “designed to safeguard Fourth Amendment rights generally through its deterrent effect.”<sup>54</sup> And the deterrent effect of the ex-

<sup>48</sup> S. REP. NO. 99-541, at 23, reprinted in 1986 U.S.C.C.A.N. at 3577. The Senate Report also makes clear that for violations “of law of a constitutional magnitude,” a court should “apply the existing Constitutional law with respect to the exclusionary rule.” *Id.*; see also CARR & BELLIA, *supra* note 13, § 6.1 (“For electronic communications, Title III itself supplies no suppression remedy, and suppression is therefore available only for violations of a constitutional magnitude.”).

<sup>49</sup> See *Weeks v. United States*, 232 U.S. 383, 398 (1914); see also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to state law enforcement actions).

<sup>50</sup> While the Fourth Amendment does state that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,” it does not state a remedy if that right is in fact violated. U.S. CONST. AMEND. IV.; see, e.g., *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (“[T]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands.”).

<sup>51</sup> See *Herring v. United States*, 555 U.S. 135, 141 (2009) (internal quotation marks omitted).

<sup>52</sup> 468 U.S. 897 (1984).

<sup>53</sup> *Id.* at 922–23.

<sup>54</sup> *Id.* at 906. (internal quotation marks omitted) The Court’s treatment of the exclusionary rule as a deterrent mechanism rather than a constitutional right of the accused was subject to contemporaneous criticism. See *id.* at 931–38 (Brennan, J., dissenting) (arguing that the Fourth Amendment creates “a personal right to exclude all evidence secured by means of unreasonable searches and seizures”). Commentators have also argued that the Fourth Amendment creates a personal constitutional right. See, e.g., Timothy Casey, *Electronic Surveillance and the Right to Be Secure*, 41 U.C. DAVIS L. REV. 977, 1027–32 (2008) (arguing that the application of the Fourth Amendment’s exclusionary rule should hinge on a personal “right to be secure” rather than a reasonable expectation of privacy).

clusionary rule is aimed at “police misconduct rather than to punish the errors of judges and magistrates.”<sup>55</sup> Thus, where an officer acted with objective good faith and obtained a search warrant, the Court reasoned that suppression of evidence obtained during execution of the warrant would not offer enough of a deterrent benefit to “justify the substantial costs of exclusion.”<sup>56</sup>

The crux of the good faith analysis is “‘confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal’ in light of ‘all of the circumstances.’”<sup>57</sup> In *Leon*, that meant the exclusionary rule did not apply where officers reasonably relied on a facially valid search warrant issued by a magistrate that was later found to lack probable cause based on the unreliability of information provided by a confidential informant.<sup>58</sup> A companion case to *Leon*, *Massachusetts v. Sheppard*, established that the good faith exception to the exclusionary rule was applicable where a judge failed to make “clerical corrections” to revise a warrant form intended for the search of narcotics that officers presented with an affidavit seeking permission to search for evidence of a murder.<sup>59</sup> The Court determined that the officers did all that was required of them by alerting the judge to the inconsistency between the warrant form and affidavit, and that the officers were entitled to rely on the judge’s assurances that he would make the necessary corrections to the warrant form and that the search requested in the affidavit was lawful.<sup>60</sup>

Since *Leon* and *Sheppard*, the Court has extended application of the good faith exception beyond reliance on a judge-issued warrant. For example, the Court determined that the good faith exception applied to officers’ objectively reasonable reliance on a statute authorizing warrantless administrative searches that was subsequently declared unconstitutional.<sup>61</sup> Similarly, the Court recently held that the good faith exception applied to officers who conducted a search in reliance on “binding judicial precedent” that was later

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<sup>55</sup> *Leon*, 468 U.S. at 916.

<sup>56</sup> *Id.* at 918–22.

<sup>57</sup> *Herring v. United States*, 555 U.S. 135, 145 (2009) (quoting *Leon*, 468 U.S. at 922 n.23). The Court in *Leon* emphasized that the good faith exception is an objective analysis and does not depend on the subjective belief of the officer involved. See *Leon*, 468 U.S. at 919 n.20. This “lack of precision” in labeling an objective assessment of officers’ conduct as “good faith,” which implies a subjective analysis of an individual officer’s motivations, did not escape the notice of contemporary scholars commenting on the *Leon* decision. See Jeremy M. Miller, *The Good Faith Exception to the Exclusionary Rule: Leon and Sheppard in Context*, 7 CRIM. JUST. J. 181, 194 (1984). The Court recently defended the objective nature of the good faith analysis, however, noting that while the circumstances to be considered will “frequently include a particular officer’s knowledge and experience,” that is no more subjective than a judge making a probable cause determination based in part on an officer’s knowledge and experience. See *Herring*, 555 U.S. at 142, 145–46.

<sup>58</sup> See *Leon*, 468 U.S. at 900–06.

<sup>59</sup> See 468 U.S. 981, 982, 985–86 (1984).

<sup>60</sup> *Id.* at 989–91.

<sup>61</sup> See *Illinois v. Krull*, 480 U.S. 340, 349–50 (1987).

overturned.<sup>62</sup> And the good faith exception applies to officers who relied on incorrect information showing an outstanding arrest warrant for a suspect that was found in a court's database resulting from a mistake by court personnel,<sup>63</sup> as well as to officers' reliance on a law enforcement database that incorrectly showed an outstanding arrest warrant for a suspect, even when police personnel were responsible for the negligent error.<sup>64</sup>

Despite criticisms of the good faith exception,<sup>65</sup> there is no debate that it is well-established in the context of reliance on Rule 41 search warrants. Moreover, as described above, the Supreme Court has shown a proclivity for expanding the good faith exception beyond the context of reasonable reliance on a search warrant in some circumstances.<sup>66</sup>

### C. Courts Remain Divided Over Application of the Good Faith Exception in Title III Cases

There remains a split of authority in the circuit and district courts as to whether the good faith exception should again be extended beyond the facts of *Leon*, which did not concern electronic surveillance, to cover the government's reasonable reliance on a Title III wiretap order that is later determined to have been issued in violation of the statute.<sup>67</sup> For example, the Sixth Circuit and various district courts have determined that Title III's statutory suppression provision precludes application of the good faith exception in wiretap cases.<sup>68</sup> These courts have relied on three primary grounds for that conclusion: (1) the language of Title III clearly requires courts to suppress illegally obtained wiretap evidence; (2) the statute's legislative history expresses the intent of Congress to incorporate search and seizure law that was in place at the time of Title III's passage; and (3) the impropriety of modifying a statutory suppression remedy with an exception drawn from the judicially created exclusionary rule.<sup>69</sup>

<sup>62</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2434 (2011).

<sup>63</sup> See *Arizona v. Evans*, 514 U.S. 1, 14–16 (1995).

<sup>64</sup> See *Herring v. United States*, 555 U.S. 135, 147–48 (2009).

<sup>65</sup> For a useful summary of some of the judicial and scholarly critiques of *Leon*, see John E. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under United States v. Leon*, 54 U. KAN. L. REV. 155, 167–68 (2005), and accompanying footnotes.

<sup>66</sup> See *supra* Part II.B.

<sup>67</sup> Compare *United States v. Rice*, 478 F.3d 704, 711 (6th Cir. 2007) (holding no good faith exception for reliance on wiretap orders), and *United States v. Ward*, 808 F. Supp. 803, 807–08 (S.D. Ga. 1992) (same), with *United States v. Brewer*, 204 F. App'x 205, 208 (4th Cir. 2006) (unpublished per curiam) (holding good faith exception applies to reliance on wiretap orders), and *United States v. Moore*, 41 F.3d 370, 376–77 (8th Cir. 1995) (same), and *United States v. Malekzadeh*, 855 F.2d 1492, 1497 (11th Cir. 1988) (same).

<sup>68</sup> See, e.g., *Rice*, 478 F.3d at 712. Other courts have suggested that the good faith exception would not apply in electronic surveillance cases, without deciding the issue. See, e.g., *United States v. McGuinness*, 764 F. Supp. 888, 897 n.2 (S.D.N.Y. 1991).

<sup>69</sup> See *Rice*, 478 F.3d at 712–13; see also, e.g., *Ward*, 808 F. Supp. at 807–08; *United States v. Orozco*, 630 F. Supp. 1418, 1521–22 (S.D. Cal. 1986).

The Eighth and Eleventh Circuits, and multiple district courts, have decided that objectively reasonable reliance on a wiretap order by government agents makes the government's resulting wiretap evidence eligible for the good faith exception.<sup>70</sup> As aptly noted by one commentator, however, some of the opinions rely on *Leon* without even addressing Title III's suppression provision.<sup>71</sup> Those courts that do address the statutory suppression provision have determined that the good faith exception still applies because suppression under the statute is discretionary<sup>72</sup> and the intent of Congress was to incorporate the current state of Fourth Amendment suppression law into Title III.<sup>73</sup>

Still other courts have adopted a middle ground. These courts determined that the good faith exception is applicable to constitutional violations, such as the failure to establish probable cause in a wiretap application, but not to violations of the non-constitutional statutory requirements of Title III, because of the statute's exclusion remedy.<sup>74</sup>

### III. THE CASE FOR APPLYING THE GOOD FAITH EXCEPTION TO WIRETAP ORDERS ISSUED UNDER THE CURRENT VERSION OF TITLE III

This Part aims to show that when the government reasonably relies on a federal wiretap order to initiate interception of electronic communications under the current version of Title III, courts have reasonable grounds to apply the good faith exception should a reviewing judge later find that order to be deficient under the statute. That argument, which is absent in the current scholarship, expands on the truncated analysis in court opinions that have applied the good faith exception to reliance on Title III wiretap orders. Ultimately, resolution of this circuit split under the current version of the statute is far from certain, which leads to the proposal in Part IV of this Article that Congress should amend Title III to clarify that the good faith exception applies in wiretap cases.

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<sup>70</sup> See, e.g., *Brewer*, 204 F. App'x at 208 (unpublished per curiam); *Moore*, 41 F.3d at 376; *Malekzadeh*, 855 F.2d at 1497.

<sup>71</sup> Leib, *supra* note 12, at 425 (noting that all but two courts that have applied the good faith exception to reliance on Title III wiretap orders have done so by relying "solely on *Leon*" without discussing Title III's suppression provision). Indeed, this trend has continued. Some recent cases that post date the critique raised by this commentator have applied the good faith exception to wiretap cases without any discussion of Title III's exclusionary remedy. See, e.g., *United States v. Tomero*, 462 F. Supp. 2d 565, 572 (S.D.N.Y. 2006); *United States v. Scala*, 388 F. Supp. 2d 396, 403 & n.26 (S.D.N.Y. 2005).

<sup>72</sup> See, e.g., *Moore*, 41 F.3d at 376.

