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Criminal Procedure -- Pen Registers: Compelling Third Party Assistance Under the All Writs Act

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investment in a stock of computers for leasing. This requirement is in fact the major capital entry barrier into the manufacturing market. Thus, by restricting the growth of strong leasing companies, IBM maintains significant capital entry barriers in the manufacturing market.

These additional and more subjective factors support the conclusion that IBM violated the antitrust laws by engaging in a socially undesirable price squeeze. It should be remembered, however, that when predatory pricing analysis is opened to considerations beyond the monopolist’s costs the advantages of the cost-based rules are diminished, and the analysis leans toward the “intrinsically speculative and indeterminate” approach such rules are designed to avoid.

The problem of determining standards for a monopolist’s price behavior is compounded when that behavior occurs on successive market levels, as in the Greyhound case. Clear and precise standards are needed to guide the monopolist and the courts. Such standards are available in the form of cost-based predatory pricing rules, which can be applied to the vertically integrated monopolist. The court of appeals in Greyhound overlooked the possibility of such an application, relying on general definitions of monopolization to find a prima facie case of monopolization. The court overlooked or ignored the crucial issue of IBM’s costs as a measure of the propriety of its prices; IBM’s potential defenses based on cost considerations went unnoticed, leaving open the unhappy possibility that even weaker cases will be approved in the future. The Greyhound court thus decided, for badly flawed reasons, to enter the economic thicket of judicial supervision of IBM’s pricing policies.

MICHAEL L. BALL

Criminal Procedure—Pen Registers: Compelling Third Party Assistance Under the All Writs Act

A pen register is a mechanical device that records the outgoing numbers dialed on a monitored telephone, but that does not overhear oral communications or record whether a call is actually completed. Because

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109. G. Brock, supra note 11, at 57-60.
110. Id.; J. Soma, supra note 11, at 41.
111. Areeda & Turner, supra note 65, at 897.

1. A pen register is attached to a telephone line usually at a central telephone office. In
pen registers, unlike wiretapping and eavesdropping devices, are not governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), the manner of their use has remained a matter within the discretion of the federal courts. In *United States v. New York Telephone Co.* the United States Supreme Court considered the question whether a United States District Court may properly direct a telephone company to provide federal law enforcement officials the facilities and technical assistance necessary for the execution of its order authorizing the use of pen registers. The Court held that the district court had power under Federal Rule of Criminal Procedure 41 (rule 41) to authorize the use of pen registers, and power under the All Writs Act to order the telephone company to furnish assistance. Although the *New York Telephone Co.* decision is consistent with recent courts of appeals rulings and with congressional action concerning electronic surveillance under Title III, it


2. "Wiretapping" is the interception of communication by means of a physical connection with a communications system at a point between the sender and the receiver; "eavesdropping" refers to the interception of communication by means of a mechanical or electronic device that is not physically connected with the communications system. 74 AM. JUR. 2d Telecommunications §§ 211, 216 (1974). See generally A. WESTIN, PRIVACY AND FREEDOM 73-78 (1967).


5. Rule 41(b) authorizes federal magistrates and state judges to issue a warrant to search for and seize any "(1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense." FED. R. CRIM. P. 41(b). See also text accompanying notes 32-37 infra.

6. 28 U.S.C. § 1651(a) (1970); see text accompanying note 48 infra.


8. Congress amended Title III in 1970 by adding the following language to § 2518(4):

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier . . . shall
raises serious questions about the scope of authority conferred by rule 41 and the All Writs Act.

The United States District Court for the Southern District of New York issued an order authorizing agents of the Federal Bureau of Investigation (FBI) to install and use pen registers on two telephones upon finding that there was probable cause to believe that the two telephones were being used in connection with an illegal gambling operation. The order also directed the New York Telephone Company (the Company) to furnish the FBI "[a]ll information, facilities, and technical assistance" necessary to employ the pen registers unobtrusively, and it directed the FBI to compensate the Company at prevailing rates. The Company provided the FBI with the information it needed to install the pen registers, but it refused to lease the lines to the FBI that were required to install the pen registers in an inconspicuous location, away from the building containing the telephones. The district court denied the Company's motion to vacate that part of the order directing it to provide assistance, and the Company appealed.

The Court of Appeals for the Second Circuit affirmed that part of the order authorizing the use of pen registers, concluding that pen registers are not subject to the provisions of Title III and that district courts have power, either inherently or as a "logical derivative" of rule 41, to order pen register surveillance upon a showing of probable cause. The Second Circuit, furnishing the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier . . . is according the person whose communications are to be intercepted.

