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MAIL COVERS AND THE FOURTH AMENDMENT: *UNITED STATES v. CHOATE*

In *United States v. Choate*,¹ the Ninth Circuit held that a mail cover² is not an unreasonable search and seizure in violation of the fourth amendment of the United States Constitution.³ The majority of the court recognized that the reasonableness of the mail cover procedure is to be measured by the criteria set forth in *Katz v. United States*,⁴ but did not find that an addressee seeks privacy with respect to the outside cover of his mail or that such an expectation would be reasonable.

I. INTRODUCTION

A mail cover is a surveillance of an addressee's mail conducted by postal employees at the request of law enforcement officials.⁵ While not expressly permitted by federal statute, a mail cover is authorized by postal regulations in the interest of national security and crime prevention,⁶ and permits the recording of all information appearing on the outside cover of all classes of mail.⁷ Under the regulations, the Chief

1. 576 F.2d 165 (9th Cir.), *cert. denied*, 99 S. Ct. 350 (1978).

2. The mail cover procedure is defined in 39 C.F.R. § 233.2(c)(1) (1977) as follows:

"Mail cover" is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second-, third-, or fourth-class mail matter as now sanctioned by law, in order to obtain information in the interest of (i) protecting the national security, (ii) locating a fugitive, or (iii) obtaining evidence of commission or attempted commission of a crime.

3. U.S. CONST. amend. IV. The fourth amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

4. 389 U.S. 347 (1967). The test was stated in *Katz* by Justice Harlan in his concurring opinion: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'." *Id.* at 361 (Harlan, J., concurring).

5. Mail covers are originally authorized for 30 days, but may be renewed upon request prior to the termination of the preceding period for 30-day periods not to exceed a total of 120 days, unless further extension is personally approved by the Chief Postal Inspector. 39 C.F.R. § 233.2(f)(4)-(5) (1977).

6. See note 8 *infra* for text of 39 C.F.R. § 233.2(d)(2)(ii) (1977).

7. The federal regulations do not specify what data may be recorded. Such information would appear to include the name and address of the addressee, the postmark (date and city), the name and address of the sender, and the class and nature of the article. In Choate's case, the information included a listing of the addressee, address (three locations were covered), sender, return address, place and date of postmark, and class of mail. 576 F.2d at 187

Postal Inspector or his designee is permitted to order a mail cover when there is reason to suspect that the subject of the cover is violating a postal statute, or upon written request from a law enforcement agency where reasonable grounds for institution of the cover are specified.⁸ A mail cover may be authorized for a broad investigatory purpose⁹ or as part of the investigation of a single suspect as long as the postal inspector in charge is satisfied that the subject has committed or is attempting to commit a felony.¹⁰

Since a thirty-day mail cover yields a great deal of information about an addressee which would otherwise remain private,¹¹ the use of mail covers by federal and state law enforcement agencies clearly raises the constitutional question of whether a mail cover constitutes a reasonable

(Hufstedler, J., concurring in part and dissenting in part). A mail cover also includes a physical inspection of the contents of second, third, and fourth class mail. 39 C.F.R. § 233.2(c)(1) (1977).

8. 39 C.F.R. § 233.2(d) (1977) reads as follows:

Authorizations—Chief Postal Inspector. (1) The Chief Postal Inspector is the principal officer of the Postal Service in the administration of all matters governing mail covers. He may delegate any or all authority in this regard to not more than two designees at Inspection Service Headquarters. Except for national security mail covers, he may also delegate any or all authority to the Regional Chief Postal Inspectors. All such delegations of authority shall be issued through official directives.

(2) The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

(i) When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.

(ii) When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (A) protect the national security, (B) locate a fugitive, or (C) obtain information regarding the commission or attempted commission of a crime.

(iii) Where time is of the essence, the Chief Postal Inspector, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written request is received.

9. *See United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) (mail cover authorized for the recording of information appearing on the outside cover of all letters mailed from Switzerland to New York bearing specific postage meter marks, lacking return addresses, and addressed to any recipient). *Leonard* is discussed in text accompanying notes 136 through 142 *infra*.

10. 39 C.F.R. § 233.2(c)(3) (1977) states: "'Crime,' for purposes of these regulations, is any commission of an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding 1 year."

11. A watch of the cover of mail could reveal information about where the subject banks and shops, his physicians, creditors, accountants, property interests, religious, political and educational affiliations, publications to which he subscribes, and the identity of personal correspondents. The only correspondent exempted from a mail cover is the subject's attorney whose identity must be known in advance and communicated to the Postal Service pursuant to 39 C.F.R. § 233.2(f)(2) (1977). Presumably, other legal correspondence would be subject to recordation. *See* 576 F.2d at 187 & n.13 (Hufstedler, J., concurring and dissenting).

governmental intrusion on individual privacy rights. It can be argued that although information appearing on the outside cover of first-class mail is in plain view to postal personnel, it is implicit in the nature of the postal system that such information is to be used for the limited purpose of moving the mail.¹² Thus, as Judge Hufstедler asserted in the *Choate* dissent, a mail cover and the data taken from the surface of mail may be a warrantless search and seizure in violation of the fourth amendment.¹³

II. HISTORY OF THE CASE

In 1971, Dennis Choate was under investigation by the Bureau of Narcotics Enforcement (BNE) for suspected drug dealing. The BNE investigation yielded insufficient evidence in connection with the suspected offense and the file was closed. The BNE report was then turned over to the Federal Bureau of Customs, which reopened the investigation of Choate in 1972. The thrust of this new inquiry was to determine if Choate's assets coincided with the amount of narcotics he was suspected of importing. In this connection, a mail cover of his incoming correspondence at three addresses was sought. Since Choate was suspected of obtaining drugs from South America, it was expected that a mail cover would reveal, *inter alia*, his South American source.¹⁴

12. The basic function of the Postal Service is established in 39 U.S.C. § 101(a) (1976): The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities.

