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MUCH ADO ABOUT NOTHING? A COMPARISON OF THE INDIVIDUAL RIGHTS PROVIDED BY THE FISA AND TITLE III NOTICE AND CIVIL REMEDY PROVISIONS

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INTRODUCTION

Together, the Foreign Intelligence Surveillance Act [1] ("FISA") and Title III of the Omnibus Crime Control and Safe

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[1] 50 U.S.C.S. §§ 1801–1811 (2009).

Streets Act[2] ("Title III") regulate domestic wiretapping.[3] Both statutes attempt to provide effective tools for investigators without unduly abridging individual rights. The protective provisions of each statute, though similar in aim, operate differently, and commentators have suggested that in a variety of circumstances FISA is less protective of individual rights than Title III.[4] This note addresses one apparent difference between the statutes: the relative efficacy of their notice and civil remedy provisions. It concludes that the Title III civil remedy provision is far more limited than it appears on its face to be, and provides little, if any, additional protection than the FISA civil remedy provision.

At first glance, the notice and civil remedy provisions of FISA and Title III seem to provide starkly different protections. Both acts contain provisions allowing subjects of illegal surveillance to sue for statutory damages, fees and costs, and punitive damages in appropriate circumstances.[5] Under Title III, targets of surveillance must be notified within 90 days of the termination of a wiretap, or the denial of a wiretap application, unless an ex parte showing of good cause is made.[6] By contrast, FISA does not require notice to be given unless information derived from the surveillance is to be used in an official proceeding.[7] As a result, the FISA civil damages provision appears to be a classic right without a remedy, at least with respect to surveillance targets who are not subsequently prosecuted.

As a matter of individual rights, however, the difference in notice provisions is largely irrelevant in practice. While there has been a wealth of Title III wiretapping litigation, it has primarily been between

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[2] 18 U.S.C.S. §§ 2510–2522 (2009).

[3] For a discussion of the argument that the president has statutory and constitutional authority to conduct foreign intelligence surveillance without complying with FISA or Title III, see generally DAVID KRIS & DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS §§ 15:1–15:18 (2007).

[4] For a succinct summary of the principal differences, see STEPHEN J. SCHULHOFER, RETHINKING THE PATRIOT ACT: KEEPING AMERICA SAFE AND FREE 31–35 (2005).

[5] *See* 18 U.S.C.S. § 2520; 50 U.S.C.S. § 1810.

[6] 18 U.S.C.S. § 2518 (8)(d).

[7] *See* 50 U.S.C.S. §§ 1806(c)–(d).

private parties.[8] Although there have been many cases brought against government actors, they consist almost exclusively of actions brought by government employees against their employers.[9] These cases arise out of a Title III exception allowing law enforcement phone lines to be monitored without a court order when such monitoring is pursuant to a known, routine, and defined policy.[10]

Because FISA and Title III overlap only with respect to government surveillance, and FISA contains no routine law enforcement use exception, this note is concerned exclusively with Title III claims against government investigators by private plaintiffs. Title III is a complex statute that provides varying levels of protection depending on the type of surveillance employed. This note will focus exclusively on the Title III notice and remedy provisions contained in 18 U.S.C. § 2520, as these are the provisions commonly thought to be more protective than corresponding FISA provisions.[11] Private plaintiffs have brought only a handful of cases against government investigators under Title III, and very few have been successful.[12]

Part I of this article explores the notice provisions of Title III and FISA, highlighting the apparently broader nature of the Title III notice provision. It concludes by explaining how the triggering requirement for notice, which is the expiration or denial of a judicial order, results in Title

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[8] *See, e.g.*, DIRECTV, Inc. v. Bennett, 470 F.3d 565 (5th Cir. 2006) (satellite television provider suing alleged pirate); Culbertson v. Culbertson, 143 F.3d 825 (4th Cir. 1998) (dispute between former spouses regarding alleged wiretapping).

[9] *See, e.g.*, Abraham v. County of Greenville, 237 F.3d 386 (4th Cir. 2001) (suit between state court judges and employer over monitoring of phone calls in mixed courthouse/prison building); Abbott v. Vill. of Winthrop Harbor, 205 F.3d 976 (7th Cir. 2000) (suit between police employees and employer municipality regarding monitoring of police station phones).

[10] *See* 18 U.S.C.S. § 2510(5)(a)(ii); *Abraham*, 237 F.3d 386 (discussing the applicability of the law enforcement monitoring exception in the context of monitoring of phone calls of state court judges in a mixed courthouse/prison building).

[11] Codified at 50 U.S.C.S. § 1810.