Act of July 29, 1970, Pub. L. No. 91-358, § 211(b), 84 Stat. 654 (codified at 18 U.S.C. § 2518(4) (1970)). The amendment provides further that such carrier be compensated at prevailing rates. Id. It was passed following the decision of the United States Court of Appeals for the Ninth Circuit in Application of the United States for Relief, 427 F.2d 639 (9th Cir. 1970), which held that, absent specific statutory authority, a district court was without power to compel a telephone company to provide assistance in the interception of wire communications conducted pursuant to Title III. Id. at 644. See also note 91 infra.

9. 98 S. Ct. at 367.


11. 98 S. Ct. at 367.

12. The Company advised the FBI to string its own wires from the "subject apartment" to another location where the pen registers could be installed, but the FBI determined that this could not be accomplished without alerting the suspects and jeopardizing the investigation. Id.


14. In re Order Authorizing the Use of a Pen Register, 538 F.2d 956, 960 (2d Cir. 1976), noted in 8 Rut.-Cam. L.J. 538 (1977). The court concluded that the power to order pen register surveillance is the equivalent of the power to order a search pursuant to a search warrant, and is
however, reversed that part of the order directing the Company to provide facilities and technical assistance. It assumed, arguendo, that a district court has authority to compel assistance by the Company, but concluded that "in the absence of specific and properly limited Congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance." The Supreme Court interpreted the Second Circuit's holding "as generally barring district courts from ordering any party to assist in the installation or operation of a pen register." It agreed "that the power of federal courts to impose duties upon third parties is not without limits," but the Court concluded that the district court was authorized by the All Writs Act to order the Company to provide technical assistance to implement the pen register order.

The decision of the Supreme Court in New York Telephone Co. can best be understood in light of the statutory authority upon which it relies—Title III, rule 41 and the All Writs Act. Title III was intended to be a comprehensive electronic surveillance statute, prohibiting all wiretapping and other types of electronic surveillance except by law enforcement officials investigating specified crimes and acting pursuant to rigid procedures under judicial supervision. Title III, however, authorizes only those orders "authorizing or approving the interception of a wire or oral communication." "Intercept" is defined as "the aural acquisition of the
PEN REGISTERS

Because pen registers do not "aurally" acquire the "contents" of any communication, they are not covered by Title III; each court of appeals that has considered the matter has so concluded. The question presented, therefore, concerns the source of the district courts' authority to issue pen register orders. The courts of appeals have found a basis for that authority either in the "inherent power" of a district court or in rule 41.

Rule 41(b) authorizes a federal magistrate to issue a warrant to search for and seize, among other things, "property that constitutes evidence of the commission of a criminal offense." The difficulty in using the rule to authorize the issuance of a pen register order is that the evidence seized by means of the pen register—numbers dialed on a telephone—does not fit the definition of the term "property." Rule 41(h) defines property "to include documents, books, papers and any other tangible objects." Thus, strictly construed, rule 41 does not purport to authorize warrants to search for and seize "nontangibles" such as evidence gained as a result of pen register surveillance. Of the four courts of appeals that have invoked rule 41 as authority for the issuance of a pen register order, three have done so by

26. Id. § 2510(4) (emphasis added).
27. "Aural" is not defined in Title III. The OXFORD ENGLISH DICTIONARY gives the following definition: "1. Of or pertaining to the organ of hearing. 2. Received or perceived by the ear."
28. "Contents" is defined as "including any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8) (1970).
29. The Senate report on Title III indicates that pen registers were intended to be excluded from coverage: "The proposed legislation is not intended to prevent the tracing of phone calls. The use of a 'pen register,' for example, would be permissible. . . . The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication." SENATE REPORT, supra note 3, at 90, reprinted in [1968] U.S. CODE CONG. & AD. NEWS at 2178 (citation omitted). Both the Supreme Court and the Second Circuit cited this language in support of their conclusion that pen registers are not covered by Title III. See 98 S. Ct. at 370; In re Order Authorizing the Use of a Pen Register, 538 F.2d 956, 958 (2d Cir. 1976).
30. See Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254 (9th Cir. 1977); United States v. Clegg, 509 F.2d 605 (5th Cir. 1975); United States v. Falcons, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); cases cited note 7 supra. But cf. United States v. Lanza, 341 F. Supp. 405 (M.D. Fla. 1972) (pen register used in conjunction with wiretap is authorized by Title III wiretap order).
31. Both the Eighth and the Seventh Circuits have suggested that the inherent authority of a district court to issue a pen register order has been "necessitated" by the special nature of electronic communications. See United States v. Southwestern Bell Tel. Co., 546 F.2d 243, 245 & n.5 (8th Cir. 1976), cert. denied, 98 S. Ct. 716 (1978); United States v. Illinois Bell Tel. Co., 531 F.2d 809, 811 & n.2 (7th Cir. 1976).
32. Fed. R. Crim. P. 41(b); see note 5 supra.
34. But cf. Katz v. United States, 389 U.S. 347, 355 n.16 (1967) (dicta that rule 41(d) would not require prior notice of an otherwise constitutionally valid order authorizing electronic surveillance); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 661, at 21 (1969) (rule 41 should be read as applying to verbal statements).
analogy. Only the Sixth Circuit, in *Michigan Bell Telephone Co. v. United States*, actually held that rule 41 gives district courts that power.

