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The Odyssey of Federal Wiretapping Law—Beware of Meese Bearing Gifts

by Robert L. Corn

When the citizens of Troy brought the Horse into their city, a seeming tribute to Trojan valor left behind by the departing Greek armies, they were unaware the Horse was in fact the plot of the crafty Odysseus. Thus, Troy fell. Attorney General Edwin Meese, a latter day Odysseus, has recently given the nation a new federal wiretap law. The Electronic Communications Privacy Act of 1986 was signed by the president on October 21 and goes into effect this month. If we are to avoid Troy's fate, those who stand guard over our privacy protections had better stay alert.

The act is a much-needed rewrite of the first comprehensive federal wiretapping law, Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Although the act was not proposed by Meese, the Justice Department exerted a great deal of control over the final product. When the proposal was introduced on the Senate floor last June, then-Senator Charles McC. Mathias, Jr. of Maryland went out of his way to commend Meese for his role in promoting the legislation, and, through the Justice Department, shaping its provisions. The result, he concluded, was "a bill that the Department embraces as a vehicle for carrying out the Attorney General's commitment to protect the privacy of Americans."

But Meese's concern for individual privacy probably was stated more eloquently in his speech to the U.S. Chamber of Commerce last October, delivered within days of the act's signing. In addressing the role of employers in the struggle against narcotics, the attorney general stated: "Management must also indicate its willingness to undertake surveillance of problem areas such as locker rooms, parking lots, shipping and mailroom areas, and nearby taverns, if necessary." So much for his concern about privacy. If the sponsors of the Electronic Communications Privacy Act really believed that the attorney general's helpful suggestions were intended to protect privacy interests, his Chamber of Commerce speech should at least make them wonder whether the provisions fashioned by the Justice Department represent a horse of a quite different color.

Nevertheless, the bill was promoted as a measure to bring federal wiretapping law up-to-date, and it has been hailed by many as a significant improvement in privacy protections. Sen. Patrick Leahy (D-Vt.), a co-sponsor of the Senate bill, explained its purpose as being to update existing law "to provide a reasonable level of Federal privacy protection to these new forms of communication." The trade newsletter *Communications Daily* described the act as the most important communications law since the Cable Communications Policy Act of 1984 and the fourth most significant since the Communications Act of 1934.

The new law undoubtedly expands statutory privacy protections in certain areas. It codifies privacy rights for computer and other digitized transmissions such as electronic mail and extends its coverage beyond the common-carrier services of telephone companies to include private providers of communications services. It establishes procedures governing the installation of pen registers (which record dialing in-

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Cato president Ed Crane (left) and *Cato Journal* editor Jim Dorn (right) talk with Milton Friedman at Cato/Liberty Fund conference.

Misunderstanding Politics: Stockman and His Revolution

Editorial

David Stockman's book—which has just been published in paperback—has been discussed primarily in terms of Stockman's support for a tax increase or of his disregard for the sensitivities of his elders.

The real story of the book, however, is how Stockman forgot what he knew about the political process. Stockman sums up his argument this way: "We have had a tumultuous national referendum on everything in our half-trillion-dollar welfare state budget. . . . Lavish Social Security benefits, wasteful dairy subsidies, futile UDAG grants, and all the remainder of the federal subventions do not persist solely due to weak-kneed politicians or the nefarious graspings of special-interest groups."

But this is where he goes wrong. "We" did not have a national referendum on spending—Congress and the White House did. The crucial question is whether the lack of support from President Reagan, the White House staff, the Cabinet, and Congress for an assault on the welfare state—what might be termed the Stockman Revolution, in contrast to the largely mythical Reagan Revolution—does, in fact, reflect popular sentiment. Stockman assumes, without much argument, that it does.

But in a mixed-economy democracy, the actions of government reflect not the will of the majority but the pressure of interest groups. For any spending program, Congress hears from those who benefit from the program—while those who pay for it are silent.

Stockman understood this in his younger days. When he returned to Michigan in 1976 to run for Congress, he found that "the solid entrepreneurs of southern Michigan's hamlets" were willing to give up their subsidies in return for smaller government overall. But when "their" voices were heard in Washington, it was in the form of trade associations lobbying for their own pet programs.

The point, then, is that American society has not held a referendum on UDAG grants, dairy subsidies, water projects, Amtrak, the Export-Import Bank, Social Security benefit levels, and so on. Stockman's position, as he himself acknowledged, "was utterly repudiated by the combined forces of the politicians"—not by the people.

And even if Stockman does believe that we had a national referendum on government spending, consider another referendum: During the past tumultuous decade, from Proposition 13 in 1978, to the election of Ronald Reagan in 1980, to the tax cut of 1981, to the overwhelming 1984 defeat of a man who openly and honestly proclaimed his intention to raise taxes, we had a national referendum on the level of taxes. The voters made it clear that taxes were too high. Interestingly, the name "Walter Mondale" does not appear in Stockman's book, despite the light his defeat sheds on the desires of the American people.

After all the hysteria over Reagan's budget cuts, not a single Republican congressman was defeated in 1982, 1984, or 1986 because he voted for budget cuts, a pretty good sign that Republicans had not found the limits of budget cutting that the American people would accept.

In his disillusionment with the political process, Stockman has forgotten the lessons he entered the White House with. He has become what he warned Republicans against: "the tax collector for the welfare state."

David Stockman has given up too easily. His vision of society has not been rejected by the American people. It was never offered to them. If Walter Mondale had offered his program of all the government we have now and enough taxes to pay for it, and President Reagan or another candidate had offered a vision of smaller government, fewer spending programs (with the cuts identified), deregulation, and lower taxes, does Stockman believe that the American people would have preferred Mondale's program?

The Reagan Revolution—an attempt to reduce the size of government by cutting taxes and painlessly eliminating waste and fraud—was doomed to failure. But the Stockman Revolution—a frontal assault on the welfare state to liberate the "limitless possibilities" of the free market—has not yet been tried.

—David Boaz

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CATO INSTITUTE

Book Proposes Repeal

Occupational Licensing Raises Prices, Limits Consumer Choice

"Occupational regulation has served to limit consumer choice, raise consumer costs, increase practitioner income, limit practitioner mobility, deprive the poor of adequate service, and restrict job opportunities for minorities—all without a demonstrated improvement in quality or safety."

That's the conclusion of Tulane professor S. David Young in a new Cato Institute book, *The Rule of Experts: Occupational Licensing in America*. Young's findings represent the results of a thorough survey of the scholarly literature on occupational licensing in a wide variety of professions.

One major problem with licensing, Young notes, is that it misallocates the labor of the most skilled workers in society. "The wealth transfers to occupational groups that often result from licensure are more damaging, dollar-for-dollar, than transfers to the poor."

In the book, Young considers the effects of licensing on freedom of entry, professional income, consumer costs, quality, occupational mobility, innovation, and minorities and the poor. He also surveys the generally poor results of various reforms of licensing that have been tried, including adding public members to regulatory boards, oversight agencies, and sunset laws. He praises the efforts of the Federal Trade Commission to fight anticompetitive provisions of state licensing laws.

Young concludes, "Individual liberty may be a long-standing American tradition, but it has done little to stem the tide of professional regulation or its control by the professions. . . . Primarily, licensure is a political process; it has evolved through political activity, and the best hope of reversing it, at least in the short run, rests with political activity." ■

Dean Manne Honored at Cato

The Cato Institute held a reception in honor of Henry Manne, a Cato adjunct scholar recently named dean of the George Mason University Law School. Manne also moved the Law and Economics Center, which he heads, from Emory University to George Mason.

Henry G. Manne, newly appointed dean of the George Mason University Law School and a Cato adjunct scholar, speaks on the future of law and economics at a Cato Forum.

In his talk on law and economics at the event, Manne quoted Columbia Law School professor Bruce Ackerman, who said recently, "Law and economics is the most important thing that has happened in legal thought since the birth of the Harvard Law School." Manne added one more point: "Law and economics has become the principal bulwark in the law schools against the total radicalization of American law."