<sup>73</sup> See *id.*; *United States v. Ambrosio*, 898 F. Supp. 177, 187 (S.D.N.Y. 1995).

<sup>74</sup> See *Ambrosio*, 898 F. Supp. at 187-89; *United States v. Ferrara*, 771 F. Supp. 1266, 1273 (D. Mass. 1991).

### A. The Statutory Text

In properly looking first to the language of Title III,<sup>75</sup> the Sixth Circuit in *Rice* declined to apply the good faith exception because the statute is “clear on its face” that “[c]ourts must suppress illegally obtained wire communications.”<sup>76</sup> The support for this plain language argument against application of the good faith exception is derived from Title III’s statutory suppression provisions. Specifically, § 2515 states that “no part of the contents” of an intercepted wire or oral communication may be used in any federal or state proceeding if disclosure would be in violation of the statute.<sup>77</sup> Section 2518(10) then sets out that intercepted wire and oral communications are obtained in violation of Title III if they are “unlawfully intercepted” or not made in conformity with the court’s order, or if the court’s order is “insufficient on its face.”<sup>78</sup> The court in *Rice* noted the absence of any explicit exceptions to exclusion in Title III in declining to apply the good faith exception.<sup>79</sup>

This plain language argument, while not devoid of merit, skirts the issue of whether the suppression provisions in Title III preclude application of the good faith exception to objectively reasonable reliance on facially valid wiretap orders, however. Although the first ground for suppression in Title III includes communications that were “unlawfully intercepted,” Congress did not define in Title III what that term actually means.<sup>80</sup> In *Giordano*, the Supreme Court limited “unlawfully intercepted” communications to include only those intercepted in violation of the Constitution or statutory requirements that “directly and substantially” implement the congressional intent to limit wiretapping, thereby exempting technical violations of the statute from exclusion.<sup>81</sup> While the Court also determined that “[t]he issue

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<sup>75</sup> See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (noting that resolution of dispute over the meaning of a statute “must begin . . . with the language of the statute itself”).

<sup>76</sup> See *United States v. Rice*, 478 F.3d 704, 712 (6th Cir. 2007) (“First, the language in Title III provides that exclusion is the exclusive remedy for an illegally obtained warrant.”).

<sup>77</sup> 18 U.S.C. § 2515 (2006). See *Rice*, 478 F.3d at 712; see also *United States v. Ward*, 808 F. Supp. 803, 807 (S.D. Ga. 1992); *United States v. Orozco*, 630 F. Supp. 1418, 1522 (S.D. Cal. 1986); *County of Oakland v. City of Detroit*, 610 F. Supp. 364, 369 n.10 (E.D. Mich. 1984).

<sup>78</sup> 18 U.S.C. § 2518(10)(a) (2006). See *Rice*, 478 F.3d at 710; *Ward*, 808 F. Supp. at 807 (“Section 2518 plainly provides for exclusion of ‘unlawfully intercepted’ communications.”).

<sup>79</sup> See *Rice*, 478 F.3d at 712 (holding that “Title III provides that exclusion is the exclusive remedy for an illegally obtained warrant” and the statute “does not provide for any exception.”).

<sup>80</sup> See 18 U.S.C. §§ 2510, 2518(10)(a) (2006).

<sup>81</sup> See *United States v. Giordano*, 416 U.S. 505, 525–28 (1974). In *Giordano*, the government filed a wiretap application without the required approval of a statutorily specified DOJ official. The government argued that because the remaining two grounds for suppression in § 2518(10)(a)—the facial insufficiency of the wiretap order, § 2518(10)(a)(ii), and interception not made in conformity with the order, § 2518(10)(a)(iii)—cover purely statutory violations, to include purely statutory violations under the “unlawfully intercepted” provision of § 2518(10)(a)(i) would drain paragraphs (ii) and (iii) of meaning and render them surplusage.

[of evidence suppression for substantial statutory violations] does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III[.]”<sup>82</sup> that pronouncement is only conclusive on the issue of applying the good faith exception to reliance on Title III wiretap orders, if it is clear that the language of the statute precludes exceptions to exclusion.<sup>83</sup>

On that score, there is support in the statutory text for a good faith exception to exclusion. For instance, following the list of grounds on which a defendant may bring a suppression motion, the statute states that interceptions are in violation of the chapter only “[i]f the motion is granted,”<sup>84</sup> implying that judges maintain discretion in deciding suppression motions and are not mandated to grant suppression under Title III.<sup>85</sup> Arguably this discretion may include the determination of whether to apply a good faith exception in instances where the government has followed all the pre-authorization requirements of Title III to the satisfaction of the judge issuing the wiretap order.

The 1986 amendments to Title III lend additional support to application of the good faith exception. Specifically, Congress amended the statutory suppression provision to provide that the “remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.”<sup>86</sup> Some courts, in part relying on the legislative history of the amendment, have interpreted this provision to mean that Congress, by excluding electronic communications from the statutory suppression remedy, intended to incorporate new developments in Fourth Amendment law into Title III, such that a good faith exception should apply to oral, wire, and electronic communications intercepted under the statute.<sup>87</sup> Some commentators have criticized this approach, arguing that

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*Id.* at 526. See *infra* Part III.A.2. and accompanying footnotes for a discussion of requirements mandated by Title III for the government’s wiretap applications.

<sup>82</sup> *Giordano*, 416 U.S. at 524.

<sup>83</sup> *But see* *United States v. Ferrara*, 771 F. Supp. 1266, 1299 (D. Mass. 1991) (holding that *Giordano* requires suppression “without regard to good faith . . . if certain statutory provisions of Title III not rooted in the requirements of the Fourth Amendment were not satisfied”).

<sup>84</sup> 18 U.S.C. § 2518(10)(a) (2006).

<sup>85</sup> *See* *United States v. Moore*, 41 F.3d 370, 376 (8th Cir. 1995) (holding that “§ 2518(10)(a) is worded to make the suppression decision discretionary” because it uses the term “if” as opposed to a term such as “when” which would imply the decision is mandatory.); *see also* Shaun T. Olsen, Note, *Reading Between the Lines: Why a Qualified “Clean Hands” Exception Should Preclude Suppression of Wiretap Evidence Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 36 VAL. U. L. REV. 719, 755–56 (2002) (arguing that the language of § 2515 permits judicial discretion in applying Title III’s suppression remedy because it states that illegally obtained evidence “may” not be received in evidence instead of “shall” not be received).

<sup>86</sup> 18 U.S.C. § 2518(10)(c) (2006).

<sup>87</sup> *See, e.g.,* *United States v. Ambrosio*, 898 F. Supp. 177, 187–88 (S.D.N.Y. 1995); *United States v. Jackson*, 493 F. Supp. 2d 592, 604 (W.D.N.Y. 2006) (noting that the Second Circuit has yet to rule on whether the good faith exception applies to electronic surveillance cases but citing cases that have applied the exception).

Congress meant to specify that Title III did not provide for statutory suppression involving electronic communications only<sup>88</sup> and that the amendment is limited to consideration of electronic communications, rather than all communications intercepted under Title III.<sup>89</sup> These commentators acknowledge that the 1986 amendment to Title III applies the full range of Fourth Amendment law, including the good faith exception, to electronic communications.<sup>90</sup>

The arguments for and against application of the good faith exception in Title III cases based on the plain language of the statute seem far from conclusive. The differing interpretations of the plain language of Title III—as to whether Fourth Amendment suppression law applies to all intercepted communications—at least serve to underscore that the statutory text does not settle the issue of whether the good faith exception should apply to reliance on wiretap orders.

### B. Title III's Legislative History

Perhaps the most telling indication that the question of the applicability of the good faith exception is not answered by the text of Title III is the heavy reliance on legislative history by courts and commentators to preclude application of the exception. These courts note that the Senate Report that accompanied Title III indicated that the statute's suppression remedy was intended to “largely reflect[ ] existing law”<sup>91</sup> and was not meant “to press the scope of the suppression role beyond present search and seizure law.”<sup>92</sup> One interpretation of these congressional statements leads to the conclusion that the good faith exception should not be applied to reliance on wiretap orders based on a simple chronology: Title III was passed in 1968 with the congressional intention of reflecting existing search and seizure law, and the Supreme Court decided *Leon* in 1986; thus, Congress could not have intended for a good faith exception to Title III's suppression remedy that did not exist at the time of the statute's enactment.<sup>93</sup> Some commentators have also adopted this argument as foreclosing application of the good faith ex-

<sup>88</sup> See Leib, *supra* note 12, at 429.

<sup>89</sup> See CARR AND BELLIA, *supra* note 13, § 6:40.

<sup>90</sup> See, e.g., Leib, *supra* note 12, at 430 (“Since Congress wanted to give no greater protection than necessary, the ‘good faith’ exception, which allows in more evidence, certainly applies when electronic communication is involved”).

<sup>91</sup> See *United States v. Ward*, 808 F. Supp. 803, 807–08 (S.D. Ga. 1992) (quoting *United States v. Giordano*, 416 U.S. 505, 524 (1974) (quoting S. REP. NO. 90-1097, at 69 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2185)).

<sup>92</sup> See *United States v. Rice*, 478 F.3d 704, 713 (6th Cir. 2007) (quoting S. REP. NO. 90-1097 at 69, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2185); see also *Ward*, 808 F. Supp. at 807–08; *United States v. Orozco*, 630 F. Supp. 1418, 1522 n.9 (S.D. Cal. 1986).

<sup>93</sup> See *Rice*, 478 F.3d at 713; *Ward*, 808 F. Supp. at 808; *Orozco*, 630 F. Supp. at 1522 n.9. For example, the court in *Orozco* stated that “Congress did not intend to bind the § 2515 remedy to whatever the state of search and seizure law is at the time of the interception.” *Orozco*, 630 F. Supp. at 1522 n.9.

ception in wiretap cases.<sup>94</sup> Courts also point out that the Congress expressed its intent in passing Title III to protect privacy by curtailing unlawful interception of wire and oral communications. Some courts see such an expression as inconsistent with application of the good faith exception.<sup>95</sup>

Not surprisingly, the same provisions of Title III's extensive legislative history can tell a different story.<sup>96</sup> For example, the congressional statement that Title III was not meant "to press the scope of the suppression role beyond present search and seizure law" could be interpreted simply as Congress's intention that suppression under Title III not be more widely available than under the then-existing search and seizure law. That statement is not necessarily a clear directive that changes to search and seizure law, such as exceptions to suppression, may not be incorporated into the statute.<sup>97</sup> Put another way, this language could be interpreted as providing a ceiling for the statutory suppression remedy—note the terms "press the scope" and "beyond"—but not a floor.

