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PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: UNITED STATES, Petitioner V.

FILBERTO OJEDA RIOS, ET AL.

CASE NO: 89-61

PLACE: Washington, D.C.

DATE: February 28, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
v. : No. 89-61  
FILIBERTO OJEDA RIOS, ET AL. :

- - - - -x  
Washington, D.C.  
Wednesday, February 28, 1990

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:43 a.m.

APPEARANCES:  
WILLIAM C. BRYSON, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on  
behalf of the Petitioner.  
RICHARD A. REEVE, ESQ., New Haven, Connecticut; appointed  
by this Court on behalf of the Respondents.

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1           The district court denied the vast bulk of those  
2 grounds, but granted the suppression motion in part with  
3 respect to two groups of tapes on one ground. And that  
4 ground was that the tapes with -- those two sets of tapes  
5 had not been sealed quickly enough after the termination  
6 of the interceptions and the extensions, as the district  
7 court construed the term "extensions," and that,  
8 therefore, those tapes had to be suppressed under Section  
9 2518(8)(a) of the wiretap statute.

10           QUESTION: Mr. Bryson, the offense occurred in  
11 1983?

12           MR. BRYSON: That's right, Your Honor.

13           QUESTION: And has the defendant ever been  
14 brought to trial?

15           MR. BRYSON: Well, a number of the defendants  
16 have been brought to trial. The ones who are before the  
17 Court here are the ones that were severed out at the time  
18 of the -- or following the loss of the evidence from  
19 suppression because these were the defendants as to whom  
20 that evidence was deemed to be essential.

21           There were a number of other defendants who have  
22 already been tried and most of them have been convicted.  
23 One was acquitted.

24           QUESTION: But, at least, Mr. Ojeda Rios has  
25 never been tried?

1 MR. BRYSON: That's right. That's right. He --  
2 he remains at large --

3 QUESTION: And you -- you take the position that  
4 the Speedy Trial Act does not preclude trial at this  
5 junction?

6 MR. BRYSON: Oh, that's right, Your Honor,  
7 because we have -- there has been ongoing litigation on  
8 this issue ever since. There's never been a point in  
9 which nothing was going on. In fact, this case has had an  
10 enormous amount of activity all the way through.

11 QUESTION: The statutory provision under which  
12 the exclusion was made says basically that the presence of  
13 the seal --

14 MR. BRYSON: That's right.

15 QUESTION: -- provided for by this subsection.  
16 That's the language used.

17 MR. BRYSON: That's right.

18 QUESTION: Doesn't that phrase have the effect  
19 of incorporating the timing requirement provided for in  
20 this subsection?

21 MR. BRYSON: We don't think so, Your Honor. Let  
22 me move to that argument.

23 QUESTION: It certainly could be said to do so.  
24 I mean, I am concerned with the language of the provision  
25 itself.

1 MR. BRYSON: As are we, and it could be said to  
2 -- to do so, and the Second Circuit, the First Circuit and  
3 the D.C. Circuit have concluded that that is the proper  
4 reading of the statute.

5 We think it's a very unnatural reading of the  
6 statute which isn't supported either by the plain language  
7 of the statute, by its legislative history or really by  
8 the purposes of the statute. And let me turn to that, if  
9 I may, right now.

10 The language, as you say, is the presence of the  
11 seal provided for by this subsection. Our view is that  
12 means the judicial seal, the seal that a judge must put on  
13 the tapes at the time that the tapes are -- are sealed.  
14 Now, the -- it then says, or a satisfactory explanation  
15 for the absence thereof. Now, the purpose --

16 QUESTION: Do we have a judicial seal? I never  
17 had a judicial seal. Do we get issued these things? I  
18 didn't have one.

19 MR. BRYSON: No, Your Honor --

20 (Laughter.)

21 QUESTION: Just district judges have them maybe,  
22 huh?

23 MR. BRYSON: District judges are --

24 QUESTION: I always wanted one, you know. You  
25 know, you could put a red --

1 (Laughter.)

2 MR. BRYSON: It -- this is I think -- it may not  
3 be exclusive to this statute --

4 QUESTION: Yeah.

5 MR. BRYSON: -- but it certainly is unusual to  
6 have courts involved in sealing evidence. But basically  
7 it's the same thing as the seal that any one uses in the  
8 -- in the context of establishing chain of custody.

9 You take a piece of evidence tape and you wrap  
10 it around the box and you've sealed it. You put your  
11 initials on it and it's a judicial seal. So, it's nothing  
12 really more complicated than that. The judge can vary the  
13 procedure if he likes, but basically that's the process.

14 Now, if Congress had met -- Congress is using  
15 the words presence and absence of the seal. Now, presence  
16 and absence suggests that if you look for it and you say  
17 it's absent, nothing's there. In fact, the argument that  
18 the defendants are making is that, well, this -- what's  
19 absent is a timely imposed seal, a timely affixed seal,  
20 which is a very awkward way to put the point,

21 Congress, if they had wanted to deal with both  
22 delay and absence, could have easily said a seal not  
23 timely affixed -- or delay or absence. But they said  
24 absence. What's more, the -- if you look at other  
25 applications of the same principle that they -- they argue



1 for, it demonstrates, I think. how strange the language is  
2 to -- to import so much -- to put so much weight on the  
3 phrase "provided for by this subsection."

4 QUESTION: Well, in your view, there would be no  
5 remedy for an unexcused delay in sealing?

6 MR. BRYSON: Well, certainly Section 2518(a) --  
7 (8)(a) would not provide an exclusionary principle.  
8 That's right. Now, of course, delays in sealing can  
9 result in making the burden of authentication more  
10 difficult if in fact, as in this case, the claim is made  
11 that there was tampering with the tapes and the government  
12 has to come in and rebut by clear and convincing evidence  
13 any claim of tampering. That's what we did.

14 QUESTION: Well, Congress may have intended some  
15 kind of prophylactic remedy here in the sense that if a --  
16 if a seal is provided immediately, you're just going to  
17 eliminate the risk of much tampering.

18 MR. BRYSON: There is no doubt that they  
19 intended the immediate sealing to do exactly that, Your  
20 Honor. They have -- they had a ruling that the evidence  
21 is clear from the legislative history -- they said, we  
22 want to avoid arguments on this point, we want you to seal  
23 it immediately.

24 But the question is what happens if you don't.  
25 And we submit that Congress did not say that any time you

1 don't seal immediately, that's the end of the matter. And  
2 no court has so held. The rule does not apply across the  
3 board.

4 What Congress is saying is, look, seal  
5 immediately. If you -- if you have not sealed and if  
6 there's no seal there, we'll -- we'll have one narrow  
7 provision in which you will not be -- simply not be  
8 allowed to argue that the tapes should be admitted and  
9 that is where you don't have either a seal or a  
10 satisfactory explanation for a seal.

11 QUESTION: Mr. Bryson, I assume that if you --  
12 if you don't do it right away, the district judge -- you  
13 run the risk of the district judge saying, I'm sorry it's  
14 too late.

15 MR. BRYSON: Of course.

16 QUESTION: Right?

17 MR. BRYSON: That's right.

18 QUESTION: So it -- it isn't a sure thing that  
19 there's no harm in --in not -- in not doing it  
20 immediately.

21 MR. BRYSON: That's right and -- and --

22 QUESTION: You were lucky here, though, he -- he  
23 did approve them.

24 MR. BRYSON: He did approve it because this was  
25 -- these were both (a) relatively short delays. It wasn't

1 the case of a seal which was imposed two days before  
2 trial. The parade of horrors that defendants --

3 QUESTION: Yeah, but what if it was? What if it  
4 was? What if a judge said -- you did -- just like marking  
5 exhibit, you ought to mark your exhibit before you hand it  
6 to -- up for evidence. You didn't get the seal on these;  
7 here, you'd better seal it right now.