Manne urged judges to use economic analysis in their rulings and acknowledged that he "comes down squarely on the side of the activists in the current jurisprudential debate" because "it would be the height of folly to leave this field to the anti-libertarian activists."

Among the more than 100 guests who gathered to welcome Manne and the Law and Economics Center to Washington were Office of Management and Budget director James C. Miller III and U.S. Circuit Judge Danny J. Boggs. ■

Politics, Markets, and Schools

"Public schools are unavoidably subject to control by democratic political institutions and are only minimally controlled by market forces, while quite the reverse is true for private schools," said John Chubb, senior fellow in the Governmental Studies Program of the Brookings Institution, at a Cato Policy Forum.

Thus, Chubb argued, "Current education reform proposals are not likely to work because they don't get at the root of the problem." Public schools are subject to many levels of political and administrative control. Private schools have many fewer administrative bodies to satisfy, so they can concentrate on meeting the demands of parents and students—the true consumers of education.

Chubb argued that real educational improvement requires that we "break the system of democratic control" and "move toward a system where there is real choice among schools and schools face the real possibility of going out of business."

At a Cato Policy Forum, John Chubb of the Brookings Institution discusses why "the inherent logic of politics and markets" makes private schools respond to consumer demand better than public schools.

Also participating in the discussion were Joan Wills, research director for the National Governors Association, and Terry Moe of Stanford University, who is working with Chubb on a book tentatively titled *Politics, Markets, and the Organization of Schools.* ■

Cato Activities Roundup

Friedman Attends Cato's Liberty Fund Conference

Cato Journal editor **James A. Dorn** directed a Liberty Fund conference on **Allan Meltzer's** new book, *Keynes's Monetary Theory: A Different Interpretation.* Among the participants in the San Francisco conference were Nobel laureate **Milton Friedman, Karl Brunner** of the University of Rochester, **Anna Schwartz** of the National Bureau of Economic Research, **Axel Leijonhufvud** of UCLA, **Leland Yeager of Auburn University, Lindley Clark** of the *Wall Street Journal,* and **Donald Muggeridge,** editor of Keynes's collected works. **David Laidler** of the University of Western Ontario chaired the conference sessions. . . .

A distinguished group of economists gathered at a Liberty Fund conference, organized by the Cato Institute, to discuss Allan Meltzer's forthcoming book on Keynes's monetary theories.

While he was in San Francisco for the Liberty Fund conference, Cato president **Edward H. Crane** spoke on "America's Policy Myopia" to the San Francisco Press Club and appeared on the "Jim Eason Show" on KGO radio. . . .

Cato chairman **William A. Niskanen** spoke on Reaganomics and on international trade to audiences in Sweden, Norway, and Belgium. He also spoke on economic policy at the Economic Outlook Conference in Southern California, on the trade deficit to a conference in Dallas, and on "the economic constitution" to a conference of college newspaper editors. . . .

Vice president **David Boaz** discussed libertarian policy ideas with an audience at the College of William and Mary. . . .

Senior policy analyst **Catherine England** addressed the National Economists Club and the American Friends of the London School of Economics on Cato's Financial Deregulation Project. . . .

David Boaz greets bookbuyers at National Press Club Book Fair and Authors' Night. Boaz and Stephen Macedo were both selected to display books at the event.

Foreign policy analyst **Ted Galen Carpenter** has been busy with interviews since the news of the Reagan Administration's negotiations with Iran broke. Carpenter's May Policy Analysis, "Global Interventionism and the New Imperial Presidency," had warned of the danger "that an unfettered president may pursue policies that would contravene fundamental American values." He called on Congress to reassert its role in foreign policy, pointing out that "congressional participation does not guarantee a prudent, noninterventionist foreign policy, but by adding another step to the decision-making process, it significantly reduces the risk of acting rashly." . . .

Robert M. Dow, Jr., a 1986 Cato summer intern and now a senior at Yale University, was named a Rhodes Scholar in early December. . . .

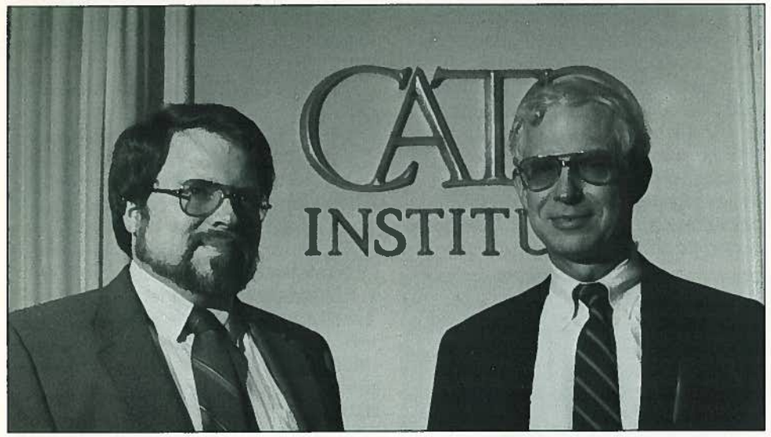
Ed Crane debated John Bickerman of the Center on Budget and Policy Priorities on federal budget issues before a Trenton State College forum in New Jersey. . . .

David Boaz, editor of *Left, Right, and Babyboom: America's New Politics,* and Harvard government professor **Stephen Macedo,** author of Cato's *The New Right v. the Constitution,* were two of the 100 authors selected to appear at the annual National Press Club Book Fair and Authors' Night. Among the other authors at the event were **David Eisenhower,** author of *Eisenhower: At War, 1941-43;* **Abigail McCarthy** and **Jane Gray Muskie,** authors of *One Woman Lost;* and cartoonist **Pat Oliphant.** . . .

The Cato Institute hosted an informal gathering of supply-side economists in late November. Leading the discussion was Rep. **Jack Kemp** (R-N.Y.), who discussed tax and monetary reform proposals. . . .

Jim Dorn organized a session on "Monetary Disequilibrium and the Keynesian Diversion" at the annual meeting of the Southern Economic Association. Besides Dorn, who presented a paper entitled "Clark Warburton on the Keynesian Diversion," other speakers at the session included **Anna Schwartz** and **Leland Yeager.** At the same meeting, **Catherine England** presented a paper on what market mechanisms would develop to protect depositors in the absence of banking regulation and federal deposit insurance. She also commented on two papers, one on statewide banking and another on the possible effects of deregulation on technological developments in banking. . . . ■

Rosecrance: Trading Nations May Eclipse Arms-Oriented Rivals



Ted Galen Carpenter (left) and Richard Rosecrance talk after their Policy Forum on trading states versus military-political states.

Nations stressing internal economic development and the expansion of international commerce are acquiring a decisive advantage over states preoccupied with the traditional trappings of military power, asserted Cornell University political scientist Richard Rosecrance at a Cato Policy Forum. Rosecrance's talk was based on his recently published book, *The Rise of the Trading State: Commerce and Conquest in the Modern World.*

According to Rosecrance, Japan and West Germany epitomize the ascension of commercially oriented "trading states." Both the United States and Soviet Union represent obsolete "political-territorial" models based on military power that is largely unusable in a thermonuclear age. He contended that unless the two superpowers prune their military establishments and revitalize their economies, they face the prospect of being eclipsed by less militaristic rivals. The Soviet Union is already on the verge of being surpassed by Japan as the world's number two economic power.

While the increasing relevance of commerce poses some problems for the Soviet Union and the United States, Rosecrance argued that it is a positive development for global peace. Since armed conflict disrupts commerce, a firm commitment to trade has always served to reduce the danger of war, he insisted. The growing strength of the trading impulse in our era therefore maximizes the possibility that major wars can be avoided.