[12] There appear to be only two federal appellate decisions affirming plaintiffs' verdicts against government investigators under the remedy contained in 18 U.S.C.S. § 2520. *See* Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979) (upholding district court judgment against prison officials after finding that monitoring of an inmate plaintiff's call was not part of a routine monitoring program); Jacobson v. Rose, 592 F.2d 515 (9th Cir. 1978) (upholding in part a damages award against police officers, but finding damages limited to joint, rather than individual liability).

III providing notice only to plaintiffs whose claims are vulnerable to a statutory good-faith defense.

Part II will consider the civil remedy provisions of Title III and FISA. Part IIA focuses on who may sue under each act. Part IIB discusses who may be sued, arguing that limitations on liability for government entities in some circuits, and for the United States in all circuits, significantly discourage civil Title III suits by creating more sympathetic defendants and by decreasing the potential recovery of punitive damages. Part IIC analyzes the damages authorized by Title III and FISA. It asserts that the difficulty of establishing actual damages, combined with the judicial discretion to decline to award statutory damages and attorneys' fees, sharply decreases the value of Title III claims. Part IID evaluates defenses to FISA and Title III civil remedy claims, beginning with a discussion of the statutory good faith defense available to Title III violators. It then argues that the triggering requirement for notice—the expiration or denial of a court-ordered surveillance—results in Title III only providing notice to subjects of illegal surveillance whose claims could not survive the good faith defense.

Part III considers the combined effect of the obstacles facing potential plaintiffs under FISA and Title III from the perspective of a potential plaintiff. Consistent with existing case law, it contends that potential plaintiffs, on average, will lose money by raising Title III civil remedy claims. In economic terms, the expected value of a Title III suit is negative. This means that to vindicate their statutory rights, potential plaintiffs must be willing to act against their financial self-interest by spending more money asserting their claim than they can expect to recover in damages. Part III therefore concludes that the combined effect of notice limits, restricted damages, limited liability for governmental entities, judicial discretion, and available defenses render the Title III civil remedy provision useless.

Of course Title III's expanded notice may provide benefits, such as enhanced accountability of government actors, even without enabling a cause of action by those who receive notice. However, this note focuses primarily on the relative efficacy of the notice and civil remedy provisions of Title III and FISA from the perspective of an aggrieved individual considering asserting his statutory rights.

I. NOTICE PROVISIONS IN TITLE III AND FISA

The notice provision of Title III, 18 U.S.C § 2518(8)(d), requires notice to be given within 90 days of the termination or denial of a wiretap order to the individual(s) named in the surveillance order.[13] It also gives the authorizing or denying judge discretion to: (1) require notice to any other individuals whose communications were intercepted under the order, and (2) allow individual(s) subjected to surveillance access to such portions of the intercepted communications as the interests of justice may require.[14] Finally, any judge of competent jurisdiction may postpone the provision of notice on an ex parte showing of good cause. The switch from "the issuing or denying judge" to "a judge of competent jurisdiction" in the postponement provision suggests that prosecutors seeking to postpone notice may do so by application to a judge other than the authorizing judge.[15]

A significant class of potential plaintiffs would not receive notice under this provision. Because the provision requires "the issuing or denying judge" to cause notice to be served,[16] any plaintiffs who are subjected to surveillance without judicial review will not likely receive

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[13] The full text of the provision reads:

> Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under [18 USC §] 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—
> (1) the fact of the entry of the order or the application;
> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
> (3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.
> The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

[14] 18 U.S.C. § 2518(8)(d).

[15] *Id.*

[16] *Id.*

notice of the violation. Title III's failure to provide notice to plaintiffs subjected to surveillance that has not been either approved or denied by a judge is significant because persons subjected to surveillance without prior judicial review are completely unprotected by the Title III civil remedy.

This class of unprotected persons should be limited by the fact that Title III criminalizes non-foreign intelligence related domestic surveillance conducted without a warrant.[17] Nevertheless, this notice gap eliminates a significant benefit of the remedy provision: its potential to ensure at least after-the-fact judicial review of any surveillance decisions not properly subjected to review before surveillance is conducted. It may also operate to reward bad faith or shoddy investigative work by insulating from review instances where investigators ignored Title III entirely.

The restriction of notice to persons who are the subject of a denied or expiring judicial order takes on special significance when combined with the good faith defense contained in 18 U.S.C. § 2520(d). The net effect of these provisions is that the only potential plaintiffs likely to receive notice of improper surveillance are those whose claims are vulnerable to the statutory defense of good faith reliance on a court order or warrant.[18]

The notice provision divides recipients into three groups, none of whom will be able to raise a successful damages claim. The first group, as discussed above, never receives notice that they may have a Title III claim because they were subjected to surveillance without judicial review. The second group receives notice that the government wished to subject them to surveillance but was prevented from doing so by the reviewing judge. The third group learns that they were subjected to surveillance but that the surveillance was conducted pursuant to a judicial warrant, strongly suggesting that any damages claim they might raise will be precluded by the statutory good faith defense contained in 18 U.S.C. § 2520(d).

