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Accountability for Domestic Silent Video Surveillance and Future Technologies

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Table of Contents

I.	INTRODUCTION	3
II.	IMPLEMENTING THE FOURTH AMENDMENT REQUIREMENTS	4
III.	IMPLICATIONS ON ACCOUNTABILITY AND FUTURE TECHNOLOGY	9
IV.	CONCLUSION	14

I. INTRODUCTION

As surveillance technology evolves, courts and lawmakers face increasing challenges in balancing governmental investigative tools with constitutional privacy protections. One area of concern is domestic silent video surveillance (hereinafter DSVS), a form of surveillance that captures visual data without accompanying audio. Historically, U.S. presidents have engaged in domestic and foreign intelligence collection,¹ but the unchecked expansion of intelligence operations, formalized under the National Security Act of 1947, led to abuses that prompted Congressional action. An example of Congressional action was the enactment of *Title III of the Omnibus Crime Control and Safe Streets Act* of 1968, 18 U.S.C. §§ 2510–20 (1988) (hereinafter Title III).²

This paper is inspired by *United States v. Koyomejian*, 970 F.2d 536 (9th Cir. 1992), which examined the applicability of the *Electronic Communications Privacy Act* of 1986, 18 U.S.C. §§ 2510–2520 (1988) (hereinafter Title I) that served as an amendment to Title III and the *Foreign Intelligence Surveillance Act* of 1978, 50 U.S.C. §§ 1801–1811 (1978)³ (hereinafter FISA).⁴ In doing so, the Ninth Circuit identified a regulatory gap, concluding that neither Title I nor FISA adequately covers the intersection of visual and aural surveillance, and therefore asserting that warrants for DSVS must adhere to the specific Fourth Amendment requirements.⁵

¹ Aaron L. Jackson, *Bridging the Gap: Amending FISA to Allow Seamless Surveillance of Foreign Terrorists Who Breach Our Nation's Walls*, 4 HOMELAND & NAT'L SEC. L. REV. 1, 3 (2016) (Benjamin Franklin provided intelligence during the Revolutionary War, and George Washington and Abraham Lincoln employed spies and saboteurs during the Civil War).

² *Id.* at 6.

³ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1885c (1978).

⁴ *United States v. Koyomejian*, 970 F.2d 536, 538 (9th Cir. 1992).

⁵ *Id.* at 540 (following *dicta* that concluded that the definition of "intercept" indicates, it refers to "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device").

Part II of this paper will discuss how the courts have adopted Fourth Amendment standards of probable cause and particularity for DSVS by reviewing Congressional intent to limit abuses of eavesdropping, the statutory language in Title III and FISA, and Aural Common Law before the enactment of Title III.⁶

Part III will examine how the Court's narrow interpretation of Title III deviates from Congressional original intent, which was to impose judicial oversight on intrusive forms of surveillance. This part will also highlight how this interpretation undermines the accountability mechanisms that Title III was designed to enforce, and that these mechanisms are essential for regulating emerging technologies like DSVS and Cell Site Simulators.

Part IV will conclude with the argument that by limiting Title III's applicability to only auditory surveillance, current legal interpretations leave more advanced and invasive technologies outside the statute. Thereby weakening statutory accountability and requiring Congress to act reactively for each new intrusive surveillance innovation.

II. IMPLEMENTING THE FOURTH AMENDMENT REQUIREMENTS

This section explores how courts have approached the constitutional requirements of probable cause and "particularity" for a DSVS warrant. The Fourth Amendment protects against unreasonable searches and seizures by requiring the government to demonstrate two elements:

⁶ See, *Berger v. New York*, 388 U.S. 41, 59 (1967) (The Court condemned the absence of the five minimum requirements that we apply to video surveillance in this case. The weaknesses of the statute were: (1) "eavesdropping is authorized without requiring belief that any particular offense has been or is being committed," (2) "[I]f likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations," (3) The statute does not require minimization by allowing "eavesdropping for a two-month period. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation," (4) "the statute places no termination date on the eavesdrop once the conversation sought is seized," and (5) the statute "permits uncontested entry without any showing of exigent circumstances").

probable cause and particularity.⁷ The definition of “search” has evolved over time, from *Olmstead v. United States*, 277 U.S. 438 (1928), which focused on physical intrusion,⁸ to *Katz v. United States*, 389 U.S. 347 (1967), which introduced the reasonable expectation of privacy standard.⁹ This standard provided flexibility for cases involving advanced technology, such as video surveillance.