In his response, Cato foreign policy analyst Ted Galen Carpenter praised Rosecrance's study but cited three areas of disagreement. Carpenter contended that Rosecrance underestimated the ability of ideology and other noneconomic factors to override rational economic considerations and plunge nations into war. He also noted that international commercial ties were weakest at precisely the point they needed to be strongest—between the Soviet bloc and the capitalist world—if they are to reduce materially the danger of armed conflict. Finally, he stressed that Japan and West Germany, the quintessential "trading states," are able to pursue that strategy primarily because the United States continues to subsidize their defense requirements. A withdrawal of the American shield combined with a heightened U.S. emphasis on economic matters, Carpenter argued, might compel such trading states to place greater priority on military factors. ■

Essay Contest on Foreign Policy

The Cato Institute is sponsoring its second annual Foreign Policy Essay Contest for graduate students in the social sciences. Entrants will be asked to submit an essay of 3,500-5,000 words evaluating the relevance to current U.S. foreign policy of the following quotation by John Quincy Adams:

"[America] goes not abroad in search of monsters to destroy. She is the well-wisher to the freedom and independence of all. She is the champion and vindicator only of her own. She well knows that by once enlisting under other banners than her own, were they even the banners of foreign independence, she would involve herself beyond the power of extrication, in all the wars of interest and intrigue, of individual avarice, envy, and ambition, which assume the colors and usurp the standard of freedom. The fundamental maxims of her policy would insensibly change from liberty to force . . . . She might become the dictatress of the world. She would be no longer the ruler of her own spirit."

The purpose of the contest is to encourage young scholars to consider the validity of a noninterventionist approach to foreign affairs. John Quincy Adams was one of the leading proponents of the doctrine during the early decades of the American republic.

Judges for the contest are Ted Galen Carpenter, Cato's foreign policy analyst; Earl C. Ravenal, professor of international relations at Georgetown University and a Cato senior fellow; and Leonard P. Liggio, president of the Institute for Humane Studies at George Mason University.

Prizes awarded in the contest will total $6,000, incuding $3,000 for the first-place essay. In addition, the winning essay will be published in the *Cato Journal* or as part of Cato's Policy Analysis series. The deadline for submissions is April 15, 1987, and the winners will be notified by June 1.

Graduate students in the social sciences are encouraged to write Ted Galen Carpenter at the Cato Institute for further information. ■

Reading the Constitution

How Should Judges Protect Liberty?

Policy Forum

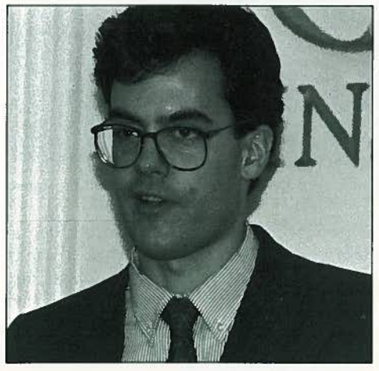
The Cato Institute regularly sponsors a Policy Forum at its Washington headquarters where distinguished analysts present their views to an audience drawn from government, the media, and the public policy community. A recent forum featured Harvard University government professor Stephen Macedo, author of The New Right v. the Constitution. *Commenting on Macedo's remarks was Gary McDowell, associate director for public affairs of the Justice Department. McDowell's remarks reflect his own views and not necessarily those of the department.*

Stephen Macedo: "The kind of man who demands that government enforce his ideas," said H. L. Mencken, "is always the kind whose ideas are idiotic."

Mencken's political cynicism is a great temptation, especially when political opinions that we find objectionable are framed as matters of principle, moral claims, or claims of constitutional rights.

But as tempting as cynicism can be, it is of no practical help or guidance. For the fact is—the government *must* enforce *someone's* ideas. And unless there is the possibility that some ideas about politics really are better than others, better in the sense of better justified or truer, then all government rests only on power, or mere "will." If the cynic is correct, there can be no way of distinguishing between right and wrong, between justice and tyranny, between fidelity to law and willful innovation. To give in to cynicism then, is to give up on trying to justify our political arrangements. It is to concede that all political arrangements are equally arbitrary, equally unjustified, and distinguishable only in terms of whose ox is being gored.

The jurisprudence of the New Right, at least as articulated by Chief Justice William Rehnquist, Judge Robert Bork, and Attorney General Edwin Meese, rests on moral cynicism. Their position is this: That when activist justices interpret individual rights broadly in the name of principles smacking of "philosophy" or morality, you can be sure that these unelected judges are really only using the Constitution as a way of imposing their own personal preferences on the community. Judges must stay away from philosophy and morality and stick close to the text, structure, and purpose of the Constitution itself, the Constitution as it was written. And when text, structure, and purpose are unclear, says the New Right, justices must complete the meaning of the text by looking to the specific historical intentions of those who framed or ratified the text in question.



Stephen Macedo: "The Constitution establishes a scheme of government that is not basically democratic or majoritarian, but republican, whose powers are limited and which is charged with enforcing a broad array of individual rights."

Moved by moral cynicism, the New Right confronts the flawed moral arguments of liberal judicial activists, not by seeking better moral arguments, but by condemning the resort to morality altogether.

The problem faced by the New Right is this: Constitutional text, structure, purpose—and certainly everything we know about the moral confidence of our 18th-century statesmen—all draw conscientious interpreters toward, and not away from, morality. The New Right's advocacy of judicial restraint is not the consequence of taking the Constitution seriously—it is the consequence of ignoring those parts of the Constitution that moral skeptics and majoritarians find inconvenient.

When New Right advocates of judicial restraint tell us that the Constitution's purposes must be located in the particular historical conceptions of the framers, this is not out of respect for the text, but in place of serious reflection on the purposes that the text itself announces:

> We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

These are the purposes that the Constitution itself announces, these are the intentions that count. They are broad moral purposes, consistent with the moral confidence of the framers. Those who summon up particular historical intentions not stated in the Constitution do so in order to evade the text, not to vindicate it.

And so, Chief Justice Rehnquist, in a speech several years ago debunking what he called the "cliché" that the Constitution "can fairly be described as a charter which guarantees rights to individuals against the government," referred to the "Bill of Rights" as a term "commonly applied to the first eight amendments to the United States Constitution." Of course, every schoolchild knows what the Chief Justice on this occasion conveniently forgot: that there are 10 amendments in the Bill of Rights, and that the Ninth tells us that individuals have rights not explicitly mentioned in the document itself: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Ninth Amendment, then, like the preamble, is a part of the text that propels the conscientious interpreter beyond the text itself. What other rights do we have? The Constitution doesn't say, but it says we have them, and it says they are *rights*, moral claims not dependent on mere historical circumstance, accident, or will.

Before getting to the need for a morally principled judicial activism, let me briefly address two other shaky pillars of the jurisprudence of the New Right:

the reliance on original intentions, and the idea that the Constitution establishes a basically democratic or majoritarian scheme of government.

First, the jurisprudence of the Reagan administration is, according to Attorney General Meese, a jurisprudence of original intent. The idea of referring to specific historical intentions as a way of closing the meaning of the general phrases actually written into the Constitution is extremely popular, but enormously problematic. As I've already indicated, the text of the Constitution sets moral and political, not historical questions for us. The framers were capable of being specific when they wanted to be, so when they used general language we should take this as a deliberate delegation to future interpreters.

And the framers' actions speak even louder than their words: The Philadelphia convention was conducted in secret. And contrary to what Meese has said, the proceedings of the convention are *not* a matter of public record. What we have are the personal notes of several delegates; whose should we pick? Madison's are by far the most extensive, but Madison was a participant, not a neutral observer, and Madison waited half a century to publish his notes, publishing them after everyone else who had been at the convention was dead. We have no way of checking his accuracy.

If the framers wanted future interpreters to be guided by their particular unstated intentions about individual rights, why did they keep the convention secret? Why did they write broad moral purposes into their statement of intentions in the preamble? Why did they write a Ninth Amendment which refers, not to historical entitlements, but to unspecified rights which people have prior to any constitutive act of government? If the framers intended us to be guided by their specific intentions, they chose an idiotic strategy for communicating that intention to us.