This view is strengthened when the "press the scope" statement is put into the context of the Senate Report. The Senate Report states that the suppression provision:

[L]argely reflects existing law. It applies to suppress evidence directly or indirectly obtained in violation of the chapter. There is, however, no intention to change the attenuation rule. Nor generally to press the scope of the suppression role beyond present search and seizure law. But it does apply across the board in both Federal and State proceeding [sic]. And it is not limited to criminal proceedings.<sup>98</sup>

By emphasizing the connection between Title III's suppression provision and "existing law," Congress expressed its intent to limit the scope of suppression so as to not expand the statutory suppression remedy past the state of then-present law. This intention is made clear by the report's emphasis of the applicability of the suppression remedy in federal, state, and non-criminal forums in a way that treats the preceding sentences regarding the

<sup>94</sup> See Leib, *supra* note 12, at 424; see also Boerman, *supra* note 12, at 627.

<sup>95</sup> See Ward, 808 F. Supp. at 808; Orozco, 630 F. Supp. at 1522 n.9.

<sup>96</sup> While a complete examination of the proper role of legislative history in statutory interpretation is beyond the scope of this Article, it seems uncontroversial to note that legislative history can often be used to support differing interpretations of a statute. See Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (noting agreement with Judge Harold Leventhal's description of the use of legislative history as "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends").

<sup>97</sup> Courts have interpreted the statement regarding the scope of the suppression role as indicating congressional intent "to adopt suppression principles developed in Fourth Amendment case." United States v. Moore, 41 F.3d 370, 376 (8th Cir. 1995); see also United States v. Ambrosio, 898 F. Supp. 177, 187 (S.D.N.Y. 1995) ("[I]n enacting the wiretap statute, Congress clearly intended for the statute to be applied consistently with constitutional requirements").

<sup>98</sup> S. REP. NO. 90-1097 at 96 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2185.



attenuation rule and the scope of the suppression role as limiting the exclusion provision.

Moreover, while the argument that Congress intended the suppression remedy as a means to further Title III's intent to protect privacy is supported by the legislative history,<sup>99</sup> that is only part of the story. The other stated aim of Title III was to establish a system of authorized wiretapping to combat crime.<sup>100</sup> Indeed, the Senate Report states that the "major purpose of title III is to combat organized crime."<sup>101</sup> Another part of the Senate Report reiterates that the "purpose of title III" is setting up a system that meets constitutional standards whereby law enforcement agents may obtain court orders to "tap telephone wires and install electronic surveillance devices in the investigation of major crimes."<sup>102</sup> Application of the good faith exception to reasonable reliance on facially valid wiretap orders is consistent with this stated intention of Congress in enacting Title III.

The Senate Report accompanying ECPA, the 1986 amendment to Title III, provides further indications that Congress intended to incorporate into Title III developments in Fourth Amendment law, such as the good faith exception. At least with regard to electronic communications, Congress made clear that "[i]n the event that there is a violation of the law of a constitutional magnitude, the court involved in a subsequent trial will apply the existing Constitutional law with respect to the exclusionary rule."<sup>103</sup> Tellingly, the House Report that accompanied the first version of ECPA to pass the House of Representatives included the same sentence with a citation to *Leon*.<sup>104</sup>

Some courts have gone so far as to determine that Congress intended to incorporate a good faith exception into Title III for all electronic surveillance, *i.e.*, wire, oral, and electronic communications, based on this legislative history for ECPA. For example, one court has interpreted the 1986 amendments to Title III as an "effort [by Congress] to keep the wiretap statute in line with the new developments in Fourth Amendment law."<sup>105</sup> And another court adopted the view that the 1986 amendments "clarif[ied]

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<sup>99</sup> Specifically, the Senate Report states that "[t]he [statutory suppression] provision thus forms an integral part of the system of limitations designed to protect privacy. . . . [and] should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications." *Id.*

<sup>100</sup> *Id.* at 70, reprinted in 1968 U.S.C.C.A.N. at 2153.

<sup>101</sup> *Id.* Prior to Title III, Supreme Court precedent and the federal wiretap statute then in effect, Section 605 of the Federal Communications Act, "effectively prevented" the use of direct and derivative wiretap evidence in federal or state court. *Id.* at 68, reprinted in 1968 U.S.C.C.A.N. at 2155. The Report also highlighted the support of various law enforcement organizations, state and federal attorneys general, and state and local judges for legislation granting law enforcement officers the right to use electronic surveillance. *Id.* at 75-76, reprinted in 1968 U.S.C.C.A.N. at 2163.

<sup>102</sup> *Id.* at 75, reprinted in 1968 U.S.C.C.A.N. at 2163.

<sup>103</sup> S. REP. NO. 99-541, at 23 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3577.

<sup>104</sup> H.R. NO. 99-647, at 48 (1986); see also Leib, *supra* note 12, at 429.

<sup>105</sup> See *United States v. Ambrosio*, 898 F. Supp. 177, 187 (S.D.N.Y. 1995).

that for oral, wire, and electronic communications Congress has incorporated the good faith exception for violations of a constitutional magnitude."<sup>106</sup>

C. *Role of the Courts in Interpreting Title III's Suppression Provision*

Finally, some courts have emphasized that it is improper for the judiciary to use a modification to the judicially created exclusionary rule in the context of a legislatively created suppression remedy. For example, the Sixth Circuit in *Rice* noted that courts had authority to modify the judicially created exclusionary rule, and that the Supreme Court made such a modification by creating the good faith exception, following a "judicial balancing of the social costs and benefits" of exclusion.<sup>107</sup> Title III's suppression remedy, by contrast, was created by Congress after that legislative body had already balanced the social costs and benefits of exclusion.<sup>108</sup> Thus, the Sixth Circuit concluded that the need for the judiciary to balance costs and benefits to determine if a modification to exclusion was necessary did not exist in the Title III context, and the courts should not "engraft" a good faith exception into Title III wiretap orders.<sup>109</sup>

This conclusion ignores, however, that courts have already modified the statutory suppression remedy on several occasions since its enactment. Foremost among those modifications is the Supreme Court's determination that the statute does not require suppression for "every failure to comply fully with any requirement in Title III."<sup>110</sup> Rather, statutory violations require suppression only if the portion of the statute violated "directly and substantially implement[s] the congressional intention to limit" wiretapping to authorized situations.<sup>111</sup> Thus, the Court decided to limit the statutory suppression remedy to violations of statutory provisions "intended to play a central role in the statutory scheme."<sup>112</sup> This decision by the Court, developed in the context of a determination of what constitutes "unlawfully intercepted" communications under the statute,<sup>113</sup> amounts to a modification of Title III's statutory suppression remedy, and in effect, an adoption of an exception to that remedy by deeming some violations of the statute not important enough to trigger exclusion of evidence.

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<sup>106</sup> *United States v. Ferrara*, 771 F. Supp. 1266, 1304 (D. Mass. 1991).

<sup>107</sup> *United States v. Rice*, 478 F.3d 704, 713 (6th Cir. 2007).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 712–13. The Sixth Circuit in *Rice* relied on the Second Circuit's decision in *United States v. Spadaccino*, 800 F.2d 292, 296 (2d Cir. 1986), for this reasoning. In *Spadaccino*, the Second Circuit stated that *Leon* created an exception to the judicially created exclusionary rule, but the state legislature had already weighed the "costs and benefits to determine whether evidence obtained without compliance with the Connecticut [wiretap] statute should be suppressed even where the law enforcement officers have proceeded in good faith . . ." *Id.*

<sup>110</sup> *See United States v. Chavez*, 416 U.S. 562, 574–75 (1974).

<sup>111</sup> *See United States v. Giordano*, 416 U.S. 505, 527 (1974).

<sup>112</sup> *Id.* at 528.

<sup>113</sup> *See, e.g., United States v. Donovan*, 429 U.S. 413, 432 (1976); *Giordano*, 416 U.S. at 527; *Chavez*, 416 U.S. at 574–75.

Moreover, the Court in *Scott* indicated that principles drawn from the Fourth Amendment exclusionary rule may be applicable to Title III by adopting the government's argument that "[i]n view of the deterrent purposes of the exclusionary rule," the subjective motive of government agents is relevant only after a statutory or constitutional violation of Title III has been established.<sup>114</sup> An example of courts incorporating Fourth Amendment principles in Title III cases is the widespread application of a type of "bad faith" analysis, developed in the traditional search warrant context in *Franks v. Delaware*, to affidavits filed in support of wiretap applications.<sup>115</sup> Under *Franks*, evidence can be suppressed if the government's affidavit in support of a facially valid search warrant is shown to contain materially false or misleading information, or material omissions.<sup>116</sup> Courts have almost uniformly adopted the *Franks* analysis in cases that allege falsehoods or omissions in a wiretap affidavit or application,<sup>117</sup> requiring defendants to satisfy a threshold showing of deliberate falsity or reckless disregard of the truth by the government,<sup>118</sup> despite Title III's clear directive that wiretap applications must contain a "full and complete statement of the facts and circumstances" justifying a wiretap order.<sup>119</sup> Thus, under a *Franks* analysis, a court would not deem a wiretap affidavit deficient if it omitted certain "facts and circumstances" justifying issuance of a wiretap order unless a defendant can satisfy a threshold showing that the omission was material and was a result of the government's reckless disregard of the truth.

For example, the Second Circuit, in *United States v. Bianco*,<sup>120</sup> determined that application of the *Franks* standard in Title III cases was not only consistent with the purpose of the statute's suppression remedy, but "enhance[d] the protection of the defendants, by applying to the wiretap statute an important constitutional principle that has been accepted by all courts."<sup>121</sup> Of course, application of the *Franks* standard could be characterized, perhaps charitably, as an enhanced protection insofar as it allows defendants to challenge the veracity of affidavits in support of wiretap applications as a means to suppression; application of the good faith exception to deny suppression cannot fairly be characterized in the same way. Adoption of the *Franks* analysis in wiretap cases does demonstrate, however, that judicial

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<sup>114</sup> *United States v. Scott*, 436 U.S. 128, 35–36 (1978).

<sup>115</sup> 438 U.S. 154 (1978).

<sup>116</sup> *Id.* at 171.

<sup>117</sup> *See, e.g.*, *United States v. Meling*, 47 F.3d 1546, 1553 (9th Cir. 1995) (applying *Franks* analysis to defendant's claims of false statements and omissions in government's wiretap affidavit); *United States v. Falls*, 34 F.3d 674, 681 (8th Cir. 1994) (same). For an extensive collection of cases applying *Franks* in the wiretap context, *see United States v. Ambrosio*, 898 F. Supp. 177, 188 n.14 (S.D.N.Y. 1995).

<sup>118</sup> *Ambrosio*, 898 F. Supp. at 188.

<sup>119</sup> 18 U.S.C. § 2518(b)(1) (2006).

<sup>120</sup> 998 F.2d 1112 (2d Cir. 1993).