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[17] *See id.* § 2511(1).

[18] For a more detailed explanation, see *infra* Part II.D.

FISA contains separate notice provisions for the federal government and for states, but the provisions are substantively identical.[19] The federal notice provision reads as follows:

> Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding . . . against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this title [50 USCS §§ 1801 et seq.], the Government shall . . . notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.[20]

Unlike Title III, the FISA provision requires notice only when the government intends to use information derived from an electronic surveillance against someone in an official proceeding. The practical implication of this requirement is that targets of electronic surveillance under FISA who are never subjected to criminal prosecution are unlikely ever to receive notice that they have been subjected to surveillance. As a result, FISA's notice provision precludes surveillance subjects who are not criminally prosecuted from bringing suit by preventing them from ever learning that they might have a cause of action under the FISA civil remedy provision.

It should be noted that the group of potential plaintiffs who do not receive notice of their claims is much broader under FISA than under Title III. Title III only fails to give notice to persons subjected to surveillance conducted without a court order. This group is limited by the fact that Title III makes any such surveillance a felony.[21] By contrast, FISA fails to provide notice either to people subjected to warrantless surveillance or to anyone subjected to surveillance pursuant to a FISA warrant against whom the government does not intend to use surveillance evidence in an official proceeding.[22]

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[19] *See* 50 U.S.C.S. §§ 1806(c)–(d) (2009).
[20] *Id.* § 1806(c).
[21] *See* 18 U.S.C.S. §§ 2511(1)–(2), (4).
[22] *See* 50 U.S.C.S. § 1806(c).

II. CIVIL REMEDY PROVISIONS OF TITLE III AND FISA

Title III provides that:

> [A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter [18 U.S.C. §§ 2510 et seq.] may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.[23]

FISA provides that:

> An aggrieved person, other than a foreign power or an agent of a foreign power . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 109 [50 U.S.C. § 1809] shall have a cause of action against any person who committed such violation . . . .[24]

A. WHO MAY SUE

The two statutes are very similar as to who can sue. Both confer a cause of action upon any person subjected to unauthorized surveillance. The only material difference between FISA and Title III in this regard is that FISA does not allow suit by a foreign power or an agent of a foreign power while Title III contains no statutory exceptions. Both statutes define "person" to include most types of business entities.[25]

B. WHO MAY BE SUED

The statutes vary with respect to which entities aggrieved persons may sue. Title III allows recovery from "the person or entity, other than the United States, which engaged in [the] violation . . . ."[26] Courts have uniformly concluded that Title III allows recovery from

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[23] 18 U.S.C.S. § 2520(a).
[24] 50 U.S.C.S. § 1810.
[25] *See* 18 U.S.C.S. § 2510(6); 50 U.S.C. § 1801(m).
[26] 18 U.S.C.S. § 2520(a).

private persons and business entities, but have divided over whether governmental units other than the United States fall within the scope of § 2520(a).[27] The division hinges primarily on the legislative history of § 2520(a), which did not originally include the phrases "or entity" or "other than the United States."[28] The phrase "or entity" was added in 1986, while the phrase "other than the United States" was added in 2001 as part of the USA PATRIOT Act.[29]

The Sixth Circuit has concluded that the Title III wiretap remedy provision does in fact allow suits against governmental entities.[30] In *Adams v. City of Battle Creek*, the Sixth Circuit reviewed the legislative history of § 2520.[31] The *Adams* court observed that the phrase "or entity" was added to § 2520 as an amendment in 1986.[32] However, courts had previously included business entities within the term "person."[33] To avoid rendering "or entity" superfluous, the *Adams* court concluded that "or entity" was added for the purpose of extending liability to government entities.[34]

As additional support for its conclusion, the *Adams* court noted that the phrase "or entity" had also been added to the Electronic Communications Privacy Act (ECPA) section that deals with stored communications during the same amendment process when "or entity" was added to Title III.[35] *Adams* observed that the Senate report concerning the ECPA amendment expressly stated that "entity" included governmental entities.[36] The Second Circuit reached a similar conclusion in the context of the ECPA civil remedy provision, 18 U.S.C.

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[27] Andrew Ayers, Comment, *The Police Can Do What? Making Local Governmental Entities Pay for Unauthorized Wiretapping*, 19 N.Y.L. SCH. J. HUM. RTS. 651, 680 (2003).

[28] *Id.* at 680–81.