In response to these advancements, Congress enacted legislation to define the probable cause and particularity requirements for new invasive surveillance.¹⁰ However, Congress has not explicitly spoken on the issue of DSVS, because video technology was not widely accessible until after the enactment of Title III. The Tenth Circuit addressed the application of probable cause and particularity in *United States v. Mesa-Rincon*, 911 F.2d 1433 (1990). In *Mesa-Rincon*, the Secret Service obtained authorization to install silent closed-circuit television (hereinafter CCTV) within a warehouse; the CCTV captured the defendants engaging in counterfeiting, as well as an unidentified male masturbating.¹¹ The defendants sought to suppress the footage on three grounds: lack of authority for the warrant, failure to meet Fourth Amendment standards, and non-compliance with surveillance precedent set by *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984).¹²

The Tenth Circuit determined that district courts have the authority to issue video surveillance warrants, finding them analogous to pen registers and wiretap warrants.¹³ The Tenth

⁷ See U.S. CONST. amend. IV (“no warrants [for searches and seizures] shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”).

⁸ *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

⁹ *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹⁰ *United States v. Mesa-Rincon*, 911 F.2d 1433, 1436–37 (10th Cir. 1990) (holding that suppression is required when statutory requirements implementing the congressional intent to limit use of intercept procedures are not satisfied (citing *United States v. Giordano*, 416 U.S. 505, 527 (1974))).

¹¹ *United States v. Mesa-Rincon*, 911 F.2d 1433, 1435 (1990).

¹² *Id.*

¹³ *Id.* at 1436 (“We hold that Fed.R.Crim.P. 41(b) grants authority to the district court to authorize the

Circuit drew on three sources:¹⁴ Title III, FISA, and Aural Common Law to address the Fourth Amendment standards and adopted five requirements for probable cause and particularity, (1) probable cause that a specific person is committing or has committed a crime;¹⁵ (2) an adequate description of the location, items to be seized, suspects, and crime;¹⁶ (3) guidance for agent conduct to minimize unrelated recordings;¹⁷ (4) evidence that normal investigative procedures have failed or would be dangerous;¹⁸ and (5) a time limit of no more than 30 days.¹⁹

While Title III regulates wiretaps, its requirements are almost identical to the Fourth Amendment's because its provisions included strong Congressional guidance to its scope.²⁰ The court found the interception of oral communication to be analogous to DSVS, even though video surveillance is more intrusive, as demonstrated by the capture of the individual masturbating.²¹ FISA also provided Congressional guidance, imposing safeguards comparable to Title III, with only a few differences regarding probable cause and the time limitations of surveillance for up to 90 days.²² The Aural Common Law principles further supported the Tenth Circuit's five

surveillance that took place in this case”).

¹⁴ *Id.* at 1437 (“We adopt these five requirements from three separate sources that discuss search techniques similar to video surveillance: Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–20 (1988); the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–11 (1982); and the common law concerning audio surveillance prior to the passage of Title III”).

¹⁵ *Id.* at 1437 (while absolute certainty is not necessary, there must be a substantial basis for believing that a search will yield evidence).

¹⁶ *Id.* at 1439 (the rule derived from Title III, includes an adequate description of four things: (i) the surveillance location, (ii) the type of communications sought, (iii) the identity of the suspect, and (iv) the identity of the crime).

¹⁷ *Id.* at 1440 (Title III requires agents to conduct surveillance in a way that minimizes the interception of unrelated conversations).

¹⁸ *Id.* at 1441 (Title III requires authorities to demonstrate prior unsuccessful techniques or why alternative techniques would be unsuccessful or dangerous).

¹⁹ *Id.* at 1441; *see also* *United States v. Ripka*, 349 F. Supp. 539, 542 (E.D. Penn. 1972) (finding “communication relating to the offenses of bookmaking and conspiracy” was sufficient description of the type of communication sought to intercept).