Passing over these problems, the proponents of historical intent are still a long way from home: whose intent counts? The framers' or the ratifiers'? Proponents of Original Intent always talk about the framers, but the state ratifying conventions gave the Constitution the force of law; constructing a unified intent from hundreds of delegates to 13 state ratifying conventions will be a good trick if it can be brought off.

Another problem: what counts as *evidence* of intent: only public records? Why not private correspondence?

And what happens when we find out the framers disagreed about many things: that sometimes they chose general language because that was all they could agree upon?

At other times they chose general language as a deliberate delegation to future interpreters, including the courts. To substitute specific, unstated intentions for the general terms actually cho-

Gary McDowell: "The liberty of contract doctrine of *Lochner* and the right to privacy doctrine of *Griswold* are ultimately rooted in the same shallow soil, that of personal predilection and political preference."

sen is to disregard, not to respect, the framers and the Constitution.

But let's turn from this basket case of Original Intent to the second pillar of the New Right's jurisprudence: The claim that the Constitution establishes a "basically democratic" scheme of government, and thus that the Supreme Court's power is anomalous and must be carefully circumscribed. As Bork puts it: "The makers of our Constitution . . . provided wide powers to representative assemblies and ruled only a few subjects off limits by the Constitution."

This basically democratic rendering of the Constitution fits much contemporary ideology. It suits both the morally skeptical majoritarianism of the right, and the left-wing, democratic egalitarianism of Justice William Brennan.

But we need not be detained by the question of whose version of democracy is best, because the Constitution itself is not basically democratic: The Constitution checks and limits the popular will in a host of ways; it establishes a government of enumerated powers and broad individual rights of which the judiciary is an integral part.

Chaos and factional strife in the states led to the Constitutional Convention and to the rejection of democracy in favor of republican government. Mechanisms were adopted to check the popular will and to allow statesmen to stand against popular passions in favor of justice and the public good. Senators were originally chosen by state legislators; their terms are still long and each state still gets two regardless of population. Separated powers, checks and balance, and the embrace by one national government of a vast territory all make it difficult for a popular majority to gain effective control of the government. And a vital part of this scheme of institutional checks is an independent judiciary with coordinate status and life tenure. Nothing in the Constitution supports the call for judicial restraint: Justices take an oath to support the Constitution as supreme law, and their institutional design, "their permanent tenure," as Hamilton put it in the *Federalist*, no. 78, makes the courts "bulwarks of a limited Constitution against legislative encroachments."

Leaving procedural and institutional safeguards to one side, those who claim the Constitution establishes broad powers and few and narrow rights precisely reverse the logic of the Constitution itself: Congress's powers are enumerated and specific, individual rights are left broad and unspecified. This is why Hamilton argued, in the *Federalist*, no. 84, that "the Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights." A Bill of Rights was eventually proposed and ratified, but the logic of enumerated powers and broad rights was preserved by the Ninth and Tenth Amendments, explicitly denying that individual rights are limited to those specified, and reserving all powers not delegated to the states and the people.

And so the Constitution establishes a scheme of government that is not basically democratic or majoritarian,

(Cont. on p. 8)

Constitution (Cont. from p. 7)

but republican, whose powers are limited and which is charged with enforcing a broad array of individual rights. The judiciary is not an anomalous institution, but an integral part of a scheme of constitutionally limited government. Seen in this light, the Court is warranted in exercising its powers to the fullest.

If the Court, then, is fully justified on constitutional grounds in actively protecting individual rights against the government, it does not follow that any form of activism will do. The New Right is correct in charging the activists of the Warren Court with a failure of principle: While the Warren Court correctly perceived the Constitution's concern with racial equality and personal privacy, to take two examples, the liberal activists neglected the central place that the Constitution gives to economic liberties and property rights: In the contracts clause, the takings clause, and the Fourteenth Amendment's extension of the protection of due process of law to the life, liberty, and property of citizens in the states, the Constitution manifests a concern with economic liberties that conscientious interpreters cannot ignore.

A principled activism proposes that we see the Constitution as an attempt to realize the purposes disclosed by the document itself, its language and structure: the protection of a broad array of rights, both personal and economic. A principled activism takes seriously the whole document, including those parts that liberal activists and the New Right ignore. We must accept the delegation implicit in the framers' choice of general terms and not flee from the hard questions posed by the Constitution, either under the guise of respecting historical intentions, or under the banner of a moral cynicism utterly inconsistent with the founding document and the project of the framers. Indeed, the blanket moral cynicism of Bork and Rehnquist undermines any principled case for democracy itself, and so this cynicism proves self-defeating.

Besides the insistence on principle and fidelity to the text and structure of the Constitution itself, we have another way to control the judiciary.

We need to remember that the Court is only one of three coordinate branches, and each is charged with interpreting the Constitution for itself in carrying out its own duties. The Constitution is our supreme *political* document, to be interpreted not only by judges deciding cases but by all those who take an oath to support it, including members of Congress and the president. Attorney General Meese was absolutely right when he said, a few weeks ago, that Supreme Court interpretations of the Constitution are ultimate only for the judicial branch and not for coordinate branches of the federal government.

The Senate, in its recent hearings on the nominations of Chief Justice Rehnquist and Justice Antonin Scalia, missed an important opportunity to review

"The New Right's advocacy of judicial restraint is a consequence of ignoring those parts of the Constitution that majoritarians find inconvenient."

the substantive merits of the jurisprudence of the New Right. In doing so, the Senate missed an opportunity to participate in the political process of constitutional interpretation. By confining itself to issues of intelligence and integrity, the Senate neglected its own responsibility to interpret and enforce the Constitution. Would substantive Senate oversight "politicize" the nomination process? It's already political. The president considers the substantive views of potential nominees, and the Senate should do the same before confirming.

Would substantive Senate review confound the president's appointment power? The president's power is to *nominate*, the power to *confirm* is the Senate's. And where the appointment in question is to a coordinate branch with life tenure, the president does not deserve the deference due to appointments within the executive branch, of which unity is a leading virtue. (In rejecting William Bradford Reynolds for a Justice Department position, but passing over the substantive views of Rehnquist and Scalia, the Senate reversed the proper levels of scrutiny.)

But will the open discussion and debate of the proper meaning of the Constitution further politicize the Court itself? And perhaps the Constitution? You bet it would, and high time too: Because to do so would elevate our politics. Public debate about the meaning of the Constitution educates the public in its requirements, invites the public to pass on the interpretations of particular senators as elections occur, and helps make constitutional values a lively force in our politics. To politicize the Constitution in this way is to constitutionalize our politics: to elevate our politics above the pursuit of narrow interests and help give us a politics of principle.

Now of course this already happens to some degree, and the public is aware of the propriety of serious constitutional reflection in our politics. Take the recent case of Senator Slade Gorton who, for political favors from the White House, traded his vote on the appointment of Daniel Manion to the federal bench. The people of Washington state, to their eternal credit, rewarded this bit of political corruption (utterly inappropriate to what the framers hoped for in the Senate) with a justly deserved one-way ticket home for Senator Gorton.

To take up the active enforcement of constitutional principles in the courtroom and in the political arena broadly does not mean we will find easy answers to the hard questions of political morality posed by the Constitution. The Constitution is not easy to interpret. The important point is that the hard questions posed by principled activism are the right questions, the questions we ought to be asking not just in the courtroom but in our politics more broadly. The questions posed by the jurisprudence of original intent on the other hand are not only impossible to answer, but the wrong questions, questions that fly in the face of the moral seriousness of the founding document and its framers.

Gary L. McDowell: Stephen Macedo's work is considered by many to be a brilliant effort in legal theory. My problem is that I distrust brilliant theories—perhaps for reasons personal as well as professional. I am not here to dispute the brilliance of his efforts but only to suggest we should be wary of such insightful things.

For in reading Mr. Macedo's book, and in listening to his presentation just now, I am reminded of the problem one confronts in making any argument. And that problem, to borrow the words of Benjamin Cardozo, is the tendency of an idea to exceed the limits of its logic.