[29] *Id*. *See also* The USA PATRIOT Act, Pub. L. No. 107–56, (codified in scattered sections of 5, 8, 10, 12, 18, 22, 28, 31, 42, 49, & 50 U.S.C, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf.)

[30] *See* Adams v. City of Battle Creek, 250 F.3d 980, 985 (6th Cir. 2001).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* (discussing 18 U.S.C. § 2707(a) (2000)).

[36] *Id.* (citing S. REP. NO. 99-541, at 43 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 3555, 3597).

§ 2707(a), based in part on the Senate report cited in *Adams*, but has not addressed the Title III provision.[37]

In *Amati v. City of Woodstock*, the Seventh Circuit reached the opposite conclusion, citing 18 U.S.C. § 2510(6) (part of the definitions section of Title III) for the prospect that the wiretap remedy provision of Title III "does not allow for suits against municipalities."[38] 18 U.S.C. § 2510(6) defines person as "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation." In *Abbott v. Village of Winthrop Harbor*, the Seventh Circuit reaffirmed *Amati*'s conclusion, based on its interpretation of the legislative history of § 2520.[39] The court reasoned that the legislative history of the 1986 amendments would not be silent regarding the addition of "or entity" if Congress intended to significantly expand the scope of liability under § 2520(a) to include previously exempted governmental entities.[40]

Although the Seventh Circuit is the only circuit that has concluded that governmental entities cannot be sued under § 2520(a), district courts in other circuits have adopted *Abbott*'s reasoning.[41] In *Anderson v. City of Columbus*, the district court for the middle district of Georgia found *Abbott* persuasive.[42] The *Anderson* court noted that the definition of "person" in § 2510(6) included several types of business entities and was not amended when the phrase "or entity" was added to the statute in 1986.[43] It then concluded that the phrase "or entity" referred only to those entities included in the statutory definition of "person."[44]

In 2001, as part of the USA PATRIOT Act, § 2520(a) was amended to add the phrase "other than the United States."[45] Unfortunately, as of March, 2009, there have not been any federal appellate

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[37] *See* Organizacion JD Ltda v. U.S. Dep't of Justice, 18 F.3d 91, 94–95 (2d Cir. 1994).

[38] 176 F.3d 952, 956 (7th Cir. 1999).

[39] 205 F.3d 976, 980 (7th Cir. 2000).

[40] *Id.*

[41] *See, e.g.*, Anderson v. City of Columbus, 374 F. Supp. 2d 1240, 1245 (M.D. Ga. 2005).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 1245–46.

[45] Ayers, *supra* note 27, at 681.

decisions regarding the scope of § 2520(a) since the PATRIOT Act amendment, making it difficult to predict how courts will interpret the addition of "other than the United States." However, the change, made after the emergence of the circuit split, suggests at the very least that Congress was concerned that the United States could be considered an "entity" under § 2520(a).[46] The fact that Congress chose to qualify, rather than delete, "or entity" provides further support for the position of the Second and Sixth Circuits that Title III allows suit against governmental entities other than the United States.

The FISA civil remedy provision, 50 U.S.C. § 1810, does not contain the phrase "or entity" but defines "person" as "any individual, including any officer or employee of the Federal Government, or any group, *entity*, association, corporation, or foreign power."[47] Because § 1810 allows "a cause of action against any person" who committed a violation, the same entity problem appears at a glance to be present under FISA as well. Unlike the Title III remedy provision, there have been no cases interpreting this FISA provision. However, both plain text interpretation and a review of the Title III circuit split suggest that "entity" includes governmental entities for purposes of FISA.

As a simple textual matter, the word entity is defined as "something that exists as a particular and discrete unit."[48] This definition is broad enough to include governmental units. The Seventh Circuit would likely reach the same conclusion, given that its reluctance to interpret § 2520(a) as encompassing governmental entities was based primarily on its conclusion that the legislative history would have been clearer if the addition of "or entity" was intended to significantly expand liability to include government entities.[49] Indeed, a careful reading of *Abbott* suggests that had "or entity" been included in the original version of § 2520(a), a governmental entity would be subject to liability for improper surveillance under Title III in the Seventh Circuit.[50]

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[46] *Id.*

[47] 50 U.S.C.S. § 1801(m) (2009) (emphasis added).

[48] WEBSTER'S II NEW COLLEGE DICTIONARY 383 (3rd ed. 2005).

[49] Abbott v. Vill. of Winthrop Harbor, 205 F.3d 976, 980 (7th Cir. 2000).