The question whether a district court is empowered to issue a valid order does not arise in most cases of electronic surveillance, because Title III expressly authorizes the interception of wire and oral communications subject to the procedures therein; however, because pen registers are outside the scope of Title III, the authority to issue an order for their use must be found, if at all, in the pre-1968 power of a federal magistrate to order electronic surveillance. *Katz v. United States*, decided in 1967, the United States Supreme Court indicated that a magistrate’s power to order electronic surveillance is equivalent to his power to issue a search warrant, and that such an order could properly issue if the manner of its issuance met constitutional standards. Thus, unless Congress intended in 1968 to pro-


36. 565 F.2d 385 (6th Cir. 1977). *Michigan Bell Telephone Co.* actually involved the use of a “trapping” or “tracing” device, but the Sixth Circuit concluded that the rules applicable to pen registers were controlling. *Id.* at 388. A trace determines the telephone numbers of calls *incoming* to the monitored telephone. *Id.* at 388 n.5.

37. *Id.* at 389.

38. See text accompanying notes 19-24 *supra*.

39. The United States Supreme Court first addressed the issue of electronic surveillance in *Olmstead v. United States*, 277 U.S. 438 (1928). In *Olmstead*, the Court held that neither the fourth nor the fifth amendment barred admission into evidence of information obtained by tapping defendants’ telephone lines. *Id.* at 462, 466. Congress then enacted the Communications Act of 1934, § 605 of which prohibited the interception without authorization and divulgence or publication of any wire or radio communication. Ch. 652, § 605, 48 Stat. 1064 (codified at 47 U.S.C. § 605 (1970)). In *Nardone v. United States*, 302 U.S. 379 (1937), enforced, 308 U.S. 338 (1939), the Court applied the exclusionary rule to evidence offered in a federal prosecution that was obtained in violation of § 605. 302 U.S. at 382; 308 U.S. at 340. The Court considered electronic eavesdropping for the first time in *Goldman v. United States*, 316 U.S. 129 (1942), and relied upon *Olmstead* in holding that there was no violation of the fourth amendment because there was no physical trespass in connection with the eavesdropping. *Id.* at 135. In *Silverman v. United States*, 365 U.S. 505 (1961), however, the Court held that evidence obtained by means of a “spike mike”—a spike with a microphone attached inserted into a party wall—was inadmissible because there was “actual intrusion into a constitutionally protected area” in violation of the fourth amendment. *Id.* at 512. Finally, in *Berger v. New York*, 388 U.S. 41 (1967), the Court held that “conversation” is protected by the fourth amendment and that the use of electronic devices to capture it constitutes a “search.” *Id.* at 51. The Court then found that a New York statute authorizing electronic eavesdropping failed to meet the requirements of the fourth amendment. *Id.* at 58-60; cf. *Osborn v. United States*, 385 U.S. 323, 329 (1966) (evidence obtained by means of recording device authorized subject to “precise and discriminate” procedures admissible). See generally C. WRIGHT, *supra* note 34, § 665.


41. *Id.* at 354-56 & 355 n.16.