In thinking about Mr. Macedo's argument, I was reminded of that great legal philosopher, Woody Allen. Allen, you might remember, is fascinated by logic, and in particular the problem of false steps. His famous example of syllogistic reasoning will, I think, make my point.

Major Premise: All men have legs
Minor Premise: Socrates has legs
Conclusion: All men are Socrates.

This is the sort of feeling I get when I hear or read Mr. Macedo's criticism of what he has erroneously dubbed the New Right's jurisprudence. For his attack on what has come to be called a jurisprudence of original intention is an attack that begins from a fundamentally flawed understanding of what a jurisprudence of original intention is really all about.

In particular, Mr. Macedo asserts that a jurisprudence of original intention derives from two basic assumptions, assumptions with which he obviously disagrees. The first assumption is that to speak of the intentions of the framers one can only mean what Macedo labels their "specific historical intentions." The second, and equally flawed, assumption attributed to a jurisprudence of original intention is that it is little more than a cloak for a "political preference for majoritarian power over individual rights and liberty."

I suspect I will surprise no one by suggesting that Mr. Macedo is tragically wrong on both counts. But his misreading, not only of contemporary writers but of the founders themselves, is so great that it cannot but be intended. The reason Mr. Macedo begins as he does is because his true interest is in pressing a particular political preference of his own disguised as disinterested scholarship.

To put it simply, Mr. Macedo's work is a classic example of the moral wish being father to the constitutional thought.

Let me turn first to the problem of his points of jurisprudential departure before turning to the problems posed by his point of ideological arrival.

First, as far as I know, no one who argues for a jurisprudence of original intention—certainly not Attorney General Meese, whom Mr. Macedo takes to task—has ever suggested that this view is tied to the particular historical circumstances of the founding period. What is meant by "intention" is not particular or subjective notions of that time concerning public policy or law. Rather, what is meant is what Paul Bator has called the "postulates of good government." Those postulates differ from particular policy ends in that they rely most heavily on the structural design of a government, the means a government has of effecting certain policies. Toward that end, for example, it does not matter what James Madison or Alexander Hamilton or anyone else of that generation felt about, say, abortion as a moral matter. What does matter is whether such questions as abortion are properly handled by the federal judiciary or are appropriately left to the legislatures of the several states as a result of the Constitution's principle of federalism.

Thus, what lies behind a jurisprudence of original intention is not a social agenda but a due regard for the Constitution's structure—from its enumeration of both powers and limits to its principles such as separation of powers and federalism. For taken as a whole, these particulars comprise the basic theory of the Constitution: limited but energetic government, with the power to act and a structure designed to make it act wisely or at least responsibly.

This leads directly to Mr. Macedo's second mistaken assumption. He believes that those who embrace this approach to constitutional affairs are basically nothing more than rather clumsy defenders of a crudely understood majoritarianism. To argue, as he does, that the security of our most important rights depends upon the judiciary engaging in moral philosophy in order to curb the excesses of an apparently indecent (in his view) process of majority rule, is to deny or at least ignore the rich and sophisticated theory of the American Founding, what Alexander Hamilton referred to as the newly bolstered science of politics.

In fact, the very substantive concerns

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Constance Horner, director of the Office of Personnel Management, and Peter Young of the Adam Smith Institute talk after their Policy Forum on worker buy-outs of government agencies.

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Mr. Macedo raises were raised many times by the founders. The problems of property being taken, of unjust tax laws, of the rights of any minority however defined—economic, religious, ethnic, or otherwise—being abused by a zealous and overbearing majority, were precisely the issues that drove the delegates to Philadelphia in 1787. These were precisely the concerns the Constitution was meant to address and remedy. One need only read the *Federalist*, no. 10, to understand this. Thus, it seems, Mr. Macedo and I agree on the problems to be expected under a majoritarian scheme. But we differ markedly on the means appropriate to secure those ends.

The fact of the matter is that the founders sought to create a system of government which would not deny the will of the majority but which would, as Madison so tellingly put it, refine and enlarge it. Thus, they, too, feared the excesses of democracy and the tyranny of the majority. But what they sought was a system whereby the crude and untutored opinions and passions and interests of the people would be filtered and thus refined and improved upon. What they sought, in brief, was not a simple *quantitative* majoritarianism but a *qualitative* majoritarianism.

This was to be achieved through the carefully drawn structural contrivances of the Constitution—and not upon any one institutional part of it. It would have struck that generation as bizarre to have expected the security of their rights to depend upon a judiciary willing to plunge into a moral discourse unattached to the text and divorced from the intentions that lie behind the document itself. Indeed, one need only read the *Federalist*, no. 78 or *Marbury* v. *Madison* (1803) to see the limited role they anticipated for the courts under the Constitution.

Thus the true foundation of a jurisprudence of original intention is the appreciation for the design and the objects of the Constitution. It recognizes the limitations of popular government and the need to secure individual rights—both personal and economic. But it denies that good government is ever to be expected in an unelected body of nine (give or take what Congress may see fit to change that number to) so overwhelmed with the pursuit of moral progress that they become willing, as Chancellor Kent once put it, to "roam at large in the tractless fields of their own imaginations."

Indeed, our constitutional institutions were devised precisely to supply, as Madison said in the *Federalist*, no. 51, "the defect of better motives." Sturdy institutions replaced good intentions as the source of good government.

Now I would like to turn to Mr. Macedo's more substantive concerns. That is, those objects he would both hope and expect to have judges reach once they start meandering down the moral path he has cleared for them.

"The aconstitutional jurisprudence of the liberal left and the libertarian right will weaken public confidence in the Constitution."

His concern is twofold: Economic rights on the one hand, and personal rights on the other. His means to achieving a jurisprudence dedicated to both is the same. It is, to put it bluntly, to allow judges to play fast and loose with the Constitution.

To put it briefly, Mr. Macedo's logic is guided by reference to two of constitutional decisional law's strangest polestars—*Lochner* v. *New York* (1905) and *Griswold* v. *Connecticut* (1965). These are, of course, the two exemplars of substantive due process, old and new. In each case, the Court looked beyond the text of the Constitution, beyond the intention of those who framed and ratified the Fourteenth Amendment, and beyond the limits of common constitutional sense.

The liberty of contract doctrine of *Lochner* and the right to privacy doctrine of *Griswold* are ultimately rooted in the same shallow soil, that of personal predilection and political preference. They are juridical contrivances at war with the Constitution, at war with the idea of limited government, and at war with the basic principles of democratic government upon which our entire political system and legal traditions rest.

Where the Constitution intends to protect rights, it does so—clearly and simply. Where it is silent, it is silent. The due process clause is not a judicial wild card to be used to smuggle moral theory into the Constitution; the Ninth Amendment is not a statement of fundamental rights so sweeping as to render all the other rights explicitly mentioned superfluous; most of all, Article III is not the primary means whereby rights are to find their primary protection.

Mr. Macedo's theory, if taken seriously, would render the Supreme Court not so much a continuing constitutional convention but a wildly esoteric Ivy League seminar in moral philosophy.

Thus, the notions of substantive due process that lie at the root of Mr. Macedo's theory are notions that should be rejected. The due process clauses, after all, were meant to secure those rather technical procedures all are rightfully due as part of the judicial process, as Alexander Hamilton once had occasion to explain. Those clauses were never intended to empower the judicial branch to inquire into the substance of legislation at either the state or the national level to determine if such legislation is reasonable or nonarbitrary or decent or whatever. The reason, as James Wilson put it during the Federal Convention, is that some laws may be unwise, they may be dangerous, they may be destructive—but still not be unconstitutional. To allow the courts to enter the realm of substantive policymaking is to deny the logic and the limits of the written Constitution that still governs us.

To distrust the moral impulses of judges is not to be morally cynical. It is, rather, to be politically prudent.

With all this being said, there is a deeper danger to Mr. Macedo's book. As I have said in another place, this joining of the traditions of *Lochner* and *Griswold* is a most unholy coupling of the liberal left and the libertarian right. The offspring of this curious union can only be the bastard child of judicial activism.