<sup>121</sup> *Id.* at 1126.

modification of Title III's statutory exclusionary rule through adoption of Fourth Amendment principles is not without precedent.<sup>122</sup>

#### D. A Compromise Approach

In determining whether the good faith exception applies to reliance on wiretap orders, there is a third approach used by some courts that avoids the all-or-nothing conclusions considered above: The good faith exception should apply to violations of Title III that are of a constitutional magnitude but not to purely statutory violations.<sup>123</sup> Courts adopting this view distinguish between provisions of Title III intended to adopt Fourth Amendment requirements, such as probable cause, and those provisions that are "legislated supplements" to Fourth Amendment protections.<sup>124</sup> Violations of the former provisions require that the court apply "evolving constitutional exclusionary rules" under a Fourth Amendment analysis, including application of *Franks* and *Leon*, while violations of the latter purely statutory provisions would fall under Title III's statutory exclusionary rules in 18 U.S.C. §§ 2515 and 2518(10).<sup>125</sup>

Support for this analysis hinges in part on the 1986 amendments to Title III. In particular, courts point to the language of 18 U.S.C. § 2518(10)(c), which codified that nonconstitutional violations related to electronic communications were not subject to the statutory suppression remedy, as setting up a distinction between constitutional and nonconstitutional violations of the statute, "and between the exclusionary rules applicable to each."<sup>126</sup> One court determined that the "reference in subsection (10)(c) to 'nonconstitutional' violations indicates it is the contemporary understanding of Congress and the President that the judicially crafted exclusionary rule governs conduct which violates both the Fourth Amendment and the provisions of Title III which implement its requirements."<sup>127</sup>

While this compromise approach has support in Title III's legislative history and case law, it is ultimately not an ideal resolution. Critics contend that Congress did not intend through ECPA to set up differing suppression provisions for different parts of Title III.<sup>128</sup> Moreover, a partial good faith exception for Title III cases ultimately leads to unsatisfying results, although

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<sup>122</sup> The Eleventh Circuit in *United States v. Malekzadeh*, 855 F.2d 1492, 1497 (11th Cir. 1998), seems to have based its decision to apply the good faith exception in a wiretap case on the ground that the wiretap application contained no false or misleading statements under a *Franks* analysis.

<sup>123</sup> See, e.g., *United States v. Ferrara*, 771 F. Supp. 1266, 1304 (D. Mass 1991); *Ambrosio*, 898 F. Supp. at 187-88.

<sup>124</sup> See *Ferrara*, 771 F. Supp. at 1273.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.* at 1304.

<sup>127</sup> *Id.*

<sup>128</sup> For a detailed critique of the approach taken by the court in *Ferrara*, see Leib, *supra* note 12, at 426-32.

not for the reasons previously advanced by commentators. For example, one commentator noted the “absurd result” of applying the good faith exception to constitutional violations of Title III and thus potentially allowing in more evidence for a more significant violation, as opposed to the mandatory suppression required for a purely statutory, and presumably less significant, violation.<sup>129</sup> Equally absurd, however, is the result from this approach whereby the government can comply with all of the portions of the statute that comport with constitutional standards to the satisfaction of the reviewing judge, such as establishing probable cause for interception, yet not be eligible to raise good faith reliance as a basis to avoid exclusion if the application’s defect is purely statutory in nature. That is, the government can be shown to have complied with the most important parts of the statute in seeking a wiretap order, yet evidence may be suppressed for a violation of the statute that does not rise to a constitutional magnitude.

In the end, while courts have grounds to apply the good faith exception to the government’s reasonable reliance on wiretap orders under the current version of Title III, the resolution of this issue is far from clear-cut. The longstanding circuit split over this issue should spur Congress to end this uncertainty in the courts. Specifically, it is time for Congress to amend Title III and address the statute’s ambiguity by codifying a good faith exception for reasonable reliance on wiretap orders.

#### IV. CONGRESS SHOULD AMEND TITLE III TO INCLUDE A GOOD FAITH EXCEPTION FOR OBJECTIVELY REASONABLE RELIANCE ON FACIALLY VALID WIRETAP ORDERS

Congress should act to provide clarity for the courts and prosecutors by amending Title III to enshrine a good faith exception for the government’s objectively reasonable reliance on facially valid wiretap orders in initiating interception. This Part will focus on some of the normative and practical implications of such an amendment. Most notably, the deterrence rationale underlying the good faith exception is more applicable to reliance on a wiretap order because of the enhanced procedural requirements for the government to obtain a wiretap order as compared to the more lenient process by which the government receives a Rule 41 search warrant. Also, amending Title III to enshrine a good faith exception will not encourage the government to apply for more wiretaps or erode the statutory suppression remedy.

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<sup>129</sup> See Leib, *supra* note 12, at 430–31.

A. *The Deterrence Rationale Underlying the Good Faith Exception Is Even More Applicable for Title III Cases Than for Rule 41 Cases*

In establishing the good faith exception to the exclusionary rule in *Leon*, the Court noted that after a search warrant is issued, “there is literally nothing more the policeman can do in seeking to comply with the law.”<sup>130</sup> The same could be said, if not more so, about the government’s compliance with Title III in seeking wiretap orders to initiate interception of wire, oral, and electronic communications, after a district court judge has issued a wiretap authorization order. Indeed, without a good faith exception for reasonable reliance on wiretap orders, the exclusionary punishment meted out to the government for a judge’s mistake in issuing a wiretap order is more severe than when a Rule 41 search warrant is later found deficient,<sup>131</sup> and those costs of exclusion vastly outweigh any potential deterrence of non-compliance with Title III’s authorization requirements.<sup>132</sup> To be consistent with this deterrence rationale underpinning the Court’s formation of the good faith exception, however, Congress should specify that application of the exception should extend only to the government’s objectively reasonable reliance on a wiretap order in initiating interception, and would not extend to government violations related to the manner of interception or post-interception disclosures.

1. *Congress Should Weigh the Costs of Exclusion Against the Benefits of Deterrence When Considering Inclusion of a Good Faith Exception in Title III*

The exclusionary rule “serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”<sup>133</sup> The Court first emphasized in *Leon* that the good faith analysis involved weighing the costs of exclusion with the deterrence of unlawful searches.<sup>134</sup> The Court also noted that because the exclusionary rule bars the jury from considering probative and relevant evidence, it “must bear a heavy burden of justification, and must be carefully limited to the circumstances in

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<sup>130</sup> *United States v. Leon*, 468 U.S. 897, 921 (1983) (quoting *Stone v. Powell*, 428 U.S. 465, 498 (1976)).

<sup>131</sup> *See Leon*, 468 U.S. at 921 (“Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”).

<sup>132</sup> *See, e.g., id.* at 922 (holding that “substantial costs of exclusion” of evidence must be justified by more than “marginal” effect on deterrence); *Herring v. United States*, 555 U.S. 135, 141 (2009) (holding that in applying the exclusionary rule, “the benefits of deterrence must outweigh the costs” (citing *Leon*, 468 U.S. at 910)).

<sup>133</sup> *Herring*, 555 U.S. at 144.

<sup>134</sup> *See Leon*, 468 U.S. at 922 (“We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”).

which it will pay its way by deterring official lawlessness."<sup>135</sup> Thus, to merit suppression of evidence under Rule 41, the government's "conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."<sup>136</sup> The same cost-benefit analysis is informative for Congress in determining whether to amend Title III to include a good faith exception for the government's reliance on wiretap orders. Indeed, Congress already seems to have considered the deterrence side of this balancing test by establishing a statutory suppression provision to deter violations of Title III. According to the Senate Report accompanying Title III, § 2515 was intended to "guarantee that the standards of [Title III] will sharply curtail the unlawful interception of wire and oral communications."<sup>137</sup> Congress considered the deterrence of statutory violations to be an important means of furthering a primary goal of Title III, i.e., protecting privacy.<sup>138</sup>

Of course, Congress was certainly free to, and apparently did, consider goals in addition to deterrence of future violations when designing Title III's statutory suppression remedy. For example, the Supreme Court has determined Congress was also concerned with "protect[ing] the integrity of the court and administrative proceedings" by excluding illegally obtained wiretap evidence to avoid "entangl[ing] the courts in the illegal acts of Government agents."<sup>139</sup> In the context of interceptions made pursuant to a wiretap order later found to be deficient, however, the courts are already "entangled" in any illegality by having authorized the interception in the first instance. In any event, congressional interest in the integrity of the courts seems a lesser concern in the legislative record than the repeated emphasis placed by Congress on ensuring compliance with Title III's requirements through a statutory suppression provision.<sup>140</sup>

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<sup>135</sup> *Id.* at 907 n.6 (quoting *Illinois v. Gates*, 462 U.S. 213, 257–58 (1983) (White, J., concurring in judgment)) (internal quotation marks omitted).

<sup>136</sup> *Herring*, 555 U.S. at 144. Of course, how the costs and benefits of exclusion are to be calculated leaves much room for interpretation by individual judges. For instance, Justice Brennan, in his dissent in *Leon*, stated that the majority opinion "exaggerated" the costs of excluding illegally obtained evidence and made the benefits of such exclusion "disappear with a mere wave of the hand." *Leon*, 468 U.S. at 929 (Brennan, J., dissenting).

<sup>137</sup> S. REP. NO. 90-1097 at 96 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2185.

<sup>138</sup> *Id.* ("[§ 2515] thus forms an integral part of the system of limitations designed to protect privacy."). See also Francis Marion Hamilton III, Note, *Should "Clean Hands" Protect The Government Against § 2515 Suppression Under Title III of The Omnibus Crime Control and Safe Streets Act of 1968?*, 53 WASH. & LEE L. REV. 1473, 1505 (1996) (noting that courts tend to suppress wiretap evidence in cases in which suppression will deter future misconduct and that the legislative history of Title III makes such a "deterrence-based interpretation" of the statute's exclusionary rule "plausible").

<sup>139</sup> *Gelbard v. United States*, 408 U.S. 41, 51 (1972) (holding that communications illegally intercepted by government agents could not form basis for questioning of witnesses before a federal grand jury).

<sup>140</sup> See, e.g., S. REP. NO. 90-1097, at 67 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2154 (describing as the "problem" necessitating Title III "the widespread use and abuse of electronic surveillance techniques" made possible by advancing technologies).

What is lacking in the legislative record, however, is an indication that Congress gave adequate consideration to the costs of suppression under Title III. Despite that apparent omission in the deliberations over Title III, consideration of those costs is consistent with the other primary purpose of the statute: creating a uniform system under which the government may lawfully intercept electronic communications and use that evidence in a criminal prosecution.<sup>141</sup> After all, Title III was enacted to “combat organized crime.”<sup>142</sup> The expanded use of Title III beyond the traditional conception of “organized crime” to the investigation of other sophisticated criminal ventures,<sup>143</sup> such as multi-national drug trafficking organizations,<sup>144</sup> makes an examination of the costs of suppression under the statute timely and relevant. Should Congress engage in a cost-benefit analysis of exclusion under Title III, it should find that—at least in the case of the government’s reliance on a judge-issued wiretap order to initiate interception—the deterrent effect of violations of Title III’s authorization requirements is vastly outweighed by the social costs of suppression.