42. The Court indicated that electronic surveillance would be constitutionally permissible under the following circumstances: law enforcement officials must obtain advance authorization, by a neutral magistrate upon a showing of probable cause; they must observe the precise
hibit all types of electronic surveillance except that expressly authorized under Title III,\textsuperscript{43} the permissibility of the use of pen registers arguably depends solely on compliance with the requirements of the fourth amendment. This was in fact the conclusion reached by four Supreme Court Justices in \textit{United States v. Giordano}\textsuperscript{44} upon finding that pen registers are not subject to the provisions of Title III.\textsuperscript{45} Relying upon the specific language of Justice Powell in \textit{Giordano}, each court of appeals that has directly confronted the matter has decided that the power to order pen register surveillance is either a power analogous to that in rule 41 or the power lodged in rule 41 itself.\textsuperscript{46} The power to order pen register surveillance is a nullity however, when, as in this case, the telephone company refuses to provide facilities and technical assistance.\textsuperscript{47} Consequently, the lower courts have looked to the All Writs Act for the authority to compel assistance.

The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."\textsuperscript{48} Because district courts are "courts established by Act of Congress," the statute applies to them.\textsuperscript{49} It is primarily invoked by the Supreme Court\textsuperscript{50} and the courts of appeals,\textsuperscript{51} however, in the exercise of their appellate jurisdiction; the power to grant a writ is characterized as an appellate power.\textsuperscript{52} The writs more commonly issued under the Act are writs of mandamus or prohibition,\textsuperscript{53} although the Act itself authorizes "all writs" limits established by a specific order; and they must notify the authorizing magistrate of all that is seized. \textit{Id.} at 356. Those requirements were not met in \textit{Katz. Id.}

43. Congress intended to prohibit the interception and disclosure of all wire or oral communication except as otherwise provided in Title III. \textit{Senate Report, supra} note 3, at 90, 91, \textit{reprinted in [1968] U.S. Code Cong. & Ad. News} at 2178, 2180. "Intercept" is a defined term, however, and does not reach the use of pen registers. \textit{See note 29 supra.}

45. \textit{Id.} at 553-54 (Powell, J., concurring in part and dissenting in part). The Court did not reach the issue because it concluded that the evidence obtained by means of the pen register was derived from an illegal wire interception. Pen register surveillance had been authorized by extension orders following the initial illegal wiretap order. \textit{Id.} at 533 n.19.

46. \textit{See cases cited in notes 35 & 36 supra.}
47. The Second Circuit found that without the Company's technical assistance, the pen register order would be "worthless." \textit{In re Order Authorizing the Use of a Pen Register, 538 F.2d 956, 961 (2d Cir. 1976).}
49. 9 \textit{Moore's Federal Practice} ¶ 110.26, at 278 (2d ed. 1975).
50. \textit{Id.} ¶ 110.27.
51. \textit{Id.} ¶ 110.28.
52. 16 C. \textit{Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure} § 3932, at 184 & n.3 (1977) [hereinafter cited as \textit{Wright & Miller}].
and that language has been interpreted flexibly to include such writs as common law certiorari and habeas corpus as well as injunctions.\textsuperscript{54}

The language of the statute itself prescribes several limitations on its scope. First, it authorizes only those writs that are "necessary or appropriate." Although the common law writs upon which the Act is based were considered "extraordinary remedies,"\textsuperscript{55} the Supreme Court has at times used broad language in defining the scope of the Act,\textsuperscript{56} and the standard against which its use must be tested is one of sound judicial discretion.\textsuperscript{57} The writ must also be "agreeable to the usages and principles of law." The Court has not interpreted that to mean agreeable to the usages and principles of common or English law;\textsuperscript{58} the limitation is, in effect, also one of judicial discretion.\textsuperscript{59} The most sharply defined limitation on the use of the Act is that the writ must be "in aid of [the courts'] respective jurisdictions." This means that the Act does not confer or extend a federal court's jurisdiction,\textsuperscript{60} and that it can properly be invoked by a district court only with respect to jurisdiction otherwise obtained.\textsuperscript{61} Thus, the proper exercise of power under the Act depends, first, upon whether the court invoking the Act has met the jurisdictional requirement and, second, upon whether the specific action taken by the court constitutes an abuse of that power.

The threshold question that the Supreme Court addressed in New York Telephone Co. was whether pen registers are covered under Title III. The Court concluded they are not,\textsuperscript{62} and in so concluding removed pen register orders from both the authority of Title III and its rigid procedural safeguards. The conclusion that pen registers do not pose the same threat to privacy as wiretapping and eavesdropping, and therefore need not be


\textsuperscript{55} Wright & Miller, \textit{supra} note 52, § 3933, at 213.