8 MR. BRYSON: Well, if the judge is willing to  
9 seal it under those circumstances --

10 QUESTION: And that would make it admissible.

11 MR. BRYSON: -- our position would be the  
12 statute would fall out. It wouldn't be applicable.

13 QUESTION: So it's entirely up to the judge to  
14 -- to let anything in of this kind he wants to?

15 MR. BRYSON: Well, under 2518(8)(a) that's --  
16 that's -- that's true. Now, it may be --

17 QUESTION: Well, also under the other -- it  
18 doesn't violate the other section.

19 MR. BRYSON: No. But it would have to -- we  
20 would nonetheless still have to establish the authenticity  
21 of the --

22 QUESTION: Well, maybe the judge says, well, I  
23 don't think the government agents aren't going to use  
24 phoney evidence. I don't even have to look at this. I'll  
25 presume they were fair.

1 MR. BRYSON: Well, if -- if the judge did that,  
2 I suspect, depending on the strength of the -- of the  
3 allegations --

4 QUESTION: Well, it would comply with statute.  
5 It would comply with the statute under your reading.

6 MR. BRYSON: Well, that's right. But we would  
7 still have to establish authenticity under the Federal  
8 rules and under the rules set forth by the courts with  
9 respect to tape-recorded evidence, which is a -- a  
10 significant burden. It's just that this particular  
11 provision would not bar --

12 QUESTION: This particular provision would be  
13 totally meaningless.

14 MR. BRYSON: Well, it would be inapplicable. I  
15 think not meaningless. It -- it would not -- simply  
16 wouldn't apply to that set of facts.

17 QUESTION: It would not impose any burden at all  
18 if the judge was willing to seal it.

19 MR. BRYSON: That's right.

20 QUESTION: Yeah.

21 MR. BRYSON: That's right. That -- we would  
22 still have the burden, of course, in the sense of we would  
23 have not complied with the immediate sealing requirement.  
24 And we would be subject, for example, to contempt, which  
25 is found in 2518(8)(c) -- any violation of the subsection

1 is subject to contempt -- so the prosecutor --

2 QUESTION: When the judge is willing to seal it  
3 he doesn't have to hold you in contempt.

4 MR. BRYSON: Well, that may be, although it's  
5 not clear that --

6 QUESTION: Let me ask you another question. How  
7 does someone challenging authenticity go about proving it?  
8 I mean, say you have custody of tape for three or four  
9 months and you get somebody on the witness stand that  
10 says, I don't know anything that ever happened, it was  
11 sitting in the drawer all the time. How can anybody ever  
12 challenge that testimony?

13 MR. BRYSON: How -- how can they challenge the  
14 authenticity of the tapes?

15 QUESTION: Yeah.

16 MR. BRYSON: Well, they -- they made the  
17 statements on the tapes. If they say, you have got stuff  
18 on that tape that I never said, I have no involvement with  
19 this robbery, I never said anything about Wells Fargo, I'm  
20 a complete stranger to this thing, and there's my voice  
21 saying in a spliced form that I did this.

22 I'm going to challenge that, number one, by  
23 showing that there is no valid chain of custody and,  
24 number two, I'm going to bring my expert in and I'm going  
25 show that those words were stuck together like the pieces

1 cut out of the newspaper in effect and stuck on the tape.

2 That's the way it happens. The person whose  
3 voice is intercepted is in a good position to know if he  
4 said those things. And --

5 QUESTION: And that same -- that same process  
6 would -- would transpire whether it was sealed or not,  
7 presumably.

8 MR. BRYSON: That's right.

9 QUESTION: I mean, you could make the same  
10 argument.

11 MR. BRYSON: That's right. That's right. The  
12 seal is an aid in that it establishes a better chain of  
13 custody than if there was no seal. What it does is -- and  
14 the reason that it is really welcome to the government, is  
15 something the government has an incentive to put on -- is  
16 that it takes care of everything from the moment that seal  
17 is -- is put on, when the judge puts it on, to the moment  
18 of trial.

19 Because when the judge rips the seal off and  
20 it's still intact, assuming somebody hasn't really gone  
21 wild and gone out and gotten the seal off, steamed it off  
22 or something and replaced it -- you always take that risk.  
23 But basically you have a very solid chain of custody.

24 QUESTION: As a practical matter, once the tapes  
25 have been sealed and the government wants to have access

1 to them to prepare for trial, what do they do, make  
2 copies?

3 MR. BRYSON: Well, they generally will have made  
4 copies in advance and they will be working from the  
5 copies. Or if they haven't, they can go to the court --

6 QUESTION: So you make a copy in advance of  
7 submitting it to seal?

8 MR. BRYSON: Oh, yes, that's -- that's not  
9 infrequent and the courts have approved that -- that  
10 procedure. Now -- and in fact, in some courts there --  
11 there have been delays which have been accepted as  
12 satisfactory or explained delays based on the time taken  
13 to make copies.

14 The court can -- the government can also go back  
15 to the district court, as the statute specifically  
16 provides, and ask for an order unsealing for a specific  
17 purpose and resealing so that there isn't any strict  
18 prohibition against going back and getting the tapes.

19 QUESTION: But even if the tape is sealed, the  
20 government has to authenticate it, doesn't it?

21 MR. BRYSON: Oh, sure. Absolutely. It's just  
22 an easier process, of course.

23 QUESTION: When you referred a moment ago to the  
24 -- a clear and convincing standard of evidence, is that  
25 provided in the rules?

1 MR. BRYSON: No. No. That has -- has developed  
2 in the courts of appeals and in the Second Circuit as a  
3 specific rule applicable to tape-recorded evidence.

4 QUESTION: What's -- what's the basis for that  
5 rule?

6 MR. BRYSON: There isn't any basis in the rule,  
7 Your Honor. What it is -- it's simply -- the rationale is  
8 that tape-recorded evidence is hard to -- it's hard to  
9 tell whether it's authentic or not and, therefore, we're  
10 going to put on the government a particularly high burden.

11 It's really created as a sort of common law  
12 evidentiary rule. Now, if push came to shove, the  
13 question of whether Rule 901 compels that, I think  
14 probably not. But that certainly is the rule that's  
15 followed by -- by courts of appeals.

16 QUESTION: Does that just go to the explanation  
17 for the absence of the seal or with respect to  
18 authenticity?

19 MR. BRYSON: With respect to authenticity.

20 QUESTION: Only?

21 MR. BRYSON: Well, that's right. That's right.

22 QUESTION: Doesn't -- doesn't Rule 901 provide  
23 the way things shall be authenticated?

24 MR. BRYSON: Yes, it does, and -- and I think  
25 the better argument -- I think those courts of appeals



1 that have held clear and convincing evidence as a  
2 requirement may well be wrong, and that's not the issue  
3 before the Court.

4 In this case, the district court, following  
5 established Second Circuit precedent, found the tapes in  
6 question -- or at least the tapes that he addressed -- he  
7 didn't address all of the tapes -- but the ones he did  
8 address, he found to be genuine by clear and convincing  
9 evidence following Second Circuit precedent.

10 Now, you -- you could look at the legislative  
11 history as well and find that while it's not dispositive  
12 -- this is not legislative history that simply solves the  
13 problem if it ever does -- but the legislative history is,  
14 I think, instructive in that it -- it -- there is no  
15 reference, no suggestion that the Congress was trying to  
16 deal not only with the absence of a seal but also with  
17 delays in sealing.

18 QUESTION: This seems to be our week for the dog  
19 that didn't bark legislative history. This is another  
20 one. I mean, your point is that there is nothing in  
21 there --

22 MR. BRYSON: Well, I can to a little --

23 QUESTION: -- that says that it should be  
24 excluded from that reason.

25 MR. BRYSON: I can do a little better than that.

1 I think the dog not only didn't bark but he sort of licked  
2 at the hand of the master.

3 QUESTION: Did he lick the hand?

4 MR. BRYSON: Yes.

5 QUESTION: Okay, well --

6 (Laughter.)

7 MR. BRYSON: In this case -- let me just run  
8 through what -- what we have. The statute really had its  
9 origin in the task force report on organized crime in 1970  
10 -- '67 of President Johnson's Commission on Law  
11 Enforcement and the Administration of Justice.

