rants for electronic surveillance to investigate violations of prescribed classes of criminal legislation.[401] The Court has not yet had occasion to pass on the federal statute and to determine whether its procedures and authorizations comport with the standards sketched in *Osborn*, *Berger*, and *Katz* or whether those standards are somewhat more flexible than they appear to be on the faces of the opinions.[402]

Warrantless "National Security" Electronic Surveillance.—In *Katz v. United States*,[403] Justice White sought to preserve for a future case the possibility that in "national security cases" electronic surveillance upon the authorization of the President or the Attorney General could be permissible without prior judicial approval. The Executive Branch then asserted the power to wiretap and to "bug" in two types of national security situations, against domestic subversion and against foreign intelligence operations, first basing its authority on a theory of "inherent" presidential power and then in the Supreme Court withdrawing to the argument that such surveillance was a "reasonable" search and seizure and therefore valid under the Fourth Amendment. Unanimously, the Court held that at least in cases of domestic subversive investigations, compliance with the warrant provisions of the Fourth Amendment was required.[404] Whether or not a search was reasonable, wrote Justice Powell for the Court, was a question which derived much of its answer from the warrant clause; except in a few narrowly circum-

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[401] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, 18 U.S.C. §§ 2510–20.

[402] The Court has interpreted the statute several times without reaching the constitutional questions. United States v. Kahn, 415 U.S. 143 (1974); United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974); United States v. Donovan, 429 U.S. 413 (1977); Scott v. United States, 436 U.S. 128 (1978); Dalia v. United States, 441 U.S. 238 (1979); United States v. New York Telephone Co., 434 U.S. 159 (1977); United States v. Caceres, 440 U.S. 741 (1979). *Dalia supra*, did pass on one constitutional issue, whether the Fourth Amendment mandated specific warrant authorization for a surreptitious entry to install an authorized "bug." *See also* Smith v. Maryland, 442 U.S. 735 (1979) (no reasonable expectation of privacy in numbers dialed on one's telephone, so Fourth Amendment does not require a warrant to install "pen register" to record those numbers).

[403] 389 U.S. 347, 363–64 (1967) (concurring opinion). Justices Douglas and Brennan rejected the suggestion. Id. at 359–60 (concurring opinion). When it enacted its 1968 electronic surveillance statute, Congress alluded to the problem in ambiguous fashion, 18 U.S.C. § 2511(3), which the Court subsequently interpreted as having expressed no congressional position at all. United States v. United States District Court, 407 U.S. 297, 302–08 (1972).

[404] United States v. United States District Court, 407 U.S. 297 (1972). Chief Justice Burger concurred in the result and Justice White concurred on the ground that the 1968 law required a warrant in this case, and therefore did not reach the constitutional issue. Id. at 340. Justice Rehnquist did not participate. Justice Powell carefully noted that the case required "no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." Id. at 308.