\textsuperscript{56} In Adams v. United States \textit{ex rel.} McCann, 317 U.S. 269 (1942), the Court used the following language: "Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." \textit{Id.} at 273. This language has been widely quoted. See, e.g., United States v. New York Tel. Co., 98 S. Ct. at 372.

\textsuperscript{57} See \textit{Ex parte} Republic of Peru, 318 U.S. 578, 584 (1943); Adams v. United States \textit{ex rel.} McCann, 317 U.S. 269, 273 (1942).

\textsuperscript{58} See Price v. Johnston, 334 U.S. 266, 281-82 (1948).

\textsuperscript{59} \textit{Id.} at 284.

\textsuperscript{60} See Moore's \textit{Federal Practice, supra} note 49, ¶ 110.26, at 282-83.

\textsuperscript{61} \textit{Id.} ¶ 110.29, at 318; see Commercial Security Bank v. Walker Bank & Trust Co., 456 F.2d 1352, 1355 (10th Cir. 1972); Brittingham v. Commissioner, 451 F.2d 315, 317 (5th Cir. 1971).

\textsuperscript{62} 98 S. Ct. at 369.
accorded the same safeguards, is supported by the Court's rationale—as expressed in *Berger v. New York*[^63] and *Katz*—that the fourth amendment protects oral communications.[^64] Under that rationale, the question arises whether the use of a pen register should be subject to the requirements of the fourth amendment at all since the device does not overhear oral communications. In fact, the Court has never directly addressed that question[^65] and left it unanswered in *New York Telephone Co.*[^66] If pen registers could be employed without a warrant—like mail covers[^67]—then judicial authorization would be unnecessary in the first place, and a district court would presumably lack the requisite jurisdiction to invoke the All Writs Act to order a telephone company to provide assistance.[^68] The anomalous result would be that the decision whether to allow a pen register to be used in a particular case would be made by the telephone company rather than by a federal magistrate. The Court avoided this problem in *New York Telephone Co.* by assuming that the use of a pen register constituted a "search" within the meaning of the fourth amendment,[^69] and it found authority for the district court to order its use in rule 41.

[^63]: 388 U.S. 41 (1967).

[^64]: In *Berger*, the Court held that "conversation" was protected by the fourth amendment. *Id.* at 51; see note 39 *supra.* In *Katz*, the Court concluded that listening to and recording petitioner's "words" constituted a search and seizure within the meaning of the fourth amendment. 389 U.S. at 353; see note 42 and text accompanying notes 40-42 *supra.*

[^65]: The widely-quoted statement in *Giordano* that pen registers are subject to the requirements of the fourth amendment is in a separate opinion and is not part of the holding of the case. See note 45 *supra.*

[^66]: 98 S. Ct. at 369 n.7. It is arguable that the use of a pen register by law enforcement officials violates the "justifiable" expectation of privacy that the person under investigation has in using the monitored telephone, and that such an expectation of privacy is protected by the fourth amendment. See *United States v. White*, 401 U.S. 745, 752 (1971) (clarifying *Katz*). *But see Note, The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool*, 60 CORNELL L. REV. 1028, 1042-47 (1975) (fourth amendment does not bar the use of pen registers); *cf. Note, Tracking Katz: Bepers, Privacy, and the Fourth Amendment*, 86 YALE L.J. 1461 (1977) (use of "beepers"—electronic tracking devices—invides fourth amendment rights in most cases and should be subject to statutory warrant requirements).

[^67]: The post office conducts a mail cover by furnishing the Government with the information appearing on the face of the envelope addressed to the particular address: i.e., addressee, postmark, name and address of sender (if it appears), and class of mail. The actual mail is delivered to the addressee and only the letter-carrier's notation reaches the Government agency which requests the mail cover. *United States v. Balistrieri*, 403 F.2d 472, 475 n.2 (7th Cir. 1968), *cert. denied*, 402 U.S. 953 (1971). Mail covers have been found to be outside the protection of the fourth amendment. *See*, *e.g.*, Lustinger v. *United States*, 386 F.2d 132, 139 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

[^68]: Justice Stevens reasoned that "[i]f . . . the individual's privacy interest is not constitutionally protected, judicial intervention is both unnecessary and unauthorized." On this hypothesis, the district court's order authorizing the pen registers was a "nullity" and therefore could not support the further order requiring the Company to provide assistance. 98 S. Ct. at 379 (Stevens, J., dissenting in part); *see text accompanying note 61 supra.*

[^69]: *See* 98 S. Ct. at 370.
The Supreme Court’s conclusion that rule 41 authorizes the use of pen registers is not supported by a literal reading of the rule itself, which limits its scope to tangible property. Nonetheless, the Court has recognized in *Katz* and in *Osborn v. United States* that nontangibles such as oral communications can be the objects of a proper search and seizure. Moreover, Congress clearly intended that the permissibility of pen registers survive the enactment of Title III. Finally, a federal magistrate is already empowered under Title III to order more intrusive electronic surveillance that does intercept oral communications. In light of these considerations, the Court interpreted rule 41 flexibly to effectuate its purpose of prescribing the requirements of a constitutionally valid search and seizure.