12 There was a draft statute in the appendix of  
13 that report which turns out to be very close to what  
14 ultimately became Title III. And in particular, the draft  
15 provision that we're dealing -- or the provision we're  
16 dealing with here was almost exactly word for word the  
17 draft provision that showed up in that report.

18 And the language used to describe that draft  
19 provision was -- at page 103 of the report -- was that  
20 after saying that the seals -- the tapes should be sealed  
21 when the interception is terminated, "The seals should be  
22 a prerequisite for admission unless the satisfactory  
23 showing could be made for its absence." The seal should  
24 be a prerequisite. No reference to delay -- just the  
25 seal.

1                   Again, in the Senate report, we have, "The  
2 presence of the seal, noted above, the judicial seal, is  
3 intended to be a prerequisite for use unless a  
4 satisfactory explanation can be made to the judge."

5                   Then in a statement on -- that was put into the  
6 record prior to the enactment of Title III by Senator  
7 Scott, a shorthand description of the provisions of the  
8 bill said, "Unless under seal or no satisfactory  
9 explanation of its absence, the information contained in  
10 such recording may not be used."

11                   Not only is there no hint of delay, but we're  
12 talking about unless the seal is there. And there is no  
13 reference to the provided for language, which you would  
14 think would show up if they really were focusing on that  
15 language to trigger the requirement -- to trigger the  
16 delay factor.

17                   Now the respondents argue that there are policy  
18 reasons --

19                   QUESTION: But couldn't you also interpret that  
20 history as saying they're assuming the seal wouldn't be  
21 there unless it were put on immediately, as the statute  
22 requires?

23                   MR. BRYSON: Well, you -- you could. You could  
24 interpret it that way.

25                   QUESTION: And if you do interpret it that way,

1 then it adds up to nothing.

2 MR. BRYSON: That's right.

3 QUESTION: Yeah.

4 MR. BRYSON: If you interpret it that way. My  
5 submission is not that this legislative history is a bell  
6 ringer and I can sit down. But I think it's -- it's  
7 helpful and I think it does a little more than say there  
8 is no reference to delay. It -- it suggests what we're  
9 talking about is a seal that's absent. That's the  
10 language.

11 QUESTION: Well, is there anything in the  
12 legislative history that suggests that there is any  
13 purpose for the seal other than to be sure that it was  
14 affixed in a timely manner? Isn't that the only reason  
15 they wanted the seal is to get it on their right away?

16 MR. BRYSON: Well, they certainly wanted it on  
17 there right away but there is a reason for the seal  
18 whenever it goes on, which is that even if it's two weeks  
19 late or three weeks late or six weeks late, it -- it cuts  
20 off the problem of -- of risks of -- of lack of  
21 authenticity from whatever point forward that it's put on.  
22 In this case, for example, --

23 QUESTION: So its -- its only function is a  
24 temporal function, really. I mean --

25 MR. BRYSON: Well --

1 QUESTION: -- it's a different -- a question of  
2 when it gets on is -- is the only thing that has it serve  
3 any statutory purpose.

4 MR. BRYSON: Well, its -- its function is to  
5 establish authenticity. It does that, depending on  
6 whenever it's put on with respect to timing. That's true.  
7 But it's function is --

8 QUESTION: Well, it's to prevent any post-sealed  
9 questions of authenticity --

10 MR. BRYSON: That's right.

11 QUESTION: -- from being raised.

12 MR. BRYSON: That's right. Yeah. Or at least  
13 make it harder. And one could always claim again that  
14 somebody had steamed off the seal but --

15 QUESTION: If it's put on the day before trial,  
16 it's no good, is it?

17 MR. BRYSON: Well, Your Honor, it may well be no  
18 good.

19 QUESTION: I mean, would it -- would it serve  
20 any purpose?

21 MR. BRYSON: It would -- certainly not. It  
22 would serve no purpose. I would think a judge being asked  
23 to put a seal on the day before trial would simply laugh  
24 at the person who walked into his or her office with that  
25 request.

1 QUESTION: This (inaudible) involves time  
2 (inaudible)?

3 MR. BRYSON: Certainly. In time -- if you -- if  
4 you come in on the day before the trial with a request for  
5 sealing --

6 QUESTION: Did the Department of Justice take  
7 any position on this provision to the bill?

8 MR. BRYSON: This was -- this was not the  
9 administration's bill and, Your Honor, I can't tell you  
10 whether there was any objection. I doubt it -- I can't  
11 tell you, but I doubt it --

12 QUESTION: I don't think it amounts to \_\_

13 MR. BRYSON: -- because it was not a provision  
14 that was at all controversial and it went right through  
15 all the versions of the statute. The statute went through  
16 several versions and -- this -- this provision stayed  
17 unchanged throughout. I don't remember in the  
18 department's commentary that there was any reference to  
19 it. I believe not.

20 If I may, I'd like to turn to the question of  
21 whether, assuming that delays are covered, there was a  
22 satisfactory explanation, as the statute provides, in this  
23 case for the delay or, even assuming that satisfactory  
24 explanation means something like good cause, whether there  
25 was in fact good cause in this case for the delay.

1           Now, our position with respect to the  
2           satisfactory explanation requirement is that you must do  
3           the following. You must give a credible explanation to a  
4           court of why there was a delay. And the question is then,  
5           well, what more must you do?

6           We say that the more that's required turns on  
7           the interpretation of the word "satisfactory," which is a  
8           somewhat difficult term to handle. It's not clear what it  
9           means. You could interpret it to mean simply that an  
10          accurate description, a description that satisfies the  
11          court that this is an accurate description of what  
12          happened even if the -- what happened was that the tapes  
13          got tampered with.

14          But we think it requires more than that. In  
15          light of the purpose of the statute, we think that what it  
16          requires is that you explain to the satisfaction of the  
17          judge, that you -- that the tapes have not been, in fact,  
18          tampered with, that they are pristine. And once the judge  
19          can sit back and conclude that that's the condition of the  
20          tapes, then that constitutes a satisfactory explanation.

21          Now, this --

22          QUESTION: How different -- how different is  
23          that than the sort of showing you'd put on simply to  
24          authenticate it?

25          MR. BRYSON: It's -- it's not very different.

1 It would be a very similar kind of showing.

2 QUESTION: That's a -- that's a very -- let me  
3 understand what you're saying. You're saying, assuming  
4 that you lose on the point that --

5 MR. BRYSON: Yes.

6 QUESTION: -- that the presence of a seal means  
7 the presence of a seal that was put on immediately --  
8 right?

9 MR. BRYSON: Right.

10 QUESTION: -- then all you have to do to  
11 establish a satisfactory explanation for the absence of a  
12 seal that was put on immediately is to show that this is  
13 nonetheless an authentic tape.

14 MR. BRYSON: Well, we have to have a credible  
15 explanation and that satisfies the explanation part. And  
16 then the question is what does satisfactory mean. And we  
17 submit that if the judge is persuaded by our -- by our  
18 explanation that the tapes have not been tampered with --  
19 tinkered with -- then that's satisfactory. That's our  
20 interpretation.

21 QUESTION: But what is the explanation, though?  
22 It's very strange.

23 MR. BRYSON: In this particular case?

24 QUESTION: Yeah.

25 MR. BRYSON: Oh, well, our explanation was there



1 was one legal error made, arguably. We'll concede for  
2 present purposes there was a legal error made. The lawyer  
3 whose --

4 QUESTION: I know, but you seem to say that all  
5 you have to do is to prove that the tapes are -- haven't  
6 been tampered with.

7 MR. BRYSON: Well, we have to -- we have to show  
8 an explanation. We came forward with an explanation. Our  
9 explanation was we made a legal error, arguably, in  
10 interpreting the word "extension."