Both efforts call into question in a most radical way the constitutional structures that grant legitimacy to the popular branches of the government. Each side rejects any confidence in the power of legislatures to govern decently, and each has a greater confidence in the legal argument of advocates than in the political opinions of the people duly expressed in properly representative institutions.

In the end, this aconstitutional jurisprudence of the liberal left and the libertarian right will weaken public confidence in the Constitution's institutional design that has for so long made this nation not only the most free the world has known, but the most economically prosperous.

In closing, let me briefly return to the problem of brilliance in legal theory and read a portion of a recent article in the *New Republic*. No one has said it better as regards the contemporary confusion surrounding the Fourteenth Amendment.

> [Ronald] Dworkin's theory, like [John Hart] Ely's, takes the constitutional text as the starting point, but then adds a brilliant gloss of its own.
>
> Unfortunately, these theories share a flaw, a flaw endemic to brilliant legal theories. The 14th Amendment was not written by Ronald Dworkin or John Hart Ely. Its primary drafter was a man named John Bingham. Bingham had a certain flair for sermonizing. But, based on his public speeches, it seems doubtful that he was as intelligent as the average law professor, let alone Ronald Dworkin and John Hart Ely. It is hard to see how he could have had in mind a notion so ingenious that no one thought of it until Ronald Dworkin and John Hart Ely came along.
>
> Not everyone agrees that the intent of the framers is what counts in constitutional interpretation. But virtually everyone agrees that a bedrock principle of law is consent of the governed. A brilliant theory is by definition one that would not occur to most people. The general problem with brilliant legal theories is: How can most people have agreed to something that they could not conceive of?

Justice Hugo Black once said that judges and justices take an oath to support the Constitution as it is, not as they would like it to be. The same should be required of scholarship. We should endeavor to understand and to teach and write about the Constitution as it is, not as we would like it to be.

Macedo: Let me turn first to Gary's ironic emphasis on the "brilliance" of my argument. The real irony is this: Gary thinks, no doubt, that he has an even more brilliant argument to show that mine is not the best interpretation of the Constitution, so his criticisms turn back on themselves, at least if he thinks his arguments are better than mine.

Indeed, Gary's criticisms turn back on the Reagan administration itself. This administration has encouraged the academic study of the Constitution by promoting so many professors to the federal bench and to important positions in the Justice Department: Justice Scalia and Judges Bork, Posner, Easterbrook, and Winter were all well-known academics. Gary McDowell and even the attorney general are former professors. And it seems to me that all these former professors are capable of articulating theories of the Constitution that are not only, as Gary would have it, "brilliant," but sometimes utterly fantastic.

Gary closed by warning that we should beware of brilliant academic theories that would never occur to practicing politicians or common people, theories that the people could not understand as interpretations of the Constitution. I agree. But the American people and those who framed the Constitution would have no difficulty grasping the idea that they have rights, both personal and economic, and that these rights are guaranteed by the Constitution. I suspect they would find the contrary notion, expressed by Chief Justice Rehnquist and Judge Bork, that rights claims are reducible to mere preferences or desires for gratification, extremely difficult to grasp.

Now Gary seemed, at least initially, to concede that he rejects the relevance of specific historical intentions to the project of constitutional interpretation. He conceded that the Constitution is not basically democratic or majoritarian, and he claimed that he's not really a moral skeptic. But in condemning the interpretive style of *Griswold* v. *Connecticut*, it seems to me that Gary must rely upon the sorts of claims he says he wants to eschew. Any conscientious constitutionalist must be prepared to allow the judicial protection of rights not explicitly stated in the founding document, and that is because the founding document itself tells us,

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Stephen Macedo talks with Policy Forum participants.

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in the Ninth Amendment, that we have such rights. How else can we interpret the Ninth Amendment except by engaging in the project of *Griswold*?

What *Griswold* does is to flesh out those unspecified constitutional rights by looking for principles and values implicit in the rights that are specified. And so we find that the Third Amendment protects the privacy of the home against the quartering of troops, the Fourth protects persons and their homes against unreasonable searches and seizures, the Fifth protects persons against self-incrimination, and First Amendment guarantees have been interpreted to imply a right to free association. A principle of respect for the privacy of individuals would explain and justify the inclusion of these specific guarantees in the Constitution. This implicit principle is, then, an appropriate basis for filling out the other, unspecified constitutional rights that the Ninth Amendment tells us we have. This is a principled, textual way of justifying the right to privacy extended to the intimate relations of married couples in *Griswold*, and which should have been extended to homosexuals in the recent case of *Bowers* v. *Hardwick*.

The method of *Griswold* for giving substance to unspecified constitutional rights is, incidentally, the same logic that Chief Justice Marshall applied to Congress's powers in the landmark case of *McCulloch* v. *Maryland*. Article 2 enumerates Congress's powers and then adds that Congress may also do what is "necessary and proper" to carry out the enumerated powers. But what other powers are "necessary and proper"? Marshall sought to discern the objects and ends underlying and justifying the enumerated powers. Additional powers might, then, be justified as means to the objects and ends implicit in specific grants of power. If we cannot justify the logic of *Griswold*, then we cannot justify the logic of *McCulloch:* the one seeks a principled, textual basis for the unspecified powers announced by the necessary and proper clause, the other seeks a similar basis for unspecified rights whose existence is even more clearly announced by the Ninth Amendment.

Gary also seems to claim that the Fourteenth Amendment's guarantees of "due process of law," equal protection, and so on, do not warrant judicial forays into moral and philosophical questions. He mentions the Court's controversial abortion decision, *Roe* v. *Wade*, as an example of misconceived judicial activism. Well, how can judges enforce the Fourteenth Amendment's guarantee of the equal protection of the law for all persons without deciding what counts as a person worthy of constitutional protection? We may disagree with the particular answer the Court announced in *Roe*, but surely the Court cannot avoid the issue.

"While the Warren Court correctly perceived the Constitution's concern with personal privacy, it neglected the central place the Constitution gives to economic liberties."

But Gary also claims the principle of federalism ought to preclude judicial inquiry into "such questions as abortion." Does Gary seriously mean that judges should leave the protection of individual rights to the states? Does he need to be reminded of the Civil War and the sweeping amendments passed after that war guaranteeing fundamental rights against state governments? Does he regard civil rights decisions like *Brown* v. *Board of Education* as illegitimate judicial infringements on "states' rights"?

Gary's case against a principled judicial activism rests, ultimately, on the claim that constitutional "structures"—the separation of powers and federalism—and not the judiciary, are the basic guarantees of limited government and individual rights. In this, Gary wrongly supposes that the framers pursued a simple, rather than a complex and multifaceted, strategy for limiting government and protecting individual rights. Of course the framers hoped that separated powers, a bicameral legislature, long terms for senators, the embrace by one government of a large, heterogeneous republic, and other structural measures would help prevent factions from passing unjust laws. This in no way implies, however, that the judiciary was expected to exercise restraint in striking down whatever unjust laws do manage to pass. And for Gary to cite the *Federalist*, no. 78, to support the claim that the framers envisioned a "limited role" for the Court is ludicrous. The *Federalist*, no. 78, argues for granting life tenure to Supreme Court justices so that they will have the "uncommon portion of fortitude" needed to guard the Constitution against legislative encroachments. Without the courts, according to the *Federalist*, no. 78, the limits on legislative power expressed in the Constitution would amount to nothing, and so the courts are to be "bulwarks of a limited Constitution." I cannot imagine a less plausible source of support for Gary's position than the *Federalist*, no. 78, unless perhaps it would be the Constitution itself.

The Constitution's structure has been changed in important ways since the founding. In the original design, not only the Court but the president and the Senate were remote from the people and were expected to have the good judgment needed to support minority rights against popular passions. As a consequence, we should hardly be surprised if the modern Court has become more active in defending constitutional limits than the framers anticipated: the courts are defending these limits against institutions markedly more popular than in the original design.