The practical effect of this part of the *New York Telephone Co.* decision will be to ensure that the procedural safeguards of rule 41 apply to pen register orders. The result of noncompliance with those requirements will be the exclusion of any evidence obtained by means of the surveillance from use in a criminal prosecution. Problems of construction are certain to arise because the rule as written is not intended to include nontangible property. The purpose of deterring unlawful conduct in the area of criminal investigation will be better served, however, by subjecting the use of pen registers to the procedures of rule 41 than to none at all. Moreover, when pen registers are used in conjunction with wiretaps, as they frequently are, their use arguably will be subject to the even stricter procedures of Title III.

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70. See text accompanying note 33 *supra*. The Court cited Fed. R. Crim. P. 57(b) to support its conclusion, but that rule is inapposite. Rule 57(b) specifically concerns two problems: the nonconformity of federal criminal procedure to state criminal procedure and the details of trial procedure; it is not a general grant of authority. See Fed. R. Crim. P. 57(b), Notes of Advisory Comm.


73. See note 29 *supra*.

74. See text accompanying notes 19-24 *supra*.

75. See Fed. R. Crim. P. 41; id., Notes of Advisory Comm.


77. The Court addressed two of these problems in dicta— the notice requirement of rule 41(d) and the requirement that the search be conducted within 10 days—and concluded that neither barred the use of rule 41 to authorize a pen register order. 98 S. Ct. at 371 n.16.

78. At least one court has held that a pen register is an interception of a wire communication within the meaning of Title III when used in conjunction with a court-ordered wiretap. United States v. Lanza, 341 F. Supp. 405, 422 (M.D. Fla. 1972).

From the point of view of the telephone company, the Court’s characterization of the use of a pen register as a "search and seizure" within the meaning of the fourth amendment is more problematic. Because it is now clear that a rule 41 warrant is required to use a pen register in a criminal investigation, it could be argued that the telephone company’s use of pen registers for business purposes constitutes a violation of the fourth amendment. The telephone company
Before the Supreme Court's decision that the All Writs Act authorizes a district court to order a telephone company to provide facilities and technical assistance in connection with a pen register order, three federal courts of appeals faced the identical issue;\(^7\) of those three, only the Sixth Circuit, in *Michigan Bell Telephone Co.*, actually held that the All Writs Act empowered the district court to order the telephone company to provide assistance.\(^8\) In reaching its conclusion, the Supreme Court failed to confront the difficult problem raised by Justice Stevens in the dissent: whether the district court had obtained jurisdiction, apart from the All Writs Act, over the "dispute" between the FBI and the Company.\(^8\) The Court evidently assumed that the original jurisdiction exercised by the district court in authorizing the use of pen registers was sufficient in scope to include the telephone company whose cooperation was necessary for the execution of the order,\(^8\) even though the Company was a third party not the target of the investigation. On the basis of that rationale, however, a district court could theoretically, upon a mere showing of probable cause, compel

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\(^{80}\) 565 F.2d at 389. Both the Eighth and the Seventh Circuits held that the All Writs Act was "analogous" authority to the district court's power to order the telephone company's assistance to prevent the frustration of its order. United States v. Southwestern Bell Tel. Co., 546 F.2d 243, 246 & n.7 (8th Cir. 1976), *cert. denied*, 98 S. Ct. 716 (1978); United States v. Illinois Bell Tel. Co., 531 F.2d 809, 814 (7th Cir. 1976). Both Circuits found that the district court's "inherent authority" to order pen register surveillance extended to the authority to order the telephone company's assistance. 546 F.2d at 246; 531 F.2d at 811; *see* note 31 *supra*.

\(^{81}\) 98 S. Ct. at 380 n.19 (Stevens, J., dissenting).

\(^{82}\) *See* id. at 372. Otherwise, the district court would not have met the requirement that the exercise of authority under the Act be in aid of the court's jurisdiction. *See* text accompanying notes 60 & 61 *supra*. 