11 QUESTION: And that's why you delayed.

12 MR. BRYSON: And that's why we delayed. Now,  
13 the question is is that a satisfactory explanation.

14 QUESTION: Yes.

15 MR. BRYSON: Now, it's satisfactory in one sense  
16 that it explains --

17 QUESTION: I got you. All right.

18 MR. BRYSON: -- accurately, truthfully and with  
19 no doubt what happened. There's no dispute about that.

20 QUESTION: Well, what does the term  
21 "explanation" apply to?

22 MR. BRYSON: Well, it does applies to our coming  
23 forward and telling the judge why there was a detail -- a  
24 delay in the sealing.

25 QUESTION: In other -- it's an explanation of

1 the delay?

2 MR. BRYSON: That's right.

3 QUESTION: Is that what your position is?

4 MR. BRYSON: That's right. That's right.

5 QUESTION: Gee, don't -- don't you think  
6 satisfactory explanation must mean an explanation as to  
7 why the delay is excusable?

8 MR. BRYSON: Well, I -- we think --

9 QUESTION: I -- I -- nobody would read it that  
10 way.

11 MR. BRYSON: It can be -- in a sense it is  
12 because we say that it's excusable if --

13 QUESTION: So long as you --

14 MR. BRYSON: -- in fact it had no consequence in  
15 resulting in the alteration of the tapes --

16 QUESTION: No, no.

17 MR. BRYSON: -- as opposed to being a good  
18 reason or a good cause.

19 QUESTION: Do you think it's a satisfactory  
20 explanation if the department comes in and says, well, you  
21 know, we just -- just didn't want to take it to this judge  
22 and we -- and, yeah, we know we should have taken it in,  
23 but we just didn't want to do it?

24 MR. BRYSON: Well --

25 QUESTION: We had an attorney general who didn't

1 believe in this provision of the law and we decided not to  
2 take it in. But we assure you it has not been tampered  
3 with.

4 MR. BRYSON: Well, and --

5 QUESTION: And that is a satisfactory  
6 explanation, as I understand you're -- you're saying.

7 MR. BRYSON: That's correct. And the reason is  
8 because if the judge -- that is the truthful explanation.  
9 Now, an attorney may come in and say this attorney was a  
10 rogue attorney -- this is not the case in this case -- but  
11 some attorney, well, just decided not follow the statute,  
12 said to heck with the statute, I'm not going to follow it,  
13 I'm not going to seal, it's too much trouble. And we come  
14 in and we explain that to the judge and we say this --

15 QUESTION: Nobody is perfect. Right

16 MR. BRYSON: -- it was a mistake to have --  
17 nope. Well, not only is nobody perfect, but some people  
18 are just irresponsible. And this was an irresponsible  
19 act. That's our explanation.

20 Now, question: is this the satisfactory  
21 explanation? We submit in light of the purposes of the  
22 statute, it is if we can further show that the tapes have  
23 not been tampered with. This is a chain -- essentially a  
24 chain of custody rule. Suppose that we were dealing with  
25 nothing more than a rule that said establish chain of

1 custody from place A through place Z or provide a  
2 satisfactory explanation for what's missing, we would --

3 QUESTION: Well, on that -- on that basis you  
4 don't even -- never -- don't have to have it sealed at  
5 all.

6 QUESTION: Ever.

7 QUESTION: Ever. There's no reason to do it,  
8 you're saying, so long as it's authentic. Who cares about  
9 a seal?

10 MR. BRYSON: There is a very good reason for a  
11 seal.

12 QUESTION: Well, I know, but you -- but you  
13 would still have this satisfactory explanation if there  
14 wasn't a seal. This is a --

15 MR. BRYSON: We would. That's right.

16 QUESTION: Here's why we do -- we just don't  
17 believe in seals, we never did, and we don't think there  
18 ought to be a seal on this tape.

19 MR. BRYSON: That is correct.

20 QUESTION: That's -- now, is it satisfactory?  
21 Well, yes it is because the tapes are -- haven't been  
22 tampered with.

23 MR. BRYSON: That's right. But, of course, we'd  
24 have to go through a lengthy hearing, as we did in this  
25 case. There's no incentive for us to do that. If we did

1 -- if it did come to that, yes, I think that's right. But  
2 the evidence --

3 QUESTION: But as I understand it, you would  
4 have to go through the lengthy hearing in all cases to  
5 authenticate.

6 MR. BRYSON: No, because I think what happens,  
7 Your Honor, is that if you have a chain of custody  
8 established in part with the aid of the seal, the judicial  
9 seal --

10 QUESTION: Well, we're presuming there's no  
11 seal.

12 MR. BRYSON: Well, in that case, you'd have to  
13 go through a long hearing in all likelihood, if there is  
14 any colorable showing made that anything may have happened  
15 to the tapes in the meantime. That's right.

16 QUESTION: Do you have a fall-back position?

17 MR. BRYSON: Yes, we do.

18 (Laughter.)

19 MR. BRYSON: Let me -- let me move without  
20 further delay to the fall-back position.

21 QUESTION: Mr. Bryson, before you -- before you  
22 fall back, if we file an opinion agreeing with you, aren't  
23 we, in effect, amending that statute?

24 MR. BRYSON: No, Your Honor. I don't think so.  
25 I think that --

1 QUESTION: Well, have -- have we yet an  
2 explanation of why it wasn't done?

3 MR. BRYSON: Yes, and I'm going to give you that  
4 -- you haven't yet, but you're going get it right now.  
5 I'm going to explain.

6 What happen was in this case is the attorney  
7 construed the term "extensions" to mean, any -- if you're  
8 following a particular target through the series of  
9 wiretaps and you go from house A to house B to house C,  
10 then the wiretap at house B is an extension of the wiretap  
11 at house A and the wiretap at house C is an extension of  
12 the wiretap at house B.

13 That's the way he applied the term with respect  
14 to the key interceptions in this case. He had a somewhat  
15 broader concept of extension in general in which he felt  
16 that any -- any --

17 QUESTION: Well, will you pardon me if I say I  
18 don't understand it?

19 MR. BRYSON: Well, it may well be wrong --

20 QUESTION: I mean, the statute says --

21 MR. BRYSON: -- but that was his -- that was his  
22 conclusion.

23 QUESTION: He read the statute. The statute  
24 said put the seal on and he didn't put it on.

25 MR. BRYSON: Well, that's right. That's right.

1 But he -- the reason was because --

2 QUESTION: So how does he explain that?

3 MR. BRYSON: Because he didn't think it was  
4 necessary to put it on at that time because he felt that  
5 the extension --

6 QUESTION: Well, it said so. The statute said  
7 so. Can't he read?

8 MR. BRYSON: Well, that's -- that's the  
9 question, Your Honor. It's not clear that the statute  
10 meant that he had to put the seal on at the moment that  
11 the interceptions terminated because you can put the seal  
12 on after the extensions of the interceptions terminate.  
13 And he construed the term "extensions" to apply to any of  
14 the related wiretaps in the same investigation,  
15 particularly, as in this case, when you are following a  
16 particular individual from place -- place to place.

17 QUESTION: Do you -- do you interpret the term  
18 "extension" to modify the period -- period of the order?  
19 I mean, upon the --

20 MR. BRYSON: Order --

21 QUESTION: -- separation of the period of the  
22 order or extensions thereof.

23 MR. BRYSON: I think it means order or  
24 extensions. Not period, but order or extensions.

25 The district court found he acted in good faith.

1 He was negligent. The district court thought it was a  
2 legal error and he shouldn't have made it, but that there  
3 was no intentional -- he did not intentionally ignore the  
4 law or deliberately fail to seal.

5 It was the result of a misunderstanding and that  
6 the only basis on which the district court suppressed was  
7 that the delay was simply too long. The court of appeals  
8 found that he had really disregarded the sensitive nature  
9 of the activities undertaken but still did not upset the  
10 district court's findings of good faith.

11 And in this case, we submit that because this  
12 was a single legal error which we think, in light of the  
13 Second Circuit cases such as *Principie* and *Scafidi*, was an  
14 understandable legal error, if it was an error, then there  
15 should not be exclusion in this case because it was  
16 satisfactorily explained.