2. *The Deterrent Effect on Violations of Title III’s Authorization Procedures Is Minimal Given the Statute’s Detailed Requirements to Initiate Electronic Surveillance*

In the Fourth Amendment context, the culpability of government agents in committing a constitutional violation is a consideration for courts in determining whether exclusion of evidence will deter future constitutional violations.<sup>145</sup> Thus, the government may not claim good faith reliance on a search warrant if government agents acted with deliberate knowledge, be it personal or constructive, that a search was unconstitutional.<sup>146</sup> If government agents

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<sup>141</sup> *Id.* at 66, reprinted in 1968 U.S.C.C.A.N. at 2153. In listing the various law enforcement groups in support of Title III, the Senate Report described the purpose of it as creating “[l]egislation meeting the constitutional standards set out in [Berger and Katz], and granting law enforcement officers the authority to tap telephone wires and install electronic surveillance devices in the investigation of major crimes and upon obtaining a court order, . . .” *Id.* at 75, reprinted in 1968 U.S.C.C.A.N. at 2163.

<sup>142</sup> *Id.* at 70, reprinted in 1968 U.S.C.C.A.N. at 2157.

<sup>143</sup> The Senate Report accompanying Title III detailed the suspected influence of organized crime in the United States in 1968 in various illicit activities, such as gambling, narcotics distribution, and loan sharking. *See id.*, at 70–71, reprinted in 1968 U.S.C.C.A.N. at 2157–58.

<sup>144</sup> Over ninety percent of wiretap orders in calendar year 2010 pertained to narcotics offenses, while two percent related to racketeering. *See* U.S. COURTS WIRETAP REPORT (2010), <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table3.pdf> (last visited April 1, 2012).

<sup>145</sup> *See* United States v. Leon, 468 U.S. 897, 911 (“[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus” in applying the exclusionary rule). *See also* United States v. Davis, 131 S. Ct. 2419, 2427 (2011) (“The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion ‘var[y] with the culpability of the law enforcement conduct’ at issue.”) (quoting *Herring v. United States*, 555 U.S. 135, 143 (2009)).

<sup>146</sup> *See Herring*, 555 U.S. at 143. An unconstitutional search based on nonrecurring negligence will not deprive the government of the good faith exception. *Id.* at 144.



acted with an objectively reasonable belief that a search was valid, however, the good faith exception applies, since suppression would not aid deterrence of future violations.<sup>147</sup> The government’s reliance on a wiretap order is even more objectively reasonable than reliance on a Rule 41 search warrant—and thus, government agents are less culpable for any Title III violation—given the stringent procedural requirements the government must follow to lawfully intercept wire or oral communications.<sup>148</sup> Accordingly, any deterrence of Title III violations, at least as far as the statutory requirements to initiate interception, is minimal after the government has complied with Title III’s requirements to the satisfaction of the judge issuing the wiretap order.<sup>149</sup>

Title III’s enhanced procedural requirements ensure that applications to conduct electronic surveillance receive several layers of vetting within the executive branch and the judiciary. In the first instance, Title III requires authorization of a wiretap application by a designated high-level Department of Justice official before the government may seek a court order authorizing interception of wire or oral communications.<sup>150</sup> Congress also included an exclusive list of enumerated offenses for which the government may seek authorization to intercept communications.<sup>151</sup>

The DOJ’s internal procedures go above and beyond the stringent statutory requirements. For example, in implementing Title III’s requirements for DOJ authorization for any wiretap application prior to the filing of the application with the district court judge, the Department of Justice requires Assistant United States Attorneys to submit wiretap applications to the Office of Enforcement Operations (“OEO”) in the Electronic Surveillance Unit of the Criminal Division.<sup>152</sup> These application packets must include the affidavit of an authorized law enforcement agent, the application by the Assistant United States Attorney providing the jurisdictional basis for the court’s wiretap order, and the proposed wiretap order to be signed by the court.<sup>153</sup> In a recent memo to all United States Attorneys, Matthew Friedrich, then Acting Assis-

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<sup>147</sup> See, e.g., *Leon*, 468 U.S. at 922 (holding that objectively reasonable reliance on a search warrant triggers good faith exception); *Herring*, 555 U.S. at 137, 147 (holding that police reliance on warrant database later found to be in error was objectively reasonable).

<sup>148</sup> Congress codified the procedural requirements for wiretaps primarily in 18 U.S.C. §§ 2516 and 2518. For a useful overview of the wiretap procedural requirements discussed briefly in this Article, see *Thirty-Ninth Annual Review of Criminal Procedure*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 140 (2010).

<sup>149</sup> One commentator, in ranking the threshold required of the government to receive a wiretap order above the requirements for a Rule 41 search warrant, categorized wiretaps as “super” search warrants. See Orin S. Kerr, *Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn’t*, 97 NW. U. L. REV. 607, 620 (2003).

<sup>150</sup> 18 U.S.C. § 2516(1) (2006). As amended, Title III requires the United States Attorney General, and designated deputies or assistant attorneys general in the criminal or national security divisions, to authorize an application for wire or oral communications. *Id.*

<sup>151</sup> 18 U.S.C. § 2516(1)(a)–(s) (2006).

<sup>152</sup> OFFICES OF THE UNITED STATES ATTORNEYS, CRIMINAL RESOURCE MANUAL: ELECTRONIC SURVEILLANCE, at 9-7.110, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/7mcrim.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/7mcrim.htm).

<sup>153</sup> *Id.*

tant Attorney General for the Criminal Division, outlined further requirements for DOJ authorization of wiretap applications.<sup>154</sup> For example, an attachment to the memo states that DOJ will not consider applications with stale telephone records for the target telephone<sup>155</sup> or packets submitted by federal agents “without the review of an AUSA.”<sup>156</sup> Another attachment contains a detailed checklist for agents and AUSAs to follow in drafting wiretap affidavits that will receive DOJ approval.<sup>157</sup>

Regarding the contents of the government’s wiretap application, Title III requires that it include specific information.<sup>158</sup> For example, the application must identify the law enforcement officer making the application and the Department of Justice official who authorized it.<sup>159</sup> Also, the application must include a “full and complete statement” of the following facts and circumstances justifying a wiretap order: (1) the details of the alleged offense;<sup>160</sup> (2) a particular description of the facilities from which interceptions will occur;<sup>161</sup> (3) a particular description of the type of communications to be intercepted;<sup>162</sup> and (4) the identity of the person, if known, committing the offense and whose communications are to be intercepted.<sup>163</sup> The government must also inform the court what other investigative techniques have failed or are likely to fail,<sup>164</sup> the requested time period for interception, including facts establishing probable cause for ongoing interception of communications after the first-obtained interception relating to the alleged offense,<sup>165</sup> and a statement of all previous wiretap applications known to the applicant involving the same person or facilities.<sup>166</sup>

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<sup>154</sup> *Memorandum re Title III Procedures*, CRIMINAL RESOURCE MANUAL (July 11, 2008), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00089.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00089.htm).

<sup>155</sup> The DOJ considers telephone records to be “stale” if the records do not show that the target telephone has been used to further one of enumerated target offenses in Title III within the last twenty-one days of the expected date of approval of the application by DOJ, and if the records do not show that the phone has been used for any purpose within the last ten days of the application’s expected approval date. See OFFICES OF THE UNITED STATES ATTORNEYS, CRIMINAL RESOURCE MANUAL 90: TITLE III PROCEDURES—ATTACHMENT A: REQUIREMENTS FOR REVIEW OF WIRETAPS, effective 8/1/08 (2009), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00090.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00090.htm).

<sup>156</sup> *Id.*

<sup>157</sup> OFFICES OF THE UNITED STATES ATTORNEYS, CRIMINAL RESOURCE MANUAL 92: TITLE III PROCEDURES—ATTACHMENT C: TITLE III WIRE AFFIDAVIT CHECKLIST FOR LAW ENFORCEMENT AGENTS (2008), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00092.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00092.htm).

<sup>158</sup> 18 U.S.C. § 2518(1) (2006).

<sup>159</sup> *Id.* § 2518(1)(a).

<sup>160</sup> *Id.* § 2518(1)(b)(i).

<sup>161</sup> *Id.* § 2518(1)(b)(ii).

<sup>162</sup> *Id.* § 2518(1)(b)(iii).

<sup>163</sup> *Id.* § 2518(1)(b)(iv).

<sup>164</sup> *Id.* § 2518(1)(c) (2006). 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).

<sup>165</sup> 18 U.S.C. § 2518(1)(d) (2006).

<sup>166</sup> *Id.* § 2518(1)(e). If the application is to extend wiretap authorization past the initial period of interception, the application must also set forth the results obtained from the prior interception or an explanation for the failure to obtain results. *Id.* § 2518(1)(f).

In addition to the requirements that the government must satisfy to make an application for interception and the information to be included in an application, Congress established the procedures courts must follow in considering wiretap applications.<sup>167</sup> A court must make specific findings that the government’s application has satisfied specific requirements of Title III before exercising its discretion to issue a wiretap order, including: (1) probable cause that the alleged offense enumerated in Title III is or will be committed;<sup>168</sup> (2) probable cause that interception will yield communications about the offense;<sup>169</sup> (3) a wiretap is necessary because “normal investigative procedures” have failed or are likely to fail;<sup>170</sup> and (4) the facility from which communications will be intercepted has been or will be used in connection with the alleged offense.<sup>171</sup> To assist in the fact-finding process, a judge is free to require the applicant to provide additional testimony or evidentiary support for the application.<sup>172</sup>

If a judge makes the statutorily required findings, the court order authorizing interception must include the identity of the person, if known, whose communications will be intercepted,<sup>173</sup> the nature and location as to which interception is allowed,<sup>174</sup> a description of the types of communications to be intercepted,<sup>175</sup> the particular enumerated offense involved,<sup>176</sup> the identity of the agency authorized to conduct the interception and of the person authorizing the application,<sup>177</sup> and the time period of interception.<sup>178</sup> The judge may also require the government to make reports as to the progress and continued need for interception as frequently as the judge desires,<sup>179</sup> in part to monitor government compliance with its duty to minimize the interception of communications that do not fall within the authorization granted by the order.<sup>180</sup>

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<sup>167</sup> 18 U.S.C. § 2518 (2006).

<sup>168</sup> *Id.* § 2518(3)(a).

<sup>169</sup> *Id.* § 2518(3)(b).

<sup>170</sup> *Id.* § 2518(3)(c).

<sup>171</sup> *Id.* § 2518(3)(d).

<sup>172</sup> *Id.* § 2518(2).

<sup>173</sup> *Id.* § 2518(4)(a).