Let me just say in closing that the courts should not flee from the hard moral judgments posed by the Constitution, as Gary McDowell and the New Right would have them do. Of course, the judges cannot protect rights by themselves: that is an argument for greater legislative responsibility, that is a good argument for more serious legislative consideration of constitutional issues; it is no argument at all for judicial restraint in the protection of minority rights. ■

Wiretapping (Cont. from p. 1)

formation from telephones) and tracking devices (which monitor the location of suspects). The act also creates specific penalties for the unauthorized interception of cellular telephone conversations.

Unfortunately, the law threatens to take away more than it gives. It expands significantly the list of offenses for which law enforcement authorities may obtain a surveillance order; it increases the number of Justice Department officials who can seek permission to eavesdrop and allows the FBI to use "independent contractors" to do the actual snooping; it significantly expands the "good faith" defenses available to policemen who overstep the law's boundaries; it expressly authorizes the interception of cordless telephone conversations and certain pager transmissions without any court review; it waters down the definition of what constitutes a protected communication under the law and establishes less stringent standards for obtaining a court order to gain access to electronic communications and stored data. The act will make an already complicated law virtually incomprehensible in terms of its application to new communications technologies.

The potential infirmities of the new law can be fully appreciated only through understanding the reasons for the failure of Title III of the 1968 law.

Title III and the Evolution of the Communications Marketplace

Title III established criminal and civil penalties for the unauthorized interception of certain types of communications. It prohibited eavesdropping by private parties and allowed law enforcement surveillance only upon a showing to a court that there was probable cause to believe a wiretap would uncover evidence of criminal activity. Recognizing the inherently intrusive nature of electronic surveillance, Congress limited the offenses for which a warrant could be obtained to a specific list of serious federal crimes and stipulated that only top Justice Department officials could authorize a warrant request. Title III included various additional safeguards limiting the scope and duration of eavesdropping.

The act was a product of congressional concern over the surveillance practices of the time. As such, it was influenced heavily by two 1967 Supreme Court decisions: *Katz* v. *United States*, in which the Court overturned a 39-year precedent and held that the Fourth Amendment proscription against unreasonable searches applies to government interception of telephone conversations, and *Berger* v. *New York*, in which the Court held that the use of electronic equipment to overhear face-to-face conversations constitutes a search under the Fourth Amendment.

The terminology of Title III grew out of these cases, which ultimately limited the law's ability to cover newer

"The new law establishes a lower level of protection for electronic communications than the 1968 law had provided for wire and oral communications."

communications technologies. Generally, the law prohibited the unauthorized *interception* of *wire* or *oral* communications. Its failure to adapt to new technologies is attributable primarily to its definitions of these three key terms.

Computer Transmissions Not Protected

A single word inserted into the previous law's definition of interception resulted in the wholesale exclusion of digital or computer communications from its coverage. Title III defined "intercept" as the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device." Although the legislative history failed to illuminate what Congress meant by the term "aural" acquisition, it made clear that "other forms of surveillance are not within the proposed legislation." The principal author of Title III, G. Robert Blakey, now a law professor at Notre Dame, has since stated that the definition of "intercept" was chosen specifically to exclude coverage of machine-based data.

Courts began to follow the stated (if unofficial) intent of Title III's drafter. They limited the law's scope to interceptions of conversations that could be heard—and understood—by the human ear. Thus, interception of electronic tones or pulses was not considered to be an "aural acquisition" of communications under the law. This reading excluded pen registers, the video portion of a videotape, data transmission, and telex messages from the law's protections. Such exclusions were not particularly significant in 1968 when Title III was adopted, but they became a serious concern as computer and communications technologies merged during the ensuing 18 years.

Wire vs. Oral Communications

Title III set different levels of legal protection for transmissions depending on whether they were considered to be "oral" or "wire" communications. Protection for oral communications was conditioned upon the reasonable privacy expectations of the speaker; protection for wire communications was not.

Under this statutory dichotomy, the level of protection afforded a given means of communication depended on whether it was characterized as wire or oral. Telephone systems that utilize radio waves proved to be the most difficult to categorize under this legislative scheme, since many such systems did not exist when Title III was adopted. This problem left in legal limbo many of the newer communication technologies such as cordless telephones, pagers, and mobile telephones, including cellular phones.

Courts that tried to interpret the Title III definitions were unable to articulate a satisfactory solution. A U.S. appeals court in 1973 considered the law's application to mobile telephones and reached what it conceded was an absurd result. The court concluded that conversations conducted between a mobile radio telephone and a standard landline telephone must be treated as a wire communication under the statute

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Wiretapping (Cont. from p. 13)

and thus required no privacy expectation by the speaker to be protected. Conversations conducted between two mobile telephones, on the other hand, could be considered oral communications and were not protected because it was unreasonable to expect the radio transmissions to remain private.

The clear trend following this decision was to deny protection to communications technologies that depended on radio links. Two state supreme courts held that conversations over cordless telephones are not "wire" communications under Title III and allowed the police, who lacked warrants, to record the conversations. The Florida Supreme Court similarly held that voice messages conveyed by radio waves to a paging device did not constitute "wire" communications.

This line of cases began to cause a great deal of nervousness in the cellular telephone industry, which began commercial operations after 1982. Cellular telephones are more sophisticated than the older mobile telephones, but the logic of the decisions appeared to extend to the new technology: cellular phones would not be protected by Title III because they are radio telephones. By 1984, radio scanners hit the market that allowed hobbyists and others to listen in on cellular telephone calls. These developments helped intensify the demand that the law's definitions be clarified.

The Electronic Communications Privacy Act of 1986

As it was first proposed in September 1985, the rewrite of Title III would have clarified federal wiretapping law significantly. The original bill called for replacing the definition of "wire" communications with the term "electronic" communications, which would encompass both data and radio transmissions. As with the previous standard for wire communications, electronic communications would be protected whether or not the speaker expected privacy. This fairly straightforward change would have settled most of the questions that had arisen under Title III regarding protection of new technologies.

The Department of Justice, however, whose approval was essential if the bill was to be signed by the president, categorically rejected such a clear approach. Instead, the department demanded that the legislation retain the previous definitions of oral and wire communications and that electronic communications be added as a third category. The changes also established a lower level of protection for electronic communications and set out various exceptions to the statute's coverage.

Superficially, adding the definition of electronic communications seems to solve the problems experienced under Title III. The new category extends coverage to "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." Thus, at first glance, the new federal wiretapping law appears to place restrictions on surveillance of wire communications, oral communications, and virtually everything else.

> **"The new wiretap act will increase substantially the possibilities for surveillance by federal agencies."**

This facile initial assessment of the act is deceptive, however, for the law contains a number of exceptions. For example, it expressly excludes coverage for such items as the radio portion of cordless telephone conversations; tone-only pagers; transmissions by any station for the use of the general public, or that relate to ships, aircraft, vehicles, or persons in distress; transmissions by any station operating on a frequency assigned to the general mobile radio services; and, among other things, any electronic communication that is readily accessible to the general public. This last exception is potentially quite broad since the act considers all electronic communications transmitted by radio to be "readily accessible" unless encrypted, transmitted using modulation techniques whose essential parameters have been withheld from the public to ensure privacy, transmitted on certain radio subcarrier frequencies, transmitted by a common carrier, or transmitted as part of a private microwave, satellite, or broadcast auxiliary service.

If this growing list of protected categories modified by exceptions and exclusions seems confusing, it is because it *is* confusing. Under the old law, courts were plagued with the task of determining whether a conversation should be protected as an oral or wire communication, and if so, which one. This quandary is a principal reason why coverage became uncertain for new communication technologies. Now, law enforcement agencies and courts will have an additional category to figure out. Once they do so, they will have to sort out the various exceptions.

As a practical matter, these considerations are likely to make the law almost impossible to enforce. For one thing, the rules governing interception are somewhat different for each category. Certain types of interceptions are allowed for electronic communications that cannot be authorized for wire or oral communications. Likewise, surveillance of oral communications is allowed in circumstances that would not permit eavesdropping on electronic or wire communications.