17 I would like to reserve the rest of my time.

18 QUESTION: Very well, Mr. Bryson.

19 Mr. Reeve.

20 ORAL ARGUMENT OF RICHARD A. REEVE

21 ON BEHALF OF THE RESPONDENTS

22 MR. REEVE: Mr. Chief Justice and may it please  
23 the Court:

24 Title III mandates that all electronic  
25 surveillance recordings are to be sealed immediately upon



1 the expiration of each order or extensions thereof. It is  
2 undisputed in this case, that the government violated that  
3 statutory mandate.

4 In addition to creating the requirement of an  
5 immediate seal, Congress, at the same time in the same  
6 subsection, created an independent prophylactic rule of  
7 exclusion. That rule of exclusion does not contain a  
8 prejudice test as the government contends today before  
9 this Court.

10 In fact, the sole exception to that rule of  
11 exclusion is if the government provides a satisfactory  
12 explanation for the absence of that immediate seal. None  
13 was provided in this case. The courts below were correct  
14 in finding no satisfactory explanation and excluding the  
15 evidence.

16 QUESTION: Well, the critical language doesn't  
17 say immediate seal, Mr. Reeve.

18 MR. REEVE: Your Honor, it is not explicit in  
19 that way, but I --

20 QUESTION: Well, it doesn't -- it doesn't  
21 contain the word "immediate," does it?

22 MR. REEVE: It does not in that sentence of the  
23 provision.

24 QUESTION: Yeah, that's -- well, that's what I  
25 am asking.

1 MR. REEVE: Yes, Your Honor, and I'd like to  
2 address that. And I think that there are three questions  
3 that can reasonably be asked in construing this statute.

4 Number one, what did Congress say? Number two,  
5 what did Congress not say? And, number three, did  
6 Congress know how to create a prejudice test in a rule of  
7 exclusion if they desired to do so? And I'd like to focus  
8 on the language of the statute, Your Honor, which is the  
9 question that you raised.

10 It is correct, and Justice O'Connor noted, that  
11 the language requires "the presence of the seal provided  
12 for by this subsection." The language does not say the  
13 presence of a judicial seal or the presence of a seal. It  
14 says that seal provided for by this subsection.

15 QUESTION: Of course, because that is what they  
16 were talking about.

17 MR. REEVE: Exactly right.

18 QUESTION: They didn't want to say any seal in  
19 the world would suffice.

20 MR. REEVE: That -- well, that's --

21 QUESTION: How else would they have said it if  
22 they just meant, you know, the kind of a seal we were  
23 talking about? Not necessarily timely, but -- but the  
24 seal that we have been talking about here.

25 MR. REEVE: Well, Your Honor, I think that --

1 that -- that it's clear when you look back, when you asked  
2 the question -- what is the seal provided for by this  
3 subsection? It is not just a judicial seal. It is an  
4 immediate seal and there's no question about that. In  
5 fact the government in its reply --

6 QUESTION: But even so, the statute does go on,  
7 when it talks about the use of the evidence, to say that  
8 there must be a satisfactory explanation for the absence  
9 of a seal.

10 MR. REEVE: Well, Your Honor, it does although  
11 it doesn't --

12 QUESTION: And you would read it as though it  
13 said a satisfactory explanation for noncompliance with the  
14 immediate sealing requirement.

15 MR. REEVE: Well, Your Honor, I respectively  
16 differ with the Court in -- in terms of what the language  
17 is. What it says is a satisfactory explanation for the  
18 absence thereof. And the word "thereof" is used not just  
19 in that sentence but in the first sentence which is in  
20 question, where the statute says "the period of the order  
21 or extensions thereof."

22 And just as that thereof refers to the period of  
23 the order, in this case, a satisfactory explanation for  
24 the absence thereof refers to the seal as provided for by  
25 this subsection and, as I have previously discussed, the

1 seal provided for by this subsection is an immediate seal.  
2 It's not a seal the day before the tapes are sought to be  
3 admitted. It's an immediate seal.

4 Congress could have said it differently, but  
5 they did not. And Justice Scalia inquired of my brother  
6 counsel as to whether or not, if the tapes were submitted  
7 to a district court judge the day before the government  
8 sought to admit that evidence, would that judge -- might  
9 that judge refuse to seal those tapes.

10 My suggestion is when you look at the statutory  
11 language there is no authority on the part of a district  
12 court judge to do that and the government would argue  
13 precisely that before a district court.

14 What the statute says is the recording shall  
15 first be made available to the judge issuing such order  
16 and, two, sealed under his direction. Shall. The  
17 mandatory term of that sentence clearly applies to both  
18 the submission and the seal. And if that isn't clear  
19 there, it's clear in Subsection B of 2518 --

20 QUESTION: Well, wait -- your -- your -- come to  
21 think of it, that is the logical consequence of your  
22 argument. You -- you cannot even apply to get a seal late  
23 because that would not be the seal as provided for by this  
24 section. It's no use if you're late, right?

25 MR. REEVE: No, Your Honor.

1 QUESTION: Why not?

2 MR. REEVE: Because that -- that section,  
3 immediately upon the expiration of the period of the  
4 order --

5 QUESTION: Yeah?

6 MR. REEVE: -- defines when the government is to  
7 do it.

8 QUESTION: Right.

9 MR. REEVE: Now, if the government --

10 QUESTION: I'm a district judge and I say, gee,  
11 I cannot give you a seal as provided for in this  
12 subsection because a seal as provided for in this -- in  
13 this subsection -- does it say subsection? Is that what  
14 it is? Yes.

15 MR. REEVE: Yes, it is, Your Honor.

16 QUESTION: I cannot provide you a seal as  
17 provided for by this subsection because such a seal is a  
18 seal that is issued immediately upon expiration of the --  
19 of the order. The order has long -- expired two days ago.  
20 I'm sorry, I cannot give you such a seal.

21 That would be a terrible result. Surely you  
22 want it sealed as soon as possible.

23 MR. REEVE: Your Honor, it would be my  
24 interpretation of the statute, based on the language in  
25 that sentence as well as in the language of the second

1 section, that is, Subsection B which says all orders and  
2 applications shall be sealed by the court, that the court  
3 does have a mandatory duty, and that the government could  
4 make that argument.

5 That's not a central issue, I don't believe, to  
6 the proper interpretation of this section because the  
7 reality is that -- I believe and in our view -- the  
8 language is plain, and Congress put that language  
9 "provided for by this subsection" in there for a clear  
10 reason. Otherwise -- otherwise the statutory provision  
11 simply does not make sense.

12 QUESTION: What is the harm to your client if  
13 the proof is by clear and convincing evidence that the  
14 tapes are authentic and accurate?

15 MR. REEVE: Your Honor, I would respond in two  
16 ways. There is no specific individualized prejudice in  
17 this situation. That is, and the reason is, Congress did  
18 not create a prejudice test. The same prejudice is  
19 suffered by everyone -- everyone in this courtroom when  
20 the government violates the law.

21 It is a prophylactic rule. That was what  
22 Congress established. And so there is no specific  
23 prejudice. It is the general prejudice occurs whenever  
24 the government violates the law. And that's what Congress  
25 intended to avoid. And I would like to get to that issue

1 because the next issue which the government raises is,  
2 well, how do we define the term "satisfactory explanation"  
3 for the absence of that immediate seal?

4 And I think you have to apply common sense, and  
5 I'd like to suggest a common, everyday situation which  
6 might shed some light on the situation. Suppose a parent  
7 imposes a curfew on his son and it's a 12:00 midnight  
8 curfew. The son goes out, comes home at 3:00 a.m. The  
9 parent sits the child down in the living room and says,  
10 you're not home until after three hours after that curfew,  
11 you'd better have a good explanation and I'd like to hear  
12 it now.