[50] *See id.* The *Abbott* court did not interpret the phrase "or entity" in a vacuum. Rather, it considered the legislative history of the statute and the policy implications of a broad interpretation. It then based its decision on its conclusion that the legislative

The uncertainty surrounding the potential liability of governmental entities, and the unambiguous statutory exclusion of the United States, are two of the many factors discouraging Title III civil lawsuits. As a result of these limitations, potential plaintiffs may be restricted to suing officials in their individual capacity.[51] This creates two significant problems for aggrieved persons considering filing suit under Title III. First, government employees may not have deep pockets, making them effectively judgment-proof with respect to punitive damages. Second, to a fact finder making decisions about liability and damages, civil servants sued in their individual capacity are much more sympathetic figures than powerful, faceless, and well-funded governmental entities.

C. DAMAGES AUTHORIZED

The limited damages that can be recovered under Title III may be a critical factor in the paucity of Title III civil litigation against government officials. The relief authorized under Title III includes equitable and declaratory relief, the greater of actual or statutory damages, punitive damages, and attorney's fees and litigation costs.[52] Along with improper interception of communications, willful improper disclosure of properly intercepted communications is a statutory violation.[53] In all cases except interception of satellite video signals and certain radio communications for non-tortious purposes, a court:

> may assess as damages . . . the greater of-- (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.[54]

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intent would have been clearer if Congress had intended to significantly expand liability to include governmental entities.

[51] *See, e.g.*, *id.* (finding that governmental entities cannot be sued under § 2520 and dismissing suit against municipality). *But see* Adams v. City of Battle Creek, 250 F.3d 980, 985 (6th Cir. 2001).

[52] 18 U.S.C.S. §§ 2520(b)–(c) (2009).

[53] *Id.* § 2520(g).

[54] *Id.* § 2520(c)(2).

For cases of satellite and radio communications, the damages are limited to actual damages or statutory damages between $50 and $1,000.[55] These damages may be supplemented by punitive damages "in appropriate cases."[56] Finally, Title III provides for administrative discipline of United States officers and employees who willfully and intentionally violate its provisions under certain limited circumstances.[57]

Except in the narrowly defined categories of satellite video and radio interceptions, the Title III damages provisions are permissive, vesting courts with discretion regarding how much to provide in damages.[58] Indeed, most courts have interpreted the general Title III damages provision as giving district courts the authority to decline to award statutory damages to plaintiffs who cannot establish actual damages following a successful jury verdict.[59] Only the Seventh Circuit has reached the opposite conclusion.[60]

In addition to finding damages discretionary, two circuits have interpreted the statutory damages provision as limiting damages to $10,000 unless the violation in question lasted longer than 100 days.[61] Finally, at least one Circuit has found liability to be joint and several rather than individual when multiple defendants are involved.[62] The effect of this finding is to limit compensatory damages to the amount of actual damages proved, or statutory damages between $100 and

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[55] *Id.* § 2520(c)(1)(B).

[56] *Id.* § 2520(b)(2).

[57] *Id.* § 2520(f).

[58] *See id.* § 2520(c)(2).

[59] *See, e.g.*, DIRECTV, Inc. v. Brown, 371 F.3d 814, 818–19 (11th Cir. 2004); Doris v. Absher, 179 F.3d 420, 429 (6th Cir. 1999); Reynolds v. Spears, 93 F.3d 428 (8th Cir. 1996); Morford v. City of Omaha, 98 F.3d 398, 399 (10th Cir 1996); Nalley v. Nalley 53 F.3d 649, 650 (4th Cir 1995).

[60] *See* Rodgers v. Wood, 910 F.2d 444 (7th Cir. 1990) (holding that the silence of the legislative record regarding the change from "shall" to "may," together with other statutory amendments, suggested that Congress did not intend to confer discretion).

[61] *See* Smoot v. United Transp. Union, 246 F.3d 633, 643–44 (6th Cir. 2001); Desilets v. Wal-Mart Stores, Inc., 171 F.3d 711, 715 (1st Cir. 1999).

[62] *See* Jacobson v. Rose, 592 F.2d 515, 520 (9th Cir. 1978) (upholding in part a damages award against police officers, but finding damages limited to joint, rather than individual, liability).

$10,000,[63] as opposed to the actual or statutory damage amounts multiplied by the number of defendants involved.[64]

The net effect of these limitations is to reduce the potential payout of a Title III lawsuit to the point where it would make little sense to file a Title III claim except in connection with additional claims. The easiest way to see why is to consider the options available to a potential Title III plaintiff. FISA and Title III only overlap with respect to government surveillance. As a result, this note considers only the remedies provided by Title III for plaintiffs subjected to improper government surveillance. Because the government does not benefit financially from surveillance, it would be highly unusual for a Title III plaintiff to have any chance of proving that a particular defendant profited as a result of a Title III violation.