<sup>174</sup> *Id.* § 2518(4)(b).

<sup>175</sup> *Id.* § 2518(4)(c).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* § 2518(4)(d).

<sup>178</sup> *Id.* § 2518(4)(e). The time period of interception may not exceed thirty days. *See id.* § 2518(5).

<sup>179</sup> *Id.* § 2518(6). Judges typically require reports from the government as to the investigatory progress every ten or fifteen days during the period of interception. *See, e.g.*, *United States v. Bustamante*, 493 F.3d 879, 888 (7th Cir. 2007) (describing use of ten-day progress reports).

<sup>180</sup> 18 U.S.C. § 2518(5) (2006). The government has additional duties following the expiration of a wiretap order. For example, to preserve the integrity of the intercepted communications, “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, although the government may make duplicate recordings for use in its investigation or prosecution. *Id.* §§ 2518(8)(a); 2517(1)–(2). Moreover, within ninety days of the termi-

The detailed nature of the requirements for obtaining authorization for electronic surveillance under Title III becomes readily apparent when compared to the relatively low bar the government must pass to receive a search warrant under Rule 41. For example, to search for and seize property under Rule 41, the government must only show probable cause that the search will reveal evidence of a crime, including property used or intended to be used in committing a crime, contraband, or the fruits of a crime.<sup>181</sup> This contrasts sharply with the government's dual showing of probable cause required for a wiretap—probable cause that a specified crime is or will be committed and probable cause that interceptions will yield evidence about the offense—and the additional showing that a wiretap is necessary because other investigative techniques have failed.<sup>182</sup> Also, a Rule 41 warrant must specify only the person or property to be searched and seized, and the magistrate judge to whom the warrant should be returned,<sup>183</sup> as opposed to the full and complete statement of facts needed to justify a wiretap order. Moreover, Rule 41 does not require Department of Justice authorization for the government's decision to seek a warrant, as is required for a wiretap. In fact, any federal law enforcement officer may apply for a Rule 41 search warrant to a magistrate judge, or if none is available, to a state court judge in the district of the proposed search.<sup>184</sup> And the law enforcement officer may apply for the warrant on a sworn affidavit or by sworn testimony in-person or over the telephone to the magistrate judge.<sup>185</sup>

If the government can be said to have reasonably relied on a Rule 41 search warrant, which is relatively easy to obtain, it follows logically that the government's reliance on a wiretap order obtained by following all of Title III's detailed requirements is equally, if not more, reasonable. Put another way, due to the multiple layers of review of the government's compliance with Title III's requirements to initiate interception—both within the Department of Justice and the judiciary—the good faith exception, and the deterrence considerations behind it, makes even more sense in the electronic surveillance context.<sup>186</sup> There would seem to be little impact on deterring non-compliance with Title III's authorization requirements when agents and

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nation of the interception period, the government must provide notice to those persons named in the wiretap order disclosing the existence of the order and whether or not that person's communications were intercepted. *Id.* § 2518(8)(d).

<sup>181</sup> FED. R. CRIM. P. 41(c)–(d).

<sup>182</sup> 18 U.S.C. § 2518(3)(a)–(c).

<sup>183</sup> FED. R. CRIM. P. 41(e)(2)(A).

<sup>184</sup> FED. R. CRIM. P. 41(b).

<sup>185</sup> FED. R. CRIM. P. 41(d).

<sup>186</sup> A similar argument was rejected by at least one court shortly after the good faith exception was created in *Leon*. See *United States v. Orozco*, 630 F. Supp. 1418 (S.D. Cal. 1986). The court determined that the Supreme Court did not intend to modify Title III's statutory suppression remedy in *Leon*, and it could not do so without "congressional indication" that the good faith exception should apply to reliance on Title III orders. *Id.* at 1522. That court considered only the government's argument that the good faith exception should apply under the existing version of Title III, however. See *id.* at 1521–22.

AUSAs have followed all of the detailed procedural requirements of the statute to the satisfaction of the reviewing federal district court judge and obtained a wiretap order.<sup>187</sup> As noted by one member of the defense bar, a later determination by another district court judge that a wiretap application lacked sufficient probable cause or necessity is, in some ways, simply the substitution of one judge's interpretations of those terms for another to the benefit of a defendant.<sup>188</sup>

Admittedly, the lack of deterrent benefit is limited to the government's actions in seeking authorization to conduct electronic surveillance and does not extend to the government's compliance with requirements related to the conduct of interception or its duties following expiration of a wiretap order. The distinction is clear: Unlike the judicial blessing of the government's wiretap application to initiate interception, the government receives no such prior judicial approval for its actions in conducting the interception or sealing recordings. While some of the government's methods in implementing the interception order are subject to limited judicial oversight during the course of interception, e.g., the progress reports that judges may require,<sup>189</sup> the government's actions following authorization of electronic surveillance are necessarily subject to post hoc review. Thus, suppression of wiretap evidence for government violations of statutory requirements related to how the electronic surveillance is conducted and the how the government complied with various sealing and notice requirements following interception would likely aid deterrence of future violations.

Because the deterrence of post-authorization violations can be served through suppression, Congress should specify that a good faith exception for Title III applies to the government's objectively reasonable reliance on a wiretap order in initiating interception only and not to government violations post-authorization. For example, if facing a suppression motion for violations of the statutory requirement to seal the original intercepted recordings before the authorizing judge under 18 U.S.C. § 2518(8)(a), the government should not be able to argue that it intended in good faith to seal the recordings and avoid suppression.<sup>190</sup> That would extend the application of the good

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<sup>187</sup> See *United States v. Leon*, 468 U.S. 897, 920–21 (1983); see also CARR & BELLIA, *supra* note 13, § 6:37 (arguing that the government's actions in seeking a wiretap order may be more susceptible to deterrence than the "search warrant obtained and executed in haste").

<sup>188</sup> Jonathan M. Abramson, *Challenging Federal Wiretaps*, 34 *COLO. LAW.* 73, 75 (2005) (stating that in circuits applying a *de novo* standard of review to wiretap applications in suppression hearings, defendants were successful in suppressing evidence "most often when the judge reviewing the wiretap order interpreted the necessity requirement more strictly than the issuing judge") (citation omitted).

<sup>189</sup> 18 U.S.C. § 2518(6) (2006). To a certain extent, the government's methods in conducting interception may be subject to judicial review when the government seeks an order authorizing extension of a previous wiretap order. See 18 U.S.C. § 2518(5) (2006) (outlining the process by which the government may apply for an extension of a wiretap order).

<sup>190</sup> Under Title III, the government may, however, avoid suppression for a sealing violation if it offers the judge a "satisfactory explanation" for the delay in sealing. See 18 U.S.C. § 2518(8)(a) (2006).

faith exception beyond its foundation deterrence rationale that an officer should not be punished for the errors of a judge.<sup>191</sup> Thus, a good faith exception amendment to Title III should be limited to those situations where a judge-issued wiretap order is later found to be deficient for lack of probable cause or necessity, or some other statutory requirement for its issuance.

### 3. *The Costs of Evidence Exclusion Vastly Outweigh Any Deterrent Benefits in Title III Cases*

The case for applying the good faith exception to the government's objectively reasonable reliance on wiretap orders becomes even stronger when the social costs of excluding wiretap evidence are weighed against the marginal deterrent benefits discussed above. As an initial matter, just as in Rule 41 search cases, the chief cost of exclusion of wiretap evidence is letting defendants who are guilty of a crime go free.<sup>192</sup> Not surprisingly, suppression of intercepted communications in which the defendant is recorded discussing specific events, such as drug associates discussing a shipment or sale, often deprives the government of the evidence needed to sufficiently link that defendant to the criminal activity.<sup>193</sup> And because wiretap cases may involve investigation of criminal organizations involved in violent crimes,<sup>194</sup> the societal costs of dismissing an indictment against those types of defendants for lack of evidence following exclusion of recorded calls may be even higher.

Unique aspects of electronic surveillance cases enhance the costs of suppression in a wiretap investigation as well. As previously noted, wiretap investigations tend to target criminal enterprises, such as drug trafficking or

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<sup>191</sup> See *United States v. Leon*, 468 U.S. 897, 921 (1983) (“Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”).

<sup>192</sup> See *Herring v. United States*, 555 U.S. 135, 141 (2009) (“The principle cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free—something that ‘offends the basic concepts of the criminal justice system.’” (quoting *Leon*, 468 U.S. at 908)).

<sup>193</sup> See S. REP. NO. 90-1097 at 73–74, reprinted in 1968 U.S.C.A.N. at 2160–61 (discussing the evidentiary benefit to the prosecution of recording conversations of co-conspirators discussing criminal activities and stating that authorized electronic surveillance is an “indispensable legal tool[ ]”).

<sup>194</sup> Of the 1207 federal wiretap orders issued in calendar year 2010, the vast majority, 1128, were for narcotics offenses. Ten wiretap orders were authorized for investigation of clearly violent crimes, such as homicide and assault, and twenty-five were authorized for racketeering offenses, which may have involved violent predicate acts attributed to the racketeering organization. See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRETAP REPORT (2010) 17–19, tbl.3, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table3.pdf> (last visited April 6, 2012). Of course, narcotics offenses may also involve firearms, as evidenced by the over 1500 federal criminal cases commenced in 2010 against defendants charging use of a firearm in furtherance of a violent or drug-trafficking crime under 18 U.S.C. § 924(c). See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2010) 80–83, tbl.D-2, <http://www.uscourts.gov/Viewer.aspx?doc=/Uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/D02CMar10.pdf> (last visited April 6, 2012).

racketeering organizations.<sup>195</sup> As a result, the investigations are often methodical and protracted, may be months and years in the making,<sup>196</sup> and may involve a number of federal agents and local law enforcement officials.<sup>197</sup> Indeed, the government will have been engaged in an extensive investigation prior to the wiretap phase to satisfy Title III’s necessity requirement by showing the ineffectiveness of other traditional investigative techniques, such as pen registers,<sup>198</sup> trap-and-trace devices,<sup>199</sup> search warrants, and the use of confidential informants.<sup>200</sup> The wiretap phase of the investigation alone may take several months, if extensions of wiretap orders are sought and granted.<sup>201</sup> Moreover, prosecutors may not seek an indictment or arrest warrant until months following expiration of the last wiretap order, since these investigations involve many facts, numerous potential charges, and multiple defendants.<sup>202</sup>

Due to the length of many wiretap investigations from interception to indictment, a judicial ruling on a later-filed suppression motion may come years after conclusion of the wiretap phase of an investigation.<sup>203</sup> All the

<sup>195</sup> See *supra* notes 142–144 and accompanying text.

<sup>196</sup> See, e.g., *United States v. Rivera*, 527 F.3d 891, 896–97 (9th Cir. 2008) (describing a federal investigation of a drug trafficking organization that commenced in August 2003, but did not proceed to authorized wiretap interceptions until March 2005).