13 Now, if the child responds as the government  
14 contends is an appropriate response here in this context,  
15 if the child responds, well, I didn't get in any trouble  
16 out there so don't worry about it, no harm/no foul, the  
17 parent is going to say, that is not what I asked you. I  
18 asked you why you violated the curfew. Why is it that  
19 you're three hours late?

20 And that's exactly what this statute asks. What  
21 is the explanation for why you failed, why you violated  
22 the law?

23 QUESTION: I think you're right about that but I  
24 also think the parent, if he or she did not get a  
25 satisfactory explanation, would not throw the kid out of

1 the house for the rest of the night.

2 (Laughter.)

3 MR. REEVE: Your Honor, I -- I suppose there's  
4 all different kinds of parents in the world, and --

5 (Laughter.)

6 MR. REEVE: I -- my children are not yet old  
7 enough that I have to worry about curfews. I'm going to  
8 get to that in a few years.

9 But the fact of the matter is that Congress made  
10 a decision as to what the appropriate remedy is. And that  
11 is a decision which members of this Court may feel is  
12 wrong. Everyday -- all of us feel that Congress creates  
13 statutes which may in our judgement, be wrong. But it's  
14 not -- with all respect to the Court, it's not this  
15 Court's position to determine whether or not that's a wise  
16 statute. Congress imposed it. It created a prophylactic  
17 rule, and it's there.

18 And I think the question of whether or not there  
19 is a prejudice test can also be answered by thinking about  
20 did Congress know how to create a prejudice test, if it  
21 desired to do so in a rule of exclusion. The answer is  
22 clearly yes.

23 If one takes a look at other statutes in the  
24 area of criminal law -- for example, the Speedy Trial Act,  
25 Section 3162(b), I believe it is, which this Court



1 reviewed recently in the Taylor case -- what that test in  
2 that section is, Congress said in a district court in  
3 determining whether or not an indictment should be  
4 dismissed with or without prejudice shall consider the  
5 following factors. There Congress created a prejudice  
6 test.

7 Alternatively, in the Jenks Act, Section 3500,  
8 Congress created a mandatory exclusion provision. If the  
9 government elects not to comply with an order of the Court  
10 to turn over evidence, either the testimony is stricken  
11 or, if the court determines it is in the interest of  
12 justice, a mistrial is ordered. Some of us may disagree,  
13 but that's what Congress said.

14 QUESTION: Well, how -- how did all these other  
15 -- other circuit courts of appeals get off the trolley.  
16 Was it four -- four others?

17 MR. REEVE: Your Honor, with respect, I think  
18 it's important to break down the issue, and -- and I want  
19 to address it.

20 First of all, with respect to the issue of  
21 whether or not the provision implies to late sealed tapes  
22 as well as unsealed tapes, there is unanimity among every  
23 circuit. There is not a single lower court decision that  
24 supports the government's interpretation in their first  
25 argument.

1           With respect to the second issue, there are, I  
2 believe, four courts who in various ways say we really  
3 need to focus on tampering. With all respect, I  
4 suppose --

5           QUESTION: And there -- there are four other  
6 courts that would -- would have come out differently in  
7 this case.

8           MR. REEVE: That's correct, Your Honor. And  
9 that's why this Court accepted, as I understand it,  
10 accepted this case on certiorari.

11           I respectfully disagree with that analysis. I  
12 think that it would be presumptuous for me to try to  
13 analyze or psychoanalyze why they did what they did. With  
14 all respect to those lower courts, we believe that they  
15 erred. And I want to -- in terms of --

16           QUESTION: Excuse me, I didn't understand.

17           MR. REEVE: Yes, sir.

18           QUESTION: What -- in what respect have they not  
19 agreed -- has not a single one of them agreed --

20           MR. REEVE: Yes, sir.

21           QUESTION: -- with the government? In what  
22 respect?

23           MR. REEVE: The government's initial argument,  
24 that is, that the exclusionary provision of Section  
25 2518(8)(a) only applies to cases where the seal is absent.

1 QUESTION: Absent entirely?

2 MR. REEVE: But it does not apply to cases where  
3 the seal is late. There is not a single court which has  
4 -- which has held that.

5 QUESTION: Was that -- was that argument made to  
6 each of the courts which you say have not held it?

7 MR. REEVE: Your Honor, in a number of cases it  
8 was and those courts have held. In -- in the other cases,  
9 I can't tell, Your Honor, that the argument was made in  
10 each of those cases. What I can say is that every single  
11 sealing case that's reported that I'm aware of deals with  
12 late sealed tapes. None deal with absence.

13 And they all reached the issue of satisfactory  
14 explanation. They applied different tests to that  
15 question, but they all reached that issue. So at the  
16 least, implicitly, I'm not prepared to say that in all of  
17 those decisions the issue was raised by the government.

18 QUESTION: Does any of them find an  
19 unsatisfactory explanation and exclude the tape?

20 MR. REEVE: Your Honor, as we indicated in our  
21 brief, there's only one reported decision that I am aware  
22 of where a court of appeals has specifically excluded  
23 evidence. There are a number of cases where the  
24 government has conceded a violation of the statute and it  
25 has not been litigated in a court appeals. That is --

1 QUESTION: Has there been any case where there  
2 was a seal but that it was put on late where the evidence  
3 was excluded?

4 MR. REEVE: Yes, Your Honor, and that's the case  
5 of United States v. Gigante. In addition, I would cite to  
6 the Court United States v. Fury. That is a -- that is a  
7 case where the government conceded that they had violated  
8 the statute and the question there was a derivative use  
9 question. There are decisions where tapes have been  
10 excluded. There are not a number of decisions where the  
11 issue has been resolved.

12 QUESTION: Gigante is also a Second Circuit case  
13 like this one?

14 MR. REEVE: It is, Your Honor, and it is -- it  
15 is a Second Circuit case.

16 I want to get back, if I might, to the issue of  
17 does Congress know how to create a prejudice test because  
18 I think, importantly in the context of this case, if you  
19 look at Title II of the Omnibus Crime Control Act of 1968,  
20 that was, as the Court is probably aware, the -- what I  
21 would refer to as Congress' effect -- attempt, excuse me  
22 -- to legislatively repeal, if you will, this Court's  
23 decision in Miranda. And what Congress did is they passed  
24 -- I believe it's Section 3501 of Title 18 --which  
25 basically relegated the giving of Miranda warnings to one

1 category, and they indicated none of these are  
2 dispositive.

3 If there was any question that Congress did not  
4 create a prejudice test in this section, one need only  
5 look at the very next subsection of Section 2518 of Title  
6 III -- and I refer to Section 2518, Subsection 9. And in  
7 that provision Congress required --

8 QUESTION: Where is that reproduced? Is it in  
9 your brief, in the appendix somewhere?

10 MR. REEVE: Your Honor, it may not be. I have a  
11 copy of the United States Code here --

12 QUESTION: No, we have one somewhere.

13 MR. REEVE: I don't believe it's -- I don't  
14 believe it's in the briefs, and I apologize for that.  
15 It's an analogy that I want to make because that section  
16 requires ten-day notice. It's a ten-day notice rule  
17 before the government seeks to admit Title III recordings.

18 And what Congress said in that very next  
19 subsection is -- they said, there's an exception here. If  
20 -- it's two -- it's based on two conditions. Number one,  
21 if it was not possible to comply with that and if the  
22 defendant is not prejudiced by the lesser amount of  
23 disclosure.

24 And so had Congress wanted to create a prejudice  
25 test within this sealing requirement, they clearly knew

1 how to do it. They would have done it and they didn't do  
2 it.

3 QUESTION: The gist is the -- if the defendant  
4 is not prejudiced by the shortness of notice in the  
5 section you are talking about?

6 MR. REEVE: That's correct. That's exactly  
7 right. And Congress specifically used the term  
8 "prejudice," whereas in this section, there is no  
9 reference to prejudice. And the government effectively is  
10 asking this Court to find it somewhere out there somehow  
11 in the term and the requirements satisfactory explanation.  
12 It's not there. It doesn't exist, and it shouldn't be  
13 found.