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See United States v. Dote, 371 F.2d 176, 181 (7th Cir. 1966). They are also used to investigate annoying or obscene telephone calls. See Claerhout, *The Pen Register*, 20 DRAKE L. REV. 108, 110-11 (1970). *See generally* *The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool, supra* note 66, at 1029 & n.11. Pen registers, however, are not prohibited by either Title III or § 605 of the Communications Act of 1934. Section 803 of Title III amended the Communications Act of 1934, ch. 652, § 605, 48 Stat. 1064 (formerly codified at 47 U.S.C. § 605 (1964)), to prohibit the interception and divulgence of "any radio communication." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 803, 82 Stat. 197 (codified at 47 U.S.C. § 605 (1970)). Before this amendment to § 605, the Seventh Circuit had held in *Dote* that § 605 prohibited the use of pen registers, *see* 371 F.2d at 181, but that holding has since been overruled, Korman v. United States, 486 F.2d 926, 931-32 (7th Cir. 1973). Moreover, unlike Title III, rule 41 confers authority but does not proscribe otherwise lawful activity. At least one court has held that the use of a pen register by the telephone company did not violate the subscriber's rights under either the fourth or fifth amendments. State v. Holliday, 169 N.W.2d 768 (Iowa 1969). It is also clear that there is no bar to the use of evidence unlawfully obtained by private persons so long as the government played no part in the unlawful conduct. C. WRIGHT, *supra* note 34, § 661, at 20. Finally, 18 U.S.C. § 2511(2)(a)(i) (1970) provides that it is not unlawful for a communication common carrier "to intercept, disclose, or use that [wire] communication in the normal course of [its] employment."
any unwilling third party, under the threat of contempt, to provide such assistance as the court in its discretion deemed necessary to effectuate its order. This proposition is indeed unsettling; however, the holding in New York Telephone Co. is substantially more limited.

The Court presented three major justifications for its decision. First, the Company itself, a regulated public utility, offered no substantial reasons why it should not provide assistance in investigating the suspected illegal use of its facilities, and the order provided that the Company be compensated at prevailing rates for any assistance that it furnished the FBI. Second, the Company was in the unique position of being able to deny the FBI the means to carry out its investigation. Finally, Congress provided in a 1970 amendment to Title I that a "communication common carrier" such as the Company can be ordered to provide "information, facilities, and technical assistance" in connection with electronic surveillance authorized under Title III. In light of these circumstances, the Court understood this to be an extraordinary case that justified an extraordinary remedy.

The real significance of the New York Telephone Co. decision lies in its potential to be misinterpreted by the lower federal courts as precedent for expanding the scope of rule 41 and the All Writs Act. Because the Supreme Court apparently found that the district court had obtained original jurisdiction over the Company under rule 41, it is possible to read New York Telephone Co. broadly as sanctioning the use of the All Writs Act to order any third party to assist in the implementation of a search warrant. If district courts interpret the decision as authority for invoking the All Writs Act to

83. The Second Circuit expressed its reluctance to approve the district court's order compelling the Company to provide assistance in the following language:
Perhaps the most important factor weighing against the propriety of the order is that without Congressional authority, such an order could establish a most undesirable, if not dangerous and unwise, precedent for the authority of federal courts to impress unwilling aid on private third parties. In this best of all possible worlds it is a law of nature that one thing leads to another. It is better not to take the first step.

In re Order Authorizing the Use of a Pen Register, 538 F.2d 596, 962 (2d Cir. 1976).
84. 98 S. Ct. at 373. The Sixth Circuit emphasized in Michigan Bell Telephone Co. that "a telephone company is no ordinary third party. It is a public utility, enjoying a monopoly in an essential area of communications." 565 F.2d at 389.
85. See 98 S. Ct. at 373. At the same time that Congress amended Title III to empower district courts to compel communication common carriers to provide assistance in connection with wiretap orders, it also provided that good faith compliance with such orders is a complete defense to both criminal and civil liability. Act of July 29, 1970, Pub. L. No. 91-358, § 211(a), (c), 84 Stat. 473 (codified at 18 U.S.C. §§ 2511(2)(a)(ii), 2520 (1970)). This defense would be neither available nor necessary in the case of pen registers, because they are not prohibited by Title III in the first place. See Application of the United States for an Order Authorizing Use of a Pen Register Device, 407 F. Supp. 398, 403 n.3 (W.D. Mo. 1976).
86. 98 S. Ct. at 373.
87. Id. at 373-74.
88. Id. at 374; see note 8 supra.
compel tangentially involved third parties to assist in the execution of their orders, then New York Telephone Co. will be dangerous precedent in the hands of overzealous law enforcement officials and federal magistrates. Although clear abuses of discretion should not withstand judicial review, the results could nonetheless be oppressive. If, however, New York Telephone Co. is viewed as a pragmatic solution limited to the problem of executing pen register surveillance in the absence of specific legislation, then the decision will have little precedential value in other areas of search and seizure. Several practical considerations militate in favor of the latter interpretation.