Experience with Title III amply demonstrated it is not always easy to tell whether a given message should be considered as an "oral," "wire," or "electronic" communication. Moreover, the House Judiciary Committee Report on the legislation acknowledged that a single conversation may involve elements of all three categories. It noted that "the transmission of data over the telephone is an electronic communication; but if the parties used the line to speak with one another between data transmissions, they would then be making a wire communication. And, indeed, a party's utterances into the telephone mouthpiece are an oral communication."

The advance of time and technology may blur the distinctions between categories even further. The committee report stated that transmissions on cellular systems are to be considered "wire" communications. It added, however, that if evolution of cellular technology permits the switching or transmission of cellular calls without the use of a wire, cable, or other like connection, then cellular will be transformed into an "electronic" communication service. Presumably, if such a technical change becomes possible and some cellular systems alter their method of transmission, then those systems would fall under one legal standard while the traditional systems would fall under another.

Threats to Privacy under the 1986 Act

While much of the act is confusing, one thing is clear: it establishes a lower level of protection for electronic communications than Title III had provided for wire and oral communications. Where Title III allowed government surveillance only for certain specified crimes, the new law authorizes interception of electronic messages that may provide evidence of *any* federal felony. Additionally, government agents may gain access to stored data without having to establish probable cause to believe a crime has been committed. Police may secure a warrant to seize information contained in electronic storage upon a showing that the data may be "relevant to a legitimate law enforcement inquiry." It is hard to imagine a seizure of data that could not be justified under such a standard.

Not only does the act dilute the protections it extends to new communication technologies, it chips away at existing safeguards. Taken as a whole, the wiretap act rewrite will increase substantially the possibilities for surveillance by federal agencies. For one thing, it increases by about a third the number of crimes for which a surveillance order may be obtained. Wiretaps may now be authorized for such "major" federal felonies as mail fraud, escape, and automobile theft. The new law also expands the list of Justice Department officials who may authorize applications for court approval to include "any acting Assistant Attorney General or any Deputy Assistant Attorney General in the Criminal Division." Any "governmental entity" may apply for authorization to seize stored data.

The act no longer requires that government agents actually conduct the wiretaps—the FBI may go outside the government to hire independent contractors to intercept communications. Thus, the White House plumbers unit could be reactivated so long as it is "supervised" by the Bureau. The House Judiciary Committee Report explained that this change "is designed to free field agents from the relatively routine activity of monitoring interceptions so that they can engage in other law enforcement activities." In other words, the legislative change acknowledges that wiretapping has become so commonplace that the FBI lacks sufficient manpower to carry it out.

Subtle changes in the law's definitions will enable the government with far less judicial oversight to monitor the parties involved in conversations. The 1968 law prohibited unauthorized interceptions of the *contents* of communications, defined as any information concerning the identity of the parties to a communication or its "existence, substance, purport or meaning." The new act deletes from the definition of "contents" the *existence* of the communication or the *identity* of the parties. Because of this change, no authorization at all will be necessary for surveillance that discovers only that a call took place and who was involved.

> **"Wiretapping has become so commonplace that the FBI lacks sufficient manpower to carry it out."**

This small but significant deletion will greatly enhance the government's ability to conduct certain specialized types of surveillance. It conceivably could allow specialized surveillance of the networking patterns of citizens in general, and will facilitate the government's efforts to trace leaks of sensitive information without the nuisance of having to justify its actions to a judge.

In March 1985, the *Washington Post* reported on government plans to monitor by computer all telephone calls from federal offices. The purpose of the plan was to identify calling patterns and to spot frequently dialed numbers. It would be no large leap for the computer analysis to pick out calls to reporters, as well.

The Reagan administration last year assigned to a special FBI unit the job of ferreting out leaks of government information to the press, and this change in the wiretapping law gives the squad an additional tool. Absent judicial review, there is no assurance that such techniques will be reserved for genuine matters of national security. Indeed, the FBI team already was activated to discover who disclosed the government's improper activities in the administration's "disinformation" campaign against Gaddafi. An overheated Sen. Strom Thurmond (R-S.C.) similarly demanded that the FBI check out who leaked the contents of William Rehnquist's Justice Department memos during Supreme Court confirmation hearings last summer. If Watergate were to recur in 1987, it would not be difficult for the government to identify—and silence—Deep Throat.

Assuming a government agent runs afoul of the relaxed surveillance standards and is prosecuted or sued for unauthorized surveillance, the act significantly expands the available defenses. Title III had allowed as a complete defense to any such litigation a good faith reliance on a court order. Under the new law, a good faith reliance that the surveillance was justified acts as a complete defense even in situations where a court order was not obtained. The new provision immunizes the government agent from prosecution or civil action under the Electronic Communication Privacy Act or under "any other law." Not only does the act greatly expand the government's ability to snoop, it handicaps the ability of those who are wronged to bring malefactors to justice.

At this point, the Horse is already inside the gates, the invading armies poised to spring on a slumbering citizenry. One may only hope that the beast is so poorly constructed and cumbersome that it will collapse under its own weight before the attack. ■

"To be governed..."

Alert Secret Service agents wrestled the salamis to the ground

Assistant Secretary of Defense Richard N. Perle . . . went to the quasi-summit [in Iceland] armed with "two good Hebrew National salamis" as a hedge against all-night sessions and . . . Reykjavik's restaurants. . . .

He placed this "survival kit" on the window sill of his hotel room to preserve the salamis in the cool air. . . . A storm blew up. "The salamis plunged four floors to the ground, and the Icelandic security guards, believing they were under attack, pounced on them and destroyed them."

—*Washington Post*, Oct. 17, 1986

Unless the government does it, in which case it's the other way around

[Philippine communist rebel Saturnino Ocampo] conceded that peasants and certain businesses are levied [New People's Army] taxes and those that refuse to pay often find their equipment and facilities destroyed. But Ocampo said the violence was only "a last option," taken against businesses that refuse to pay even after receiving three formal notices.

"It is a question of how this is to be looked upon," Ocampo said. "The movement calls this progressive taxation. The government calls this extortion."

—*Washington Post*, Oct. 13, 1986

Why voters remain rationally ignorant

Mayor Marion Barry, under criticism from Republican challenger Carol Schwartz for sending his child to a private school, has dismissed as just a "tactical" statement his remark in 1978 that elected officials have a "moral responsibility" to send their children to public schools. . . .

Barry said he did "not really" believe what he had said at the time.

—*Washington Post*, Oct. 30, 1986

$20,000 could score some fine smack

Republican mayoral candidate Carol Schwartz and Mayor Marion Barry yesterday blasted a recommendation to pay $20,000 to every black man in the District as an incentive to stay off drugs.

That recommendation . . . came from participants at a $93,000 weekend drug summit sponsored by the mayor.

—*Washington Times*, Oct. 24, 1986

How did we manage without regulation?

Consumer Product Safety Commission officials kicked off the agency's holiday toy safety campaign yesterday by . . . displaying some of the 51 items recalled this year for dangerous defects. . . .

"It's a miracle that we parents survived so many Christmas seasons without the CPSC to guide us," said guest speaker Barbara Bush.

—*Washington Post*, Nov. 19, 1986

Big Brother wants you to be happy

A man was handcuffed, forced into a psychiatric ward and billed $2000 for treatment after authorities heard about his recurring depression. . .

[Dennis] Saeger . . . said a moody letter he had written to his secretary, Brenda Tharp, got the ball rolling. Tharp was so distressed about the letter . . . that she called a suicide hot line and was told to call 911.

Saeger said it reminded him of a science-fiction movie when three uniformed police officers and a social worker appeared at the door of his home, interviewed him for about 10 minutes and handcuffed him. . . .

Saeger was held for three days at Olive View Hospital and billed $2000, which he refuses to pay.

Once in the hospital, he said, he thought about complaining but decided against it when fellow inmates told him that complaining would only delay his departure by 14 more days.

—*San Francisco Chronicle*, Nov. 24, 1986

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