14 The other -- the other thing that I would just  
15 suggest to this Court is that the Giordano case, a  
16 unanimous decision by the Court with respect to the issue  
17 involved -- that I want to address. It was a decision  
18 authored by Justice White. It was a decision in which the  
19 question was whether or not the executive assistant  
20 attorney general was an authorized person within Title III  
21 to authorize an application. This Court looked at the  
22 plain language of the statute and said no.

23 One of the arguments made by the Solicitor  
24 General in that case was as follows. An affidavit by the  
25 executive assistant attorney general which said, gee, the

1 reason I signed this is because the attorney general was  
2 out of town. I knew he would have authorized it. I  
3 talked to him afterwards. He would have authorized it.  
4 In effect, if you will, a result-oriented approach to an  
5 exclusion provision in Title III.

6 This Court rejected that, said Congress has  
7 decided the remedy. Congress has decided where there's  
8 exclusion and it's up to Congress. And, Your Honors, my  
9 suggestion is that's exactly the appropriate position that  
10 this Court should take. And, indeed, what happened two  
11 years after Giordano is Congress amended the statute.

12 And that's the procedure we should apply here.  
13 If the statute's wrong, then the Justice Department should  
14 approach it and convince Congress to amend it. But not  
15 come before this Court.

16 The -- yes, Your Honor.

17 QUESTION: If we adopt your rule that in effect  
18 a late-sealed -- a late-sealed intercept is -- is invalid,  
19 wouldn't you have two district judges passing upon the  
20 same question? I assume the first district judge to whom  
21 the thing is presented, you bring it up to him and say,  
22 please seal this. Don't you think he has an obligation  
23 not to seal it if he thinks there's no excuse for bringing  
24 it to him this late or do you think the seal goes on  
25 automatically?

1 MR. REEVE: I think -- my interpretation of the  
2 statute is that the seal goes on automatically. That's an  
3 issue which, as far as I know, has not been litigated in  
4 the courts below. But it would be my -- it would be my  
5 view and my interpretation that that's -- that that's  
6 correct.

7 QUESTION: I think if -- if you win this case  
8 that probably has to be -- has to be correct or you're  
9 going to have two judges basically passing on the same  
10 thing -- two district judges.

11 MR. REEVE: Well, I suppose that that might be  
12 correct although there's no statutory test that -- that  
13 establishes, for example, assuming that the initial judge  
14 has to do some tests, what that test is. The test is set  
15 up for the district court dealing with the tapes  
16 because --

17 QUESTION: Well, isn't that an ex parte  
18 proceeding?

19 MR. REEVE: -- it comes up in the context of  
20 this pleading. Excuse me?

21 QUESTION: Isn't that an ex parte proceeding?

22 QUESTION: It's ex parte.

23 MR. REEVE: It certainly is, Your Honor.

24 QUESTION: Surely you wouldn't be fighting about  
25 whether he --



1 MR. REEVE: That's right. It's an ex parte  
2 proceeding in which defense wouldn't be given any notice  
3 and in effect you'd be replacing the adversary process  
4 with such an ex parte hearing.

5 QUESTION: Mr. Reeve, what part does the  
6 satisfactory explanation requirement of the section we're  
7 talking about play under your analysis of the seal  
8 requirement?

9 MR. REEVE: Your Honor, the satisfactory  
10 explanation plays a critical component. If the government  
11 fails to immediately seal the tapes and the courts have  
12 pretty uniformly held immediate as within one or two  
13 working days of the court, then the government bears the  
14 burden of coming before the district court and  
15 establishing a satisfactory explanation.

16 That, I would suggest to the Court is something  
17 more than negligence, it's something more than a gross  
18 misreading of the statute, and the court looks at it and  
19 considers a number of questions.

20 QUESTION: Is the -- is the failure excusable?  
21 Is that what you're asking?

22 MR. REEVE: Yes, in effect that's right, Your  
23 Honor. And the courts -- the Second Circuit and the D.C.  
24 Circuit Court of Appeals and the First Circuit look at a  
25 number of factors.

1           The principal factors, we believe, are, number  
2 one, how long was the delay? Number two, why did the  
3 delay occur? Number three, is this part of a pattern of  
4 violations of this sealing requirement?

5           We have in this case all three. In effect, the  
6 court below looks at the totality of those circumstances  
7 that are relevant to the question that the statute asks.  
8 Why? And the district court makes a determination based  
9 on his assessment.

10           QUESTION: But in -- in your view, the statute  
11 doesn't just ask why. I mean, that would authorize the  
12 government's view. Just come in and give a frank  
13 explanation of all the things that went wrong and it asks  
14 for -- for first why, and then, is it your position, was  
15 this default excusable?

16           MR. REEVE: Yes.

17           QUESTION: Is -- is that --

18           MR. REEVE: Yes. Yes and I based that on two  
19 words. One, the government must supply an explanation.  
20 Number two, the government must supply an explanation  
21 which is satisfactory. They cannot merely come in and  
22 say, this is why we did it, and that's all the inquiry.

23           QUESTION: Can a good faith mistake of law be a  
24 decent explanation?

25           MR. REEVE: I think that in some circumstances,

1 yes.

2 QUESTION: Like where reasonable men might  
3 differ on what the law means?

4 MR. REEVE: I think that's possible. I think  
5 it's going to depend on the length of delay which develops  
6 and whether or not there is a conduct, a repeated pattern  
7 such as here. In our case what we have is all three.

8 QUESTION: Well, you know -- I know, but here  
9 the claim was that each time there was the same mistake of  
10 law --

11 MR. REEVE: Well --

12 QUESTION: -- and each time it was a good faith  
13 mistake of law.

14 MR. REEVE: Your Honor, I'd like to get to that  
15 issue because I think that --

16 QUESTION: Well, isn't that the claim?

17 MR. REEVE: It is the claim and I don't that's  
18 what happened, and I think that the record is clear. And  
19 I would refer the Court specifically in the Joint  
20 Appendix --

21 QUESTION: Well, the district court seemed -- at  
22 least in one case, seemed to think that, good faith or  
23 not, it was just too long.

24 MR. REEVE: Well, there is language in the  
25 district court decision --

1 QUESTION: And the court of appeals has  
2 specifically disagreed with that.

3 MR. REEVE: Well, the district -- there is  
4 language in there, but the -- but the district court also  
5 did make extensive findings of fact and at page 78(a),  
6 which is in the -- attached -- his ruling attached to the  
7 Petition for Certiorari -- the district court finds in  
8 effect gross negligence. And -- and I think that there  
9 are some differences. But for purposes of this case --

10 QUESTION: So it just wasn't really a good faith  
11 and excusable mistake of law, is that right?

12 MR. REEVE: It was not, Your Honor, and the  
13 reason is this. The prosecutor here decided, even in  
14 light and in the face of the statutory requirement of  
15 immediate sealing, in light of a memo that he had from the  
16 Justice Department that said, if you don't immediately  
17 seal, you risk suppression. Without reading the case law  
18 -- he admitted he hadn't read the case law before he made  
19 this decision -- without looking at a treatise that he had  
20 on his desk that said -- specifically rejected his theory  
21 and he was asked at the district court --

22 QUESTION: Well, what -- what -- theory of what?

23 MR. REEVE: His theory that when you have one  
24 big wiretap investigation, you don't have to seal until  
25 the very end. That was the theory that he went forward.

1 He was asked, under your theory, there is no -- arguably  
2 no limit to how far out that's going to take. If the  
3 wiretap investigation takes five years, well you've got a  
4 five-year sealing delay. Yes, that's correct.

5 It was an unlimited, if you will, venture, way,  
6 way out beyond the statute. And that kind of conduct by  
7 the Justice Department does not sanction, does not  
8 warrant, the label of a satisfactory explanation.

9 QUESTION: Well, I should assume that if the  
10 period of the order is extended a number of times, there  
11 is going to vast quantity of tapes that are just sitting  
12 around until the government brings them into the court to  
13 be sealed.