²⁰ *Mesa-Rincon*, 911 F.2d at 1438 (“These five requirements are the only requirements of Title III that deal with the probable cause and particularity requirements of the fourth amendment. We do not apply the remaining statutory provisions of Title III to video surveillance because we believe such a course to require congressional action. The provisions we do not adopt are not required by the fourth amendment”).

²¹ *Id.*

²² *Id.* at 1438 ((i) “a statement of the proposed minimization procedures,”(ii) “a detailed description of the

requirements for probable cause and particularity.²³

Additionally, the Tenth Circuit concurred with the Seventh Circuit in *Torres* that DSVS is a highly intrusive method of surveillance that raises privacy concerns, but the Tenth Circuit refused to declare it unconstitutional in every case. The Tenth Circuit instead held that stricter limitations or potential prohibitions within private residences might be necessary to achieve a balance between public safety and individual privacy rights.²⁴

In general, courts have held that DSVS does not fall under Title III while implying that video surveillance with audio may be subject to its regulation.²⁵ For instance, in *Torres*, the FBI obtained judicial authorization for separate auditory and visual surveillance under Title III.²⁶ However, the Seventh Circuit clarified that they were not extending Title III to video surveillance, only that DSVS warrants that adhere to the Title III provisions are also compliant with the Fourth Amendment standards.²⁷

The majority found that Title III's language did not apply to visual surveillance,²⁸ § 2511

nature of the information sought and the type of communications or activities to be subjected to the surveillance," (iii) "a certification ... that such information cannot reasonably be obtained by normal investigative techniques," (iv) "a statement of the period of time for which the electronic surveillance is required to be maintained," and (v) "An order issued under this section may approve an electronic surveillance for the period necessary to achieve its purpose, or for ninety days, whichever is less").

²³ *Mesa-Rincon*, 911 F.2d. at 1439; See, *Berger v. New York*, 388 U.S. 41, 59 (1967).

²⁴ *United States v. Torres*, 751 F.2d 875, 882–83 (7th Cir. 1984) ("Maybe in dealing with so intrusive a technique as television surveillance, other methods of control as well, such as banning the technique outright from use in the home in connection with minor crimes, will be required, in order to strike a proper balance between public safety and personal privacy... That question is not before us, but we mention it to make clear that in declining to hold television surveillance unconstitutional per se we do not suggest that the Constitution must be interpreted to allow it to be used as generally as less intrusive techniques can be used").

²⁵ *Torres*, 751 F.2d 875 at 893. *see also*, *United States v. New York Tel. Co.*, 434 U.S. 159, 165–68 (1977); *United States v. Cassity*, 546 F.Supp. 611, 621 (E.D.Mich.1981) (beepers), rev'd in part, on other grounds, 720 F.2d 451 (6th Cir. 1983), vacated 468 U.S. 1212 (1984) (mem.); *In re Application for Order Authorizing Interception of Oral Communications and Videotape Surveillance*, 513 F. Supp. 421 (D. Mass. 1980); *People v. Teicher*, 52 N.Y.2d 638 (1981); *Sponick v. City of Detroit Police Dept.*, 49 Mich.App. 162 (1973).

²⁶ *Id.* at 883.

²⁷ *Id.* at 88-85.

²⁸ *Id.* at 885 ("[W]e are unwilling to go further and hold that warrants for television surveillance are subject to Title III, as warrants for bugging and wiretapping are...").

prohibits the intentional interception, attempted interception, or procurement of interception of “any wire, oral, or electronic communication”²⁹. § 2510(1) defines “wire communication” as “any aural transfer made ... through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception.”³⁰ Additionally, under § 2510(4), “intercept” means “the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.”³¹ The majority concluded that these definitions in FISA demonstrated that Congress intentionally excluded visual surveillance under Title III.³² Because § 1801 of FISA was passed in response to technological advancements since the enactment of Title III and defined “electronic surveillance” broadly enough to incorporate silent CCTV because it included the use of “an electronic, mechanical, or other surveillance device...for monitoring to acquire information, other than from wire or radio communication...”³³ While FISA is specific to foreign intelligence gathering and is exclusive in its domain from Title III, the majority found that Congress intended to place DSVS outside the scope of Title III.³⁴ Congress made § 1801 broad enough to incorporate visual surveillance for the foreign surveillance domain but did not amend Title III to include such language in the domestic realm.³⁵

While the court refrained from extending Title III requirements to video surveillance because of the absence of language like that in § 1801, it did hold that failure to meet Title III requirements violated the Fourth Amendment.³⁶ However, failure to meet provisions under Title

²⁹ 18 U.S.C.A. § 2511(1)(a); *Torres*, 751 F.2d at 880.