As a result, with respect to compensatory damages, a Title III plaintiff will generally be limited to the greater of actual damages or statutory damages between $100 and $10,000.[65] A plaintiff who receives notice of surveillance but is not prosecuted will have great difficulty proving actual damages because the results of the surveillance have not been used against him in any way. The same will be true of a plaintiff who has been prosecuted and successfully suppressed wrongfully gathered surveillance evidence.

Accordingly, potential Title III plaintiffs must face the prospect of relying on statutory damages only, which may be capped at $10,000,[66] and which a court may decline to award in its discretion.[67] Potential plaintiffs can be confident that the expenses they will bear litigating their claim will far exceed available compensatory damages. In effect, it may be the possibility of punitive damages alone which makes pursuing a claim worthwhile.

Against the prospect of punitive damages, a plaintiff must weigh the costs of litigation, both in time and attorney's fees, discounted by the possibility that if he won, fees would be assessed in whole or in

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[63] *See* 18 U.S.C.S. § 2520(c)(2).

[64] *See Jacobson*, 592 F.2d at 520.

[65] *See* 18 U.S.C.S. § 2520(c)(2).

[66] *See id.*; *Smoot*, 246 F.3d 633, 643–44; *Desilets*, 171 F.3d 711, 715.

[67] *See, e.g.*, DIRECTV, Inc. v. Brown, 371 F.3d 814, 818–19 (11th Cir. 2004); Doris v. Absher, 179 F.3d 420, 429 (6th Cir. 1999); Morford v. City of Omaha, 98 F.3d 398, 400 (10th Cir. 1996); Nalley v. Nalley, 53 F.3d 649, 650 (4th Cir. 1995). *But see* Rodgers v. Wood, 910 F.2d 444, 448 (7th Cir. 1990) (declining to find discretion).

part against the defendant(s). After all, a potential plaintiff faces a real possibility of being denied damages and fees even if he establishes a violation of Title III.[68] Indeed, in *Jacobson v. Rose*, one of the few cases raised successfully by a private plaintiff against government investigators, the plaintiff was granted statutory damages but received only $12,000 of the $40,000 in attorney's fees he requested.[69] Although the opinion contains no information regarding Jacobson's fee arrangement with his attorneys, Jacobson received only $12,000 in statutory damages, making it entirely possible that he found himself owing more money to his attorneys than he recovered in his damages claim.[70] An unsuccessful plaintiff would be required to bear his own costs. As a result, the expected value of a Title III claim where the defendant did not profit and the plaintiff cannot prove significant actual damages is almost certain to be negative, meaning that the plaintiff would lose money by asserting a Title III claim.[71]

With respect to the damages authorized, FISA is very similar to Title III. The damages authorized by FISA are the greater of actual damages, $1,000, or $100 per day of the violation, punitive damages, and reasonable attorney's fees, investigation, and litigation costs.[72] Like Title III, FISA gives no textual guidance as to when punitive damages would be appropriate. Because there have been virtually no FISA cases, it is not possible to generalize about how courts may treat FISA civil remedy claims. However, the statutes are similar enough that all of the obstacles facing Title III plaintiffs are logically applicable to FISA plaintiffs.

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[68] *See Brown*, 371 F.3d at 818–19; *Doris*, 179 F.3d at 429; *Reynolds*, 93 F.3d at 434–35; *Morford*, 98 F.3d at 400; *Nalley* 53 F.3d at 650.

[69] 592 F.2d 515, 521 (9th Cir. 1978).

[70] *Id.* at 519. The $12,000 in statutory damages allowed by the district court may have been reduced further by the Court of Appeals' mandate that the district court either enter a judgment not withstanding the verdict in favor of three of the defendants or allow them to assert good faith defenses upon remand. *Id.* at 525.

[71] Of course there may be non-monetary reasons to assert a Title III claim. However, a damages claim that costs money to assert will unquestionably be invoked less often, and correspondingly be less effective in ensuring statutory compliance, than a potentially lucrative claim.

[72] 50 U.S.C.S. §§ 1810(a)–(c) (2009).

D. AVAILABLE DEFENSES

Title III also provides a complete defense for violators who act in good faith reliance on a warrant or court order, a grand jury subpoena, legislative or statutory authorization, or on an emergency law enforcement request.[73] A good faith determination that either a consensual monitoring exception, or one of a series of exceptions for providers of electronic services to the public, operates as an additional complete defense.[74] The civil relief provision is subject to a two-year statute of limitations, which begins to run on the date of the first reasonable opportunity for the aggrieved party to discover the violation.[75]

Courts have divided on whether common-law immunity defenses should apply under Title III. The Sixth and Eleventh Circuits have explicitly held that qualified immunity may be raised as a defense to a Title III claim.[76] Both courts noted that qualified immunity is analytically distinct from the Title III good-faith defense, because qualified immunity spares officials the burden of going to trial.[77] They also both noted that qualified immunity was a sufficiently well-established doctrine that it should not be considered abridged unless it was clear that Congress intended to do so.[78]