<sup>197</sup> See, e.g., *United States v. Shryock*, 342 F.3d 948, 959–61 (9th Cir. 2003) (describing in general terms a wiretap investigation and prosecution of the Mexican Mafia that resulted in an eight-month trial with 125 witnesses).

<sup>198</sup> A “pen register” allows the government to record the numbers dialed by a particular telephone, but it does not record the contents of any communications. See 18 U.S.C. § 3127(3) (2006 & Supp. IV 2010). The government is required to obtain a court order before installing a pen register. See 18 U.S.C. § 3121 (2006).

<sup>199</sup> A “trap and trace device” allows the government, pursuant to a court order, to record the incoming telephone numbers of calls received by a telephone. See 18 U.S.C. § 3127(4) (2006 & Supp. IV 2010); see also 18 U.S.C. § 3121 (2006).

<sup>200</sup> See 18 U.S.C. § 2518(1)(c) (2006). The necessity requirement is not an insurmountable standard for the government to satisfy, however. 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 alternative before obtaining a wiretap.’” (quoting *United States v. McGuire*, 307 F.3d 1192, 1196–97 (9th Cir. 2002))).

<sup>201</sup> For example, in calendar year 2010, federal district court judges issued 543 orders extending the 641 wiretaps initiated by the government, resulting in 23,487 days the wiretaps were in operation. See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRETAP REPORT (2010) 13–16, tbl.2, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table2.pdf> (last visited April 6, 2012).

<sup>202</sup> The 641 wiretaps authorized by federal district court judges in 2010 resulted in the arrest of 2,252 defendants. The Wiretap Report 2010 issued by the United States Courts notes that “[c]onvictions resulting from an intercept often do not occur within the same year in which the intercept was first reported.” See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRETAP REPORT (2010) 27–30, tbl.6, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table6.pdf> (last visited April 6, 2012).

<sup>203</sup> As of December 31, 2010, at least six suppression motions were pending for interceptions that terminated sometime between 2001–2009. See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRETAP REPORT (2010) 32–36, tbl.8, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table8.pdf> (last visited April 6, 2012). *Id.* at 30, n.\*\*\*, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table6.pdf> (last visited April 6, 2012).

while the government has relied on the lawfulness of the evidence gathered by a wiretap, and has continued to marshal that evidence for prosecution, because government agents were authorized by a court order to conduct the interception.<sup>204</sup> Should that wiretap application be found deficient by another judge ruling on a suppression motion,<sup>205</sup> the government will have incurred tremendous opportunity costs related to the long hours spent by agents on a case that will come to an abrupt end without a conviction, most likely by the government dismissing the indictment following suppression of the wiretap evidence.<sup>206</sup> While the government may have succeeded in disrupting a criminal organization or removing guns and drugs from the streets even without a conviction, society's goal of punishing wrongdoers goes unfulfilled and countless investigative hours will have been diverted from other worthwhile investigations.

When these hefty societal costs are balanced against the marginal deterrent benefit related to violations of Title III's authorization procedures, it becomes clear that exclusion of wiretap evidence does not "pay its way" by deterring Title III violations when the government has sought and received a wiretap order.<sup>207</sup> As a result, Congress should amend Title III to include a good faith exception for the government's objectively reasonable reliance on a facially valid wiretap order in initiating electronic surveillance.

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<sup>204</sup> The amount of evidence gathered during a typical interception period may require significant effort to catalogue and organize. For example, each wiretap initiated by the government in 2010 resulted in an average of 121 persons intercepted and 3,463 intercepted communications, of which 655 were deemed incriminating. See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRETAP REPORT (2010) 20–23, tbl.4, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table4.pdf> (last visited April 6, 2012).

<sup>205</sup> Of course, this suppression scenario is distinguished from the one in which the government is found under a *Franks* analysis to have included false or misleading statements in a wiretap application. In that instance, the government would not be able to rely on the good faith exception. See *United States v. Leon*, 468 U.S. 897, 923 (1983) (citing to *Franks v. Delaware* for holding that the good faith exception does not apply where affiant included misleading statements or statements in reckless disregard of the truth, 438 U.S. 154 (1978)); see also *United States v. Puckett*, 466 F.3d 626, 630 (8th Cir. 2006) (recognizing inapplicability of good faith exception if court finds a *Franks* violation).

<sup>206</sup> Aside from the lost agent hours, the government also will have made a significant investment in money and other resources during the course of the wiretap. Each interception period authorized by a federal wiretap order, which typically lasts thirty days, costs over \$63,000 on average. That results in nearly \$41 million in budget expenditures for the 641 wiretaps initiated in calendar year 2010. See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRETAP REPORT (2010) 24–26, tbl.5, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table5.pdf> (last visited April 6, 2012). While that figure may not sound like much in terms of the overall federal law enforcement budget, any funds expended for a wiretap that is later invalidated are basically sunk costs that could have been spent on other investigations.

<sup>207</sup> See *Leon*, 468 U.S. at 907–08 n.6 (White, J., concurring in the judgment) (quoting *Illinois v. Gates*, 462 U.S. 213, 257–58 (1983)).



B. *A Good Faith Exception Will Not Increase the Government's Use of Wiretaps or Swallow the Statutory Suppression Remedy*

The chief concern of critics of a good faith amendment to Title III seems to be that inclusion of a good faith exception will lead to more wiretapping and cause the government to be less vigilant in complying with Title III requirements, all at the expense of privacy rights of individual citizens.<sup>208</sup> In large part, this concern mirrors a contemporary criticism of *Leon*, i.e., the good faith exception provides an incentive for law enforcement officers and magistrates to approach the warrant process with less diligence.<sup>209</sup> While this potential effect is important to consider, there is little reason to believe that including a good faith exception in Title III will expand the government's use of, or lead to an abuse of, the federal wiretap statute.

As an initial matter, the substantial costs of a wiretap investigation, including the agent hours, funds, and resources discussed above, provides a natural limiting function on the number of wiretaps the government can pursue. That the government uses its wiretapping authority judiciously may seem somewhat counterintuitive, since a recording of a defendant discussing his crimes is some of the best evidence a prosecutor could hope to acquire. But a quick review of the statistics assembled under Title III supports that conclusion.<sup>210</sup> For example, while the number of wiretaps initiated by the federal investigators trended upward from 2000 to 2004, the next five years saw a steady decline.<sup>211</sup> Despite a recent spike in the number of wiretaps initiated, from 337 in 2009 to 641 in 2010,<sup>212</sup> the federal government commenced interception less than seven times on average in each of the country's ninety-four judicial districts.<sup>213</sup> In effect, the number of wiretaps in most districts was well below seven, and the number of intercepts varied widely by district. For example, the Eastern District of North Carolina had only one authorized wiretap order in 2010, with no actual intercepts; in contrast, the Central District of California had sixty-one authorized wiretap orders with sixty reported intercepts.<sup>214</sup> It is hard to imagine that a good faith exception to suppression would somehow cause a rush of wiretap applications by fed-

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<sup>208</sup> See Leib, *supra* note 11, at 434–37.

<sup>209</sup> See *Leon*, 468 U.S. at 956–58 (Brennan, J., dissenting); *id.* at 974 (Stevens, J., dissenting).

<sup>210</sup> Courts and the Department of Justice are required to file reports each January outlining information about the number of wiretap orders and extensions issued the previous year. See 18 U.S.C. § 2519 (2006 & Supp. IV 2010).

<sup>211</sup> See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRE-TAP REPORT (2010) 31, tbl.7, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table7.pdf> (last visited April 6, 2012).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRE-TAP REPORT (2010) 38–39, tbl.10, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table10.pdf> (last visited April 6, 2012).

eral agents and prosecutors. In fact, we already have the benefit of history to suggest otherwise. Since Congress passed the 1986 ECPA amendments to Title III, which, at a minimum, incorporated the good faith exception to interception of electronic communications,<sup>215</sup> the number of applications seeking to intercept e-mails remains a small fraction of the total number of wiretap applications.<sup>216</sup>

If anything, inclusion of a good faith exception for reliance on wiretap orders may lead to increased compliance with Title III's procedures and a more rigorous review of wiretap applications within the Department of Justice. Prosecutors and government agents will know that the availability of a good faith exception will lead to increased scrutiny of affidavits for false or misleading statements, because that will be the primary way for defendants to gain suppression, since the good faith exception would not be applicable in the context of a *Franks* analysis.<sup>217</sup> In that way, the incentive for government agents and prosecutors to avoid false statements or omissions in an affidavit will increase.<sup>218</sup>

Similarly, judges may be more inclined to enhance scrutiny of wiretap applications if they approach that task with the knowledge that government agents may rely in good faith on any wiretap order issued.<sup>219</sup> Judges tasked with reviewing wiretap applications may properly view themselves as the final check on the government's wiretapping authority, absent some later showing of misrepresentation or material omission in an affidavit. Undoubtedly, some judges may feel less constrained in issuing wiretap orders if intercepted calls will be admissible based on the government's good faith reliance, regardless of the validity of the judge's determination that probable cause and necessity were sufficiently established. Justice Brennan raised just

<sup>215</sup> See *supra* Part III.A–B.

<sup>216</sup> For instance, of the 641 wiretaps initiated by the federal government in 2010, only five involved electronic communications exclusively and one included a combination of electronic, wire, and oral communications. See JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WIRETAP REPORT (2010) 27–30, tbl.6, <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2010/Table6.pdf> (last visited April 6, 2012).

<sup>217</sup> See *Franks v. Delaware*, 438 U.S. 154, 171 (1978); see also Abramson, *supra* note 188, at 75–76 (noting that “a defendant’s most viable option for challenging a wiretap authorization is probably a so-called *Franks* challenge”).

<sup>218</sup> Congress seemed to envision some level of self-policing by the government in seeking wiretap orders, in any event. Despite the detailed procedural requirements regarding the information to be contained in an application and the enumerated crimes for which an application may be sought, Title III contains no details regarding the quality of the review by a senior Department of Justice official authorizing the government’s application. See 18 U.S.C. § 2516 (2006). *But see* CARR & BELLIA, *supra* note 13, § 4:11 (arguing that such an examination of the sufficiency of review “would not be wholly without precedent”); Charles A. Pulaski, *Authorizing Wiretap Applications Under Title III: Another Dissent to Giordano and Chavez*, 123 U. PA. L. REV. 750, 813–15 (arguing that courts should scrutinize the adequacy of the review by the authorizing government official).