³⁰ 18 U.S.C.A. § 2510(1); *Torres*, 751 F.2d at 880.

³¹ *Torres*, 751 F.2d at 880 (quoting 18 U.S.C.A § 2510(4)).

³² *Torres*, 751 F.2d at 881.

³³ *Id.* (quoting 50 U.S.C. § 1801(f)(4)).

³⁴ *Torres*, 751 F.2d at 881–82.

³⁵ *Id.*

³⁶ *Id.* at 884.

III would not create barriers on the warrant.³⁷ For example, the FBI's failure to inform the district judge that the Attorney General or an Assistant Attorney General had authorized the visual application, as mandated by § 2516(1), had no bearing on the Fourth Amendment's particularity requirements.³⁸ Thus, while the warrant requirements are almost identical for DSVS under the Fourth Amendment, the precautions and protections of Title III do not apply.³⁹

III. IMPLICATIONS ON ACCOUNTABILITY AND FUTURE TECHNOLOGY

Emerging surveillance technology poses challenges for statutory law and constitutional protection. While the Fourth Amendment and Title III share similar requirements for probable cause and particularity,⁴⁰ their divergence becomes significant regarding accountability. Title III imposes a detailed regulatory framework that includes judicial oversight, civil remedies, and administrative discipline—protections not mirrored under the Fourth Amendment.⁴¹ For example, if DSVS is destroyed without judicial authorization, the responsible party cannot face contempt charges under § 2518(8)(c) as they could for auditory surveillance.⁴²

The central implication of this discussion revolves around the principle of accountability.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Compare U.S. CONST. amend. IV (requiring that warrants issue only upon probable cause and particularly describe the place to be searched and the persons or things to be seized), with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518(3) (requiring probable cause and specificity before authorizing wiretap orders).

⁴¹ Compare 18 U.S.C. §§ 2518–2520 (establishing a detailed regulatory framework for electronic surveillance, including judicial oversight, civil remedies, and administrative discipline), with U.S. CONST. amend. IV (providing probable cause and particularity requirements but lacking comparable statutory mechanisms for oversight or civil remedies).

⁴² 18 U.S.C.A. § 2518(8)(c); see also *Torres*, 751 F.2d at 885 (“It wants the sounds as well as the sights, and it can get a warrant for the former only by complying with Title III; the soundtrack of a videotape, no less than a free-standing tape recording, is within the scope of Title III”).

found that implied monetary damages are permissible based on a federal agent's violation of the Fourth Amendment, even if no federal statute expressly creates such a remedy.⁴³ However, the victims must show that a direct violation, such as physical injury or property damage caused the injury.⁴⁴ Damages related to the discovery of incriminating evidence and subsequent prosecution are generally not compensable, as they are considered too distant from Fourth Amendment privacy concerns.⁴⁵

In contrast, Title III requires judicial authorities to seek progress reports on ongoing surveillance, evaluate the ongoing necessity of interception and data storage, and implement procedures to protect the use of such intercepted communications.⁴⁶ Title III established statutory provisions for civil actions to recover damages for violations, including punitive damages, reasonable attorney fees, and litigation costs.⁴⁷ Title III also mandates administrative discipline for federal officers or employees who commit violations.⁴⁸ Under § 2520(a), “any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation.”⁴⁹ Title III expands the recovery of damages from an implied direct harm, like property damage, to the disclosure of unlawfully intercepted or misused communications, suggesting that an agent's actions that violate the chapter, even if not directly harmful to the victim, are subject to legal remedies.⁵⁰

⁴³ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

⁴⁴ *Id.* at 396-97.

⁴⁵ *Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000); *see also Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir. 1999) (“The evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all”).

⁴⁶ *See Zweibon v. Mitchell*, 516 F.2d 594, 668 (D.C. Cir. 1975).

⁴⁷ 18 U.S.C. § 2520(b).

⁴⁸ 18 U.S.C. § 2520(f).