First, in criminal investigations that typically involve the use of pen registers—gambling, racketeering and wirefraud—the evidence obtained by means of electronic surveillance is essential to successful prosecution. Moreover, the ongoing and "professional" nature of such criminal activity demands sophisticated surveillance techniques. Telephone companies virtually control the means and expertise necessary to conduct such investigations. As long as they are compensated for providing their services in connection with pen register surveillance at prevailing rates, they have no substantial interest to protect by not providing the facilities and assistance. Second, Congress has already given district courts the power to direct communication common carriers such as the telephone company to provide such assistance in connection with court-ordered electronic surveillance under Title III. The only reason that pen register surveillance cannot be enforced under that authority is that in 1968 Congress did not consider pen registers intrusive enough to be prohibited by Title III. Common sense dictates that if a district court can order the telephone company to assist in executing a wiretap order that intercepts oral communications, it should be


90. For an example of the difficulties encountered in conducting electronic surveillance against organized criminal activity, see Michigan Bell Tel. Co. v. United States, 565 F.2d at 386.

91. See note 8 supra. There are no reported cases challenging the constitutionality of the 1970 amendment to Title III which gave federal magistrates the power to order third parties to provide assistance. Act of July 29, 1970, Pub. L. No. 91-358, § 211(b), 84 Stat. 473 (codified at 18 U.S.C. § 2518(4) (1970)). The constitutionality of Title III, and particularly § 2518, has been confirmed. See, e.g., United States v. Fucarile, 340 F. Supp. 1033, 1037-38 (D. Md.), aff'd sub nom. United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), aff'd mem., 473 F.2d 906 (4th Cir. 1973), aff'd, 416 U.S. 505 (1974). It should also be noted that the 1970 amendment extends not only to communication common carriers but to "landlord[s], custodian[s] or any other person[s]." 18 U.S.C. § 2518(4) (1970). Thus, even if the telephone companies have conceded the validity of the section, there are other parties with potential standing to contest its constitutionality.
able to direct the same company to assist in determining the number to which the intercepted call was placed or from which it originated. Finally, as the Court itself recognized, federal courts may not impose unreasonable burdens upon third parties. The use of the All Writs Act is reserved for truly extraordinary cases and the decision in New York Telephone Co., necessitated by a unique and compelling set of circumstances, in no way modifies that restriction. The Court decided that this was one of the rare cases in which use of the All Writs Act was justified; however, the obvious potential for abuse in imposing any burden upon a third party should demand that such power be used sparingly. In this context, the words of Judge Mansfield are pertinent: "Were the necessity lesser, or the burden greater, in some future case, a district court might not be justified in invoking its extraordinary powers." Viewed in this manner, the decision in New York Telephone Co. represents a judicial solution to a problem that should eventually be cured by remedial legislation, not an expansion of the scope of authority conferred by either rule 41 or the All Writs Act.

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92. New York Telephone Co. should logically apply to the use of tracing devices as well as to the use of pen registers. See note 36 supra.

93. 98 S. Ct. at 372.


95. The problem will not be cured by the Criminal Code Reform Act of 1977 as it reads in the present House version of that bill. H.R. 6869, 95th Cong., 1st Sess. (1977). Section 3108(f) defines "intercept" to mean "to acquire the contents of a communication through the use of an eavesdropping device," id. § 3108(f), and § 1526(c) of the bill defines "eavesdropping device" as "an electronic, mechanical, or other device or apparatus that can be used to intercept a private oral communication," id. § 1526(c). Thus, pen registers would still be outside the scope of the Act. It should be noted that the bill contains a section identical to 18 U.S.C. § 2518(4) (1970), which empowers a federal magistrate to compel a communication common carrier to provide assistance in connection with a court-ordered interception. H.R. 6869, § 3105(b)(2), 95th Cong., 1st Sess. (1977).