In *Berry v. Funk*, the D.C. Circuit reached the opposite conclusion.[79] The *Berry* court concluded that Congress' inclusion of a good faith defense in Title III made it inappropriate for courts to provide additional common law defenses.[80] *Berry* decided in effect that Congress had "occupied the field" by providing an express good faith defense that was more limited than qualified immunity.[81]

Unlike Title III, the FISA remedy provision does not expressly provide a good faith defense. In this respect, the FISA remedy provision may be easier to invoke than the Title III remedy provision.

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[73] 18 U.S.C.S. §§ 2520(d)(1)–(2) (2009).
[74] *Id.* §§ 2511(2)(a)(i), (3), 2520(d)(3).
[75] *Id.* § 2520(e).
[76] *See* Tapley v. Collins, 211 F.3d 1210, 1214–16 (11th Cir. 2000); Blake v. Wright, 179 F.3d 1003, 1011–13 (6th Cir. 1999).
[77] *See Tapley*, 211 F.3d at 1214–16; *Blake*, 179 F.3d at 1011–13.
[78] *See Tapley*, 211 F.3d at 1214–16; *Blake*, 179 F.3d at 1011–13.
[79] 146 F.3d 1003 (D.C. Cir. 1998).
[80] *Id.* at 1013.
[81] *Id.*

In addition, there is no case law developing the applicability of qualified immunity defenses under FISA. However, because the logic underlying the doctrine of qualified immunity is equally applicable to officials sued under the FISA civil remedy provision as under the Title III provision, there is no obvious reason why courts allowing a qualified immunity defense in the Title III context would not also do so in the FISA context.

The availability of both good faith and qualified immunity defenses places yet another significant obstacle in the path of aggrieved persons seeking civil remedies against government officials. The good faith defense narrows the pool of potential governmental defendants to those who: act in bad faith; act without a court order, grand jury subpoena, or statutory authorization; or act without the consent of one of the parties to the surveillance in certain narrow circumstances.[82] The final category of the good faith defense is a technological fix that addresses the problem of unauthorized communications that pass through multiple computers when the computer operators consent to law enforcement interception.[83]

Qualified immunity supplements the good faith defense by allowing defendants to first argue that they did not violate a clearly established right, with the fallback defense that if they did violate a right, they did so in good faith reliance on a court order. The net result of the two defenses is that aggrieved persons considering suit must be confident that potential defendants violated a clearly established right, and did so without statutory, legislative, or judicial authorization to justify filing suit.

Further, potential plaintiffs who are not criminally prosecuted are unlikely to ever become aware of a surveillance conducted in violation of Title III that was not authorized by a court. This is because the notice provision of Title III is only triggered by the expiration or denial of a judicially authorized surveillance order.[84] As a result, persons with potential claims that could survive a good faith defense are unlikely to become aware of their claims because prosecutors will hesitate to initiate criminal proceedings that depend on evidence obtained via surveillance conducted in bad faith or without judicial authorization.

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[82] *See* 18 U.S.C.S. § 2520(d) (2009).
[83] *See id.* §§ 2511(2)(a)(i), (3), 2520(d)(3).
[84] *See id.* § 2518(8).

III. CONCLUSION: THE TITLE III CIVIL REMEDY PROVISION IS A RIGHT WITHOUT A REMEDY

Although at a glance the Title III civil remedy provision seems much more meaningful than that of FISA, upon closer analysis it also can be seen as a right without a remedy. The combination of four critical limits operates to effectively nullify the Title III civil remedy provision. First, plaintiffs may be unable to sue governmental entities, and in no event may sue the United States.[85] Second, the damages available under Title III are very limited and may be denied entirely in the discretion of a trial court even following a successful claim.[86] Third, Title III provides a good-faith defense,[87] and case law may provide a qualified immunity defense to potential defendants, making it difficult to establish liability.[88] Finally, the Title III notice provision operates in practice to provide notice only to persons whose potential claims would not survive a good-faith defense.[89]

The potential limit on suing governmental entities means a plaintiff may be restricted to suing civil servants in their individual capacities. This has two effects: individuals will be sympathetic defendants and may be effectively judgment-proof with respect to large punitive damages awards. A potential plaintiff must consider an uphill battle to establish liability, followed by the realistic probability that any recovery large enough to justify bringing suit in the first place would be impossible to collect.

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[85] *See, e.g.*, Amati v. City of Woodstock, 176 F.3d 952, 956 (7th Cir. 1999) (finding that governmental entities cannot be sued under 18 U.S.C. § 2520). *But see* Adams v. City of Battle Creek, 250 F.3d 980, 985 (6th Cir. 2001).