⁴⁹ 18 U.S.C. § 2520(a); *see also Zweibon*, 516 F.2d at 659 n.216 (explaining the civil remedies available under Title III).

⁵⁰ *See Deal v. Spears*, 980 F.2d 1153, 1156 (8th Cir. 1992) (noting that Title III allows statutory damages even

For example, § 2511 provides punishment for agents that intentionally disclose or use, or endeavor to disclose or use the communication, to another person having reason to know that the information was obtained through interception.⁵¹ Additionally the statute provides:

“(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation.”⁵²

This higher standard of accountability accounts for future technologies, such as Cell Site Simulators that collect private information from unknowing persons, and requires agents to take care not to disclose such information intercepted during the investigation.⁵³ By incorporating explicit statutory provisions for civil damages and stringent procedural safeguards for surveillance, including mandating administrative discipline when a violation raises substantial concerns about an officer's willful or intentional misconduct, Title III provides stronger protections for individuals whose communications may be interpreted, even by accident, such as the footage of the unknown male masturbating in *Mesa-Rincon*.⁵⁴

While the majority in *Torres* emphasized that FISA expressly governed electronic

without proof of actual harm); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (stating that a plaintiff seeking damages for a Fourth Amendment violation must prove that the seizure was unlawful and that it caused her actual, compensable injury).

⁵¹ 18 U.S.C. § 2511(1)(c)-(d) (“[A]ny person who...intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection” and “intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection...shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)”).

⁵² 18 U.S.C. § 2511(e).

⁵³ See *Scott v. United States*, 436 U.S. 128, 142–43 (1978).

⁵⁴ 18 U.S.C. § 2520(f).

surveillance, in the dissent, Judge Cudahy contended that this interpretation overlooked the broader purposes of both FISA and Title III and placed intrusive forms of electronic surveillance beyond statutory regulation.⁵⁵ Judge Cudahy argued that both FISA and Title III were enacted to impose a regulatory scheme on the use of electronic surveillance in situations where people have an expectation of privacy.⁵⁶ When Congress enacted FISA in 1978, it directly repealed the exceptions in Title III § 2511(3) and clarified that the executive branch did not have an inherent right to conduct surveillance; its procedures and substantive requirements were designed to provide judicial control over intrusive forms of electronic surveillance and to impose federal crimes for violations.⁵⁷

Additionally, Judge Cudahy found that the enactment of FISA in 1978 provided a sound basis for extending Title III to encompass video surveillance, as Senate Reports only briefly mention that § 1801(f) “could also include miniaturized television cameras and other sophisticated devices not aimed merely at communications.”⁵⁸ The reports noted that the definition was meant to be broad, allowing other forms of surveillance while still requiring judicial oversight.⁵⁹ Thus, the reports demonstrate a practical relationship between audio and

⁵⁵ *United States v. Torres*, 751 F.2d 875, 887 (7th Cir. 1984) (Cudahy, J., dissenting); *see also Scott*, 436 U.S. at 143 (Brennan, J., concurring) (arguing that for the first time, the Act “authoriz[ed] law enforcement personnel to monitor private telephone conversations” and provided safeguards, including the § 2518(5) “minimization requirement,” which the Court in that case undermined, thereby weakening congressional protections against governmental intrusion into private communications).

⁵⁶ *Id.*; *see also* S. REP. NO. 604, 95th Cong., 1st Sess. 7, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3904, 3908 (noting Congress’s intent in FISA to balance privacy and national security, FISA and Title III together regulate electronic surveillance where privacy is reasonably expected; Title III governs domestic surveillance and originally exempted national security surveillance).

⁵⁷ *Torres*, 751 F.2d at 888; *see also* S. REP. NO. 604, 95th Cong., 1st Sess. 6, 64, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3904, 3907, 3965; S. REP. NO. 701, 95th Cong., 2d Sess. 71, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3973, 4040 (noting that FISA repealed the national security exemption and established judicial oversight of electronic surveillance).

⁵⁸ *Torres*, 751 F.2d at 888 (quoting S. REP. NO. 604, 95th Cong., 1st Sess. 35, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3904, 3936).