14 MR. REEVE: That -- that's absolutely correct,  
15 Your Honor, and in my view, and in the view of the Second  
16 Circuit and a number of courts, Congress would have been  
17 perhaps wiser in saying after every order and then after  
18 every single extension. That is, every 30 days you --

19 QUESTION: After every period. After period --

20 MR. REEVE: Correct.

21 QUESTION: -- is extended.

22 MR. REEVE: Correct. Correct. Without --  
23 without allowing the government to seek extensions. But  
24 that, again, gets to the wisdom of Congress. It's not a  
25 perfect statute. It doesn't prohibit tampering, but it

1 was designed to avoid the opportunity for tampering. And  
2 that's the critical problem -- one of the critical  
3 problems with the government's argument.

4 The government says the sole purpose is  
5 tampering. That's not the sole purpose. There are a  
6 number of purposes and they are set forth in the  
7 legislative history and they include the following.  
8 Number one, Congress intended to create immediate direct  
9 judicial supervision over wiretap evidence. Number two --

10 QUESTION: For what purpose?

11 MR. REEVE: Well, I think in part that was a  
12 response to this Court's ruling in --

13 QUESTION: Well, but --

14 MR. REEVE: -- Berger and Katz. Excuse me, Your  
15 Honor.

16 QUESTION: Well, wasn't it for the purpose of  
17 making sure there wasn't any tampering?

18 MR. REEVE: Absolutely. That's ultimate  
19 statutory purpose. But what Congress did was, looking at  
20 that ultimate statutory purpose, Congress decided the best  
21 most effective way to approach that ultimate goal of the  
22 statute is to have that judicial supervision to reduce the  
23 opportunities for tampering.

24 Congress knew it couldn't avoid all tampering.  
25 The government argues that. If -- if a prosecutor or a

1 law enforcement agent is bent on tampering with evidence,  
2 he's going to do it. And Congress knew it couldn't avoid  
3 that. But what it decided is -- we're going to create  
4 this standard to say to the government, you got to turn  
5 them in. And that judicial supervision is going to reduce  
6 the incentive and the opportunity for tampering with those  
7 tapes.

8 And it responded as well to this Court -- as I  
9 was referring to earlier, to this Court's rulings in  
10 Berger and Katz, where one of the problems with the  
11 statute, the New York State statute, was -- and the Court  
12 noted there was no return to a judicial officer. The same  
13 problem noted in Katz. That was one of the problems  
14 specifically referred to in the congressional history in  
15 the Senate report.

16 In addition, Congress was concerned about the  
17 potential abuses. It was clear at that time in 1968, when  
18 the statute was passed, that wiretap was a dangerous area.  
19 It was ripe for abuse. And Congress was concerned. And  
20 what the decision was -- and it may not be a decision  
21 which every single member of this Court agrees is the  
22 right line, but they created a line -- immediate sealing  
23 upon the expiration of the orders or extensions thereof.  
24 And it's a line they drew, and it's an appropriate line.  
25 It may not be the perfect line.

1                   The -- and so I think that that's -- even if  
2 you get to the question of statutory purpose in  
3 legislative history, it aids our view, not the  
4 government's.

5                   There are two other points that I would like to  
6 make. Number one, the government's test, if adopted by  
7 this Court, is going to require tampering hearings in  
8 every district court, in every sealing violation,  
9 regardless of whether it's a short delay where the  
10 government's explanation may be very, very reasonable,  
11 because what they're asking the Court to do is define  
12 satisfactory explanation as no tampering.

13                   Once that definition is established, in cases  
14 where the test created by the Second Circuit is in fact  
15 very, very helpful to the government. And the test  
16 applied has been extremely liberally -- liberally applied.  
17 Excuse me. Under the government's theory, we're going to  
18 have tampering hearings, and experts coming in.

19                   And that, in some ways addresses the question  
20 that Justice O'Connor raised, which is this case has gone  
21 on for years and years. And does this Court want to  
22 create a standard where you are going to compel district  
23 courts to have those kind of hearings? The hearings that  
24 occurred here that were not satisfying, the district court  
25 made no finding on any of the excluded tapes. There is no



1 finding that those tapes were not tampered with. None at  
2 all. He only found them with the tapes that were not  
3 excluded.

4 Finally, in conclusion, the -- the government  
5 came first before this Court in its petition for  
6 certiorari on page 11 and the government said in that  
7 petition, this is a serious problem because despite the  
8 best efforts of a supervising attorney in a wiretap case,  
9 there will be occasions on which the tapes will not be  
10 immediately sealed. Congress agreed with that and that's  
11 why they created a satisfactory explanation.

12 But as the delays get longer, you need a better  
13 and better reason. But the problem, and the Second  
14 Circuit has adopted that approach -- it is an approach  
15 which allows the best efforts of a supervising attorney.

16 What the government is effectively asking this  
17 Court to do today is to rewrite the statute to avoid  
18 separation of powers issues -- to avoid issues of judicial  
19 restraint -- all so that we can -- protect the negligent,  
20 sometimes willful, sloppy, intentional bad faith conduct  
21 of officers of the United States Justice Department.  
22 That, we believe, is a road that this Court should not  
23 travel down.

24 Thank you.

25 QUESTION: Thank you, Mr. Reeve.

1 Mr. Bryson, do you have rebuttal?

2 REBUTTAL ARGUMENT OF WILLIAM C. BRYSON

3 ON BEHALF OF THE PETITIONER

4 MR. BRYSON: Yes, I do, Mr. Chief Justice.

5 The first point I'd like to make quickly is each  
6 of the courts already requires us to show, as part of a  
7 satisfactory explanation, that there was no tampering.  
8 So, there's not going to be any great increase in the  
9 numbers of these hearings since that's already a  
10 requirement that we have to satisfy. The question is do  
11 we have to do more by way of establishing a satisfactory  
12 explanation for delay.

13 The second point is the Gigante case, which is  
14 the only other case in which there has been suppression at  
15 the court of appeals level that I am aware of, was a case  
16 in which we had no explanation for the delay. It wasn't a  
17 satisfactory explanation case.

18 And third, and most important, the -- teasing  
19 out the argument that, well, you have to look at how long  
20 the delay was, why the delay was, and that there was a  
21 pattern of delays, in this case in quite unfair because  
22 there was one legal mistake, the construction of the term  
23 "extension." That's what resulted in the long delay.

24 Every day that passed was not compounding the  
25 felony because this was somebody who was -- believed he

1 was secure in his construction of the term "extension."

2 QUESTION: Well, wouldn't you apply some sort of  
3 a -- objective test to whether he was justified in  
4 believing that?

5 MR. BRYSON: Well, I think --

6 QUESTION: The courts below thought that there  
7 was just no basis for that.

8 MR. BRYSON: Well, they -- they thought he was  
9 wrong. Now, the district court did not find gross  
10 negligence. The district court did find negligence. But  
11 we would submit that where the Second Circuit in one of  
12 its own opinions, in the Principie case, had found that  
13 moving from place A when the target moves to place B and  
14 getting another order for place B, when that is an  
15 extension, his construction of the statute was not  
16 unreasonable. It couldn't be unreasonable because the  
17 very court that ruled in this case had previously said  
18 that that's what extension means.

19 Now, the court distinguished that case in this  
20 case by saying, well, but that was the word "extension"  
21 that was being used in a different subsection,  
22 Subsection 2518(8)(d) dealing with inventory service. And  
23 also, there was no gap between the two orders. Therefore,  
24 that could be an extension and this, it would be  
25 unreasonable to suppose, would be -- would be an

1 extension.

2 But it -- the word has to mean the same thing in  
3 both subsections of the same provision, and we submit,  
4 therefore, that it wasn't unreasonable for him to draw  
5 that conclusion.

6 Thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bryson.

8 The case is submitted.

9 (Whereupon, at 11:41 a.m., the case in the  
10 above-entitled matter was submitted.)

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CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

NO. 89-61 - UNITED STATES, Petitioner V. FILIBERTO OJEDA RIOS, ET AL.

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