[86] *See, e.g.*, DIRECTV, Inc. v. Brown, 371 F.3d 814, 818–19 (11th Cir. 2004) (finding that district courts have discretion to decline to award statutory damages to plaintiffs unable to establish actual damages); Doris v. Absher, 179 F.3d 420, 429 (6th Cir. 1999) (same); Reynolds v. Spears, 93 F.3d 428, 434-5 (8th Cir. 1996) (same); Morford v. City of Omaha, 98 F.3d 398, 400 (10th Cir. 1996) (same); Nalley v. Nalley 53 F.3d 649, 650 (4th Cir. 1995) (same). *But see* Rodgers v. Wood, 910 F.2d 444, 448 (7th Cir. 1990) (declining to find discretion).

[87] *See* 18 U.S.C.S. § 2520(d).

[88] *See* Tapley v. Collins, 211 F.3d 1210, 1214–16 (11th Cir. 2000) (acknowledging availability of a qualified immunity defense); Blake v. Wright, 179 F.3d 1003, 1011–13 (6th Cir. 1999) (same). *But see* Berry v. Funk, 146 F.3d 1003, 1013 (D.C. Cir. 1998).

[89] *See* 18 U.S.C.S. § 2518(8)(d) (requiring notice only upon the expiration or denial of a court authorized wiretap); *id.* § 2520(d) (providing that good-faith reliance on a court order is a complete defense to liability under Title III).

A plaintiff must next consider the probable limitation of his compensatory damages to actual damages or statutory damages. This is because the government investigator who may have violated Title III did not profit as a result of the statutory violations, which would increase damages under §2520.[90] If a plaintiff were considering litigation with a private party, his potential recovery would include any profits reaped by the Title III violator.[91] This significant incentive is completely absent in government surveillance cases. Next, a plaintiff would need to consider the fact that statutory damages are effectively capped at $10,000 in several circuits, and, along with fees, may be denied entirely to successful plaintiffs.[92] As a result, a plaintiff must consider the possibility that he may establish a clear statutory violation, undoubtedly after investing significant time, energy, and attorney's fees, but fail to prove actual damages and be denied statutory damages and attorney's fees.

At this point, a rational plaintiff would conclude that unless he had a good chance of recovering punitive damages, he would lose a significant sum of money by pursuing a Title III claim. However, a plaintiff whose claims could survive the statutorily provided good faith defense[93] is unlikely to receive notice that he has a claim at all because the Title III notice provision only provides notice upon the termination or denial of a judicially authorized surveillance.[94] This results in notice of surveillance being provided only to those plaintiffs who have little or no chance of receiving punitive damages. As a result, a plaintiff who believes that his statutory rights were violated will almost certainly conclude that he would lose money by raising a damages action under Title III.

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[90] *See id.* § 2520(c)(2).

[91] *See id.*

[92] For courts finding damages under 18.U.S.C. § 2520(c)(2) limited to $10,000 unless an offense took place over more than 100 days, see *Tapley*, 211 F.3d at 1214–16; *Blake*, 179 F.3d at 1011–13. For courts finding that district courts may decline to award statutory damages to successful plaintiffs, see DIRECTV, Inc. v. Brown, 371 F.3d 814, 818–19 (11th Cir. 2004); Doris v. Absher, 179 F.3d 420, 429 (6th Cir. 1999); Reynolds v. Spears, 93 F.3d 428, 434–35 (8th Cir. 1996); Morford v. City of Omaha, 98 F.3d 398, 400 (10th Cir. 1996); Nalley v. Nalley 53 F.3d 649, 650 (4th Cir. 1995). The Seventh Circuit is the only circuit that has refused to find discretion. *See* Rodgers v. Wood, 910 F.2d 444, 448 (7th Cir. 1990).

[93] 18 U.S.C.S. § 2520(d).

[94] *See id.* § 2518(8)(d).

These limiting factors operate to render the expected value of a potential Title III civil suit negative, making it almost certain that it would cost a plaintiff more money to assert a damages claim than he would recover. In most cases, statutes providing for damages and attorneys' fees create a positive expected return for potential plaintiffs giving them an incentive to vindicate their rights. This in turn prompts individuals to play an important role in disciplining government actors.

The damages provision of Title III has the opposite effect. When considered along with the notice and civil remedy limitations of Title III, it requires plaintiffs to value non-monetary goals more highly than their financial self-interest in order to pursue Title III claims. From the perspective of an individual seeking compensation for a violation of his statutory rights, the Title III civil remedy provision, like its FISA analogue, is a classic example of a right without a remedy.