<sup>219</sup> While critics of federal wiretapping authority tend to point out that all, or nearly all, wiretap applications submitted by the government are approved, it is not clear if this is a function of “rubber-stamping” of wiretap orders by federal judges or the effectiveness of the pre-application review process within the Department of Justice. See *supra* Part IV.A.2.

such a concern in his dissent in *Leon*, speculating that magistrate judges would take less care in issuing warrants because of the good faith exception.<sup>220</sup> Concerns about the judiciary shirking its duty in scrutinizing search warrant applications seems tinged with the belief that the *Leon* Court placed too much optimism in the role of magistrates in the warrant process.<sup>221</sup> To the extent such a concern was specific to magistrate judges, however, it has less relevance in the context of wiretap orders, since applications for wiretaps must be reviewed by district court judges and not magistrates.<sup>222</sup> Moreover, wiretap applications would still be subject to rigorous analysis by a second district court judge in response to any *Franks* challenge raised by a defendant in a suppression motion.<sup>223</sup>

Even if a good faith exception is unlikely to prompt more government wiretapping, will the public's belief that Congress has granted the government expanded wiretapping authority change how people use electronic communications? One commentator has suggested that the perception that the government may more readily conduct electronic surveillance will lead the public to conclude that privacy rights have been eroded and chill the public's use of e-mail.<sup>224</sup> Specifically, this argument, in the context of the amendments to Title III in 1986 that excluded electronic communications from statutory suppression, and thus included the good faith exception for such communications, was that people would stop using e-mail if users realize that it is more easily intercepted by the government.<sup>225</sup> Again, the benefit of history shows that this is not the case. Since Congress passed ECPA in 1986, use of the Internet and e-mail has exploded in the United States.<sup>226</sup> The

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<sup>220</sup> See *United States v. Leon*, 468 U.S. 897, 956 (1983) (Brennan, J., dissenting).

<sup>221</sup> See *id.* at 969–72 (Stevens, J., dissenting); Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It A Fair Trial?*, 22 AM. CRIM. L. REV. 85, 105–12 (1984) (arguing that the *Leon* majority engaged in “[s]anctifying the [m]agistrate.”).

<sup>222</sup> See *In re United States*, 10 F.3d 931, 938 (2d Cir. 1993) (holding that district court judges are not authorized under Title III to delegate review of wiretap applications to magistrate judges).

<sup>223</sup> In this way, wiretap applications would still be subject to the adversarial process of a suppression motion, even though wiretap applications are submitted *ex parte*. See 18 U.S.C. § 2518(3) (2006).

<sup>224</sup> See Leib, *supra* note 12, at 414–15, 438.

<sup>225</sup> *Id.*

<sup>226</sup> According to one study conducted by the Pew Research Center, from June 1995 to August 2011, the percentage of U.S. adults who have used the internet rose from about fifteen percent to seventy-eight percent. *Internet Adoption, 1995–2011*, PEW INTERNET & AMERICAN LIFE PROJECT, <http://pewinternet.org/Trend-Data/Internet-Adoption.aspx> (last visited April 1, 2012). Of the U.S. adults who use the Internet, over ninety percent have used it to send or receive e-mail, see *What Internet Users Do Online*, PEW INTERNET AND AMERICAN LIFE PROJECT, <http://pewinternet.org/Trend-Data/Online-Activities-Total.aspx> (last visited April 1, 2012), and over sixty percent do so on a daily basis, see *What Internet Users Do on an Average Day*, PEW INTERNET & AMERICAN LIFE PROJECT, <http://pewinternet.org/Trend-Data/Online-Activities-Daily.aspx> (last visited April 6, 2012). Of course, the use of e-mail may decline or shift in various demographic groups for reasons other than concerns about government surveillance. See, e.g., Amanda Lenhart, *Facebook Messages—Some Say It's an Email Killer, Others Disagree; Pew Internet Data Shows Us Where Email Stands Today Among Youth*, PEW INTERNET & AMERICAN LIFE PROJECT, (Nov. 16, 2010), available at <http://pew>

public's expanded use of e-mail has continued unabated, despite well-publicized breaches of security involving e-mail providers and other companies who hold customers' private electronic data.<sup>227</sup>

There is also little reason to fear that inclusion of a good faith exception, if properly limited by Congress, will render the statutory suppression remedy meaningless.<sup>228</sup> As argued above, Congress should specify that the good faith exception included in Title III applies only to objectively reasonable reliance on facially valid wiretap orders in initiating interception. Such a limited good faith exception would still leave the government's non-compliance with its duties in conducting the interception or with post-interception requirements related to sealing and disclosures subject to statutory suppression.<sup>229</sup>

Similarly, inclusion of a good faith exception need not open the door to other exceptions to exclusion.<sup>230</sup> Congress can make clear in any amendment to Title III that, while the good faith exception is to be applied, Title III does not incorporate all of Fourth Amendment exclusionary law whole cloth. In any event, the good faith exception seems uniquely qualified for application in the wiretap context, in a way that other recognized exceptions to the Fourth Amendment's exclusionary rule do not. For instance, the good faith exception contemplated here involves the government's reasonable reliance on a judge-issued wiretap order; in those types of cases, the government would have followed Title III's lengthy requirements to apply for and receive an order authorizing electronic surveillance. Thus, various recognized exceptions to the warrant requirement, such as a search based on consent,<sup>231</sup> have no applicability to wiretap cases. Moreover, to the extent another exception

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internet.org/Commentary/2010/November/Pew-Internet-Data-Provides-Context-for-the-Facebook-Messages-Announcement.aspx (noting that while teenagers tend to use text messaging and social networking sites, e-mail use has not stopped completely).

<sup>227</sup> There are numerous recent examples of prominent e-mail hacking stories in the media. See, e.g., Salvador Rodriguez, *Hillary Clinton Says FBI Will Probe Gmail Hacker Attack*, LOS ANGELES TIMES, June 3, 2011, <http://articles.latimes.com/2011/jun/03/business/la-fi-china-hackers-20110603>. Also, breaches of private customer data held by companies and other high-profile hacking incidents are widely reported in the media. See, e.g., Victoria McGrane & Randall Smith, *Hacking At Citi Is Latest Data Scare*, WALL ST. J., June 9, 2011, <http://online.wsj.com/article/SB10001424052702304778304576375911873193624.html>; *An Anonymous Foe: Hackers Hit Big Companies, the IMF, and the Headlines*, ECONOMIST, June 16, 2011, available at <http://www.economist.com/node/18836210> (examining whether the belief that there has been an upswing in hacking activity is a result of more hacking incidents or better reporting of incidents and more extensive media coverage).

<sup>228</sup> See Leib, *supra* note 12, at 435 (arguing that a good faith exception, if interpreted too broadly, would "swallow" the statutory suppression remedy in Title III).

<sup>229</sup> For example, the government's failure to seal recordings in a timely fashion pursuant to 18 U.S.C. § 2518(8) (2006) would still be subject to the statutory suppression remedy, even with a good faith exception for reliance on wiretap orders related to the initiation of interception.

<sup>230</sup> See Leib, *supra* note 12, at 436 (arguing that Supreme Court has already made "considerable concessions to law enforcement interests" in ruling that violations of provisions that are not "central" to Title III do not warrant suppression (quoting *United States v. Chavez*, 416 U.S. 562, 572, 574-76 (1974))).

<sup>231</sup> See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

to the exclusionary rule may be applicable to electronic surveillance, the statute already has a provision addressing it or courts have recognized the exception. For example, Congress included a procedure in Title III by which the government can begin interception in emergency situations and then subsequently apply for a wiretap order,<sup>232</sup> which is similar to an officer's warrantless entry based on exigent circumstances in the Fourth Amendment context.<sup>233</sup> Also, the Sixth Circuit has adopted a "plain hearing" doctrine in wiretap cases that is analogous to the "plain view" doctrine in the Fourth Amendment context.<sup>234</sup> In crafting a "plain hearing" exception in wiretap cases, the Sixth Circuit held that the government was allowed to use evidence of an oral conversation overheard by government agents through a lawfully wiretapped telephone that had been left off the hook by the defendant.<sup>235</sup> The court reached this conclusion by analogizing to the plain view exception to exclusion under the Fourth Amendment, which allows officers to make warrantless seizures of evidence in plain view if it is "immediately apparent" that the item is evidence or contraband.<sup>236</sup>

The good faith exception fits within the framework of these already recognized "exceptions" to Title III's exclusionary provision, along with the Supreme Court's determination that only violations of core statutory provisions merit suppression, in that in each instance, the government will have sought and received a facially valid wiretap order from a federal judge. Viewed in that light, amending Title III to include a good faith exception for objectively reasonable reliance on a wiretap order is not a radical extension of the government's wiretapping authority; rather, such an amendment is a necessary step by Congress to lessen the tension between the statute's dual purposes of protecting privacy rights while providing the government with an important tool for criminal investigations.

## V. CONCLUSION

The uncertainty in the courts regarding the applicability of the good faith exception under the current version of Title III has been long-simmering.<sup>237</sup> The varying positions taken by courts all have bases for support in the statute and legislative history. Given this confusion, it is time for Congress

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<sup>232</sup> See 18 U.S.C. § 2518(7) (2006).

<sup>233</sup> See, e.g., *Warden v. Hayden*, 387 U.S. 294, 298 (1967). Of course, under Title III, the government must still file an application complying with all of the statutory requirements within forty-eight hours of the interception that occurred without an order. See 18 U.S.C. § 2518(7)(b) (2006).

<sup>234</sup> See, e.g., *United States v. Baranek*, 903 F.2d 1068, 1071–72 (6th Cir. 1990).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> The Eighth Circuit concluded in *United States v. Moore* in 1994 that the good faith exception applies to reliance on Title III wiretap orders, 41 F.3d 370, 376–77, while the Sixth Circuit reached the opposite conclusion in *United States v. Rice* in 2007, 478 F.3d 704, 711–12.

to amend Title III to include a good faith exception for the government's reliance on wiretap orders. In doing so, Congress should limit application of the good faith exception to objectively reasonable reliance on facially valid wiretap orders to initiate electronic surveillance, which would constrain the exception in wiretap cases to its foundational deterrence rationale.

Looking back to the hypothetical cases in the Introduction, such an amendment would rectify the disparity in which the exception is applied to reliance on search warrants—which are easier to obtain and subject to less scrutiny by law enforcement officers and judges—but is not uniformly applied to reliance on wiretap orders. Of course, this extension of the good faith exception will have practical consequences for the government and defendants. Wiretap evidence that would have been excluded without a good faith exception, likely leading to a dismissal of an indictment for lack of evidence, will be admissible at trial and, in turn, lead to a conviction. It may also result in increased scrutiny of wiretap applications by reviewing judges tasked with deciding whether to authorize interception and by defense counsel searching for material misstatements or omissions following indictment. These results are consistent with Title III's aims of protecting privacy, while allowing the government to effectively investigate criminal organizations. They are in line with the exclusionary rule's deterrence rationale—which is equally applicable when considering suppression under Title III—especially in light of the minimal deterrent effect of exclusion on violations of Title III's authorization procedures after the government has obtained a wiretap order and the substantial societal costs of suppressing wiretap evidence.