⁵⁹ *Torres*, 751 F.2d at 889; *see also* S. REP. NO. 604, 95th Cong., 1st Sess. 35, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3904, 3936 (“This part of the definition is meant to be broadly inclusive, because the effect of including a particular means of surveillance is not to prohibit it but to subject it to judicial oversight”).

video surveillance methods, suggesting that Title III’s silence on the latter is more plausibly the result of inadvertence than of deliberate exclusion..⁶⁰ Because Title III and FISA merely regulate intrusive electronic surveillance by proscribing conditions for their use, rather than explicitly prohibiting any surveillance methods, the regulatory framework of Title III appears to be fully adaptable, like FISA, to video surveillance.⁶¹

While Judge Cudahy acknowledged that, on its face, the language of Title III appears to apply only to auditory means—as suggested by the definition of “intercept”—he noted that the statute actually refers to “the aural acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device.”⁶² He found that this superficial interpretation developed from case law involving defendants who attempted to extend Title III to less intrusive forms of surveillance, such as beepers and pen registers, which went against the purpose of Title III’s enactment to prevent abuse of truly intrusive forms of surveillance, like wiretaps.⁶³

Thus, if the purpose of Title III was to assign responsibility for abuses and ensure proper oversight, then the majority’s interpretation in *Torres* could result in less stringent regulation of the most intrusive forms of electronic surveillance.⁶⁴ The narrow textual reading of Title III excludes new intrusive technologies from its scope. For example, Cell Site Simulators and future innovations don’t fit precisely into Title III’s existing language,

⁶⁰ *Torres*, 751 F.2d at 889.

⁶¹ *Id.* at 895 (“[T]he procedural and substantive requirements of Title III are compatible with video surveillance in every respect...[t]he same application, the same authorization, the same showing of probable cause, [and] the same showing of need for such intrusive measures would all apply equally to both video and audio surveillance methods”).

⁶² *Id.* at 893.

⁶³ *Id.* (citing *United States v. New York. Tel. Co.*, 434 U.S. 159, 165–68 (1977); *United States v. Cassity*, 546 F. Supp. 611, 621 (E.D. Mich. 1981) *rev’d in part, on other grounds*, 720 F.2d 451 (6th Cir. 1983), *vacated* 468 U.S. 1212 (1984)).

⁶⁴ *Torres*, 751 F.2d at 893.

requiring the interception of “aural or other acquisition of contents of any wire, electronic, or oral communication.”⁶⁵ In contrast, Cudahy’s approach avoids the unlikely scenario of interpreting Title III as prohibiting a type of electronic surveillance, especially since there is no legislative intent indicating a categorical ban on these techniques.⁶⁶ Under the majority’s view, Congress must intervene whenever a new form of intrusive surveillance arises. By contrast, although Judge Cudahy recognized the lack of express language in Title III, his interpretation better accords with the congressional intent reflected in the Senate Reports and maintains the heightened protections envisioned in §§ 2511 and 2520.⁶⁷ This approach also has the potential to promote efficiency, allowing Congress to speak on specific exclusions from Title III if necessary, instead of having to speak on the inclusion of intrusive technology after abuses develop.

IV. CONCLUSION

As the capabilities of surveillance technology continue to advance, often surpassing legislative clarity, the courts are called upon to interpret statutes like Title III. While the judiciary has affirmed that compliance with Title III satisfies the Fourth Amendment’s probable cause and particularity standards, courts have hesitated to extend the statutory protections of Title III to DSVS due to a lack of explicit legislative language. While the majority in *Torres* relied on *dicta*, its narrow interpretation was based on efforts to expand Title III to less intrusive forms of surveillance and ignores the history of abuses that led to its enactment. Consequently, the legal treatment of DSVS requires that Congress address emerging intrusive surveillance methods on a case-by-case basis. In an era where surveillance

⁶⁵ 18 U.S.C. § 2510(4).

⁶⁶ *Torres*, 751 F.2d at 893.

⁶⁷ *Id.* at 888-89.

is increasingly visual and pervasive, the judicial oversight and statutory remedies found in Title III should be the default for new intrusive surveillance. While Judge Cudahy's approach can be construed as legislative action, unlike the minimalist interpretation of legislative silence, it does not prevent Congress from speaking; it only subjects all intrusive methods to statutory oversight grounded in Senate Reports and historical context.