13. 576 F.2d at 189 (Hufstедler, J., concurring and dissenting). See *Katz v. United States*, 389 U.S. 347 (1967). See also notes 65-67 *infra* and accompanying text. See generally, Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 Sup. Ct. Rev. 133.

14. The body of the letter requesting the mail cover read as follows:

The above listed subject is currently under investigation by this office for the suspected smuggling of large quantities of narcotics into the United States. CHOATE is currently organizing a large narcotic smuggling ring with the primary source located in South America. It is felt that CHOATE and the source in South America correspond by mail. Return addresses on mail received at the above addresses would be of aid in identifying the source in South America and other members of the smuggling ring. It is requested that a mail cover be placed at the above addresses for a period of 30 days. It is further requested that all replies be directed to Special Agent Lynn P. Williams.

Smuggling narcotics into the United States is in violation of Title 21 USC 952 and carries a penalty under Title 21 USC 960(a)(1) of 15 years imprisonment or a fine of \$25,000 and/or both. CHOATE is not under indictment as a result of any investigation conducted by this office nor does this office have any knowledge of any other indictments pending against CHOATE. It is believed that CHOATE has retained Sherman & Sturman, Attorneys at Law, 8500 Wilshire Blvd., Suite 908, Beverly Hills, California as legal counsel.

576 F.2d at 169.

A thirty-day cover was authorized and conducted, but produced no return addresses from outside the United States.¹⁵ However, it did reveal the location of Choate's personal bank account and the identity of two creditors. From these sources, the Customs Bureau was able to obtain information about Choate's expenditures which was ultimately turned over to the Internal Revenue Service.¹⁶ The IRS launched its own investigation based on that information,¹⁷ which resulted in Choate's indictment on two counts of filing false income tax statements.¹⁸ Prior to trial, the defendant moved to suppress all evidence against him on the grounds that it was obtained by reason of an illegal search.¹⁹ The district court held that the mail cover had been conducted in violation of Choate's fourth amendment rights and granted defendant's motion.²⁰ On appeal, the Ninth Circuit reversed and remanded for trial.

III. ANALYSIS OF THE COURT'S REASONING

In *Choate*, the majority found that the mail cover placed on the defendant was neither illegal under applicable postal regulations nor a violation of any constitutionally protected right.²¹ Prior to its discus-

15. *Id.* at 188 n.19 (Hufstедler, J., concurring and dissenting).

16. *Id.* at 185.

17. *Id.*

18. Shortly after the indictment was returned, defendant filed a motion to dismiss the indictment on the ground it was the result of impermissibly discriminatory law enforcement. The motion was granted. On appeal, the Ninth Circuit reversed and remanded for trial. *See United States v. Choate*, 527 F.2d 748 (9th Cir. 1975).

19. Defendant's original argument was that in addition to the illegality of the mail cover, a government informant's burglary of his house constituted an illegal search and a bank statement taken at that time was, therefore, illegally seized. The district court found that the primary illegality did not taint the evidence in more than a de minimus manner since information contained in the bank statement did not lead to any evidence against the defendant. *United States v. Choate*, 422 F. Supp. 261, 263 (C.D. Cal. 1976). As to this issue, the district court's ruling was unanimously affirmed by the Ninth Circuit. 576 F.2d at 170, 186 (Hufstедler, J., concurring and dissenting).

20. 422 F. Supp. at 270. The district court, relying on *Katz v. United States*, 389 U.S. 347 (1967), held that the mail cover invaded Choate's reasonable expectation of privacy. It found (1) that although it is understood that the information on the outside cover of mail is available to postal employees, a reasonable person expects that such information will be used in a mechanical fashion solely for postal purposes and operations, and (2) that there is no extraordinary governmental interest justifying a mail cover's incursion into the realm of privacy. 422 F. Supp. at 270-71.

21. Citing *Katz v. United States*, 389 U.S. 347 (1967), the majority noted that protection of a general right to privacy is left largely to the states; that a personal right of privacy may not enjoy constitutional protection unless it is rooted in a specific constitutional provision; and that "[t]he specific sources for zones of privacy in the Constitution seem only to include the First, Third, Fourth, Fifth and Ninth Amendments." 576 F.2d at 173. Since neither the

sion of the primary constitutional issue, the court focused on whether the mail cover on Choate reasonably complied with postal regulations.

third nor fifth amendments had been raised by the defendant at the trial level, the majority dismissed the applicability of the third amendment by an *ipse dixit*. Nor did the court consider the fifth amendment since the defendant conceded that the information revealed by the mail cover derived from an inspection of mail still under the *senders'* control and, according to the court, defendant did not have standing to raise the senders' constitutional rights. 576 F.2d at 174 & n.8. *But see* notes 127 & 128 *infra* and accompanying text. In holding that a mail cover does not violate the ninth amendment, the court stated that privacy rights based on the ninth amendment have involved family and procreational activities "so basic and fundamental and so deeply rooted in our society" to be truly 'essential rights,' and which . . . cannot find direct support elsewhere in the Constitution." 576 F.2d at 181 (citing *Griswold v. Connecticut*, 381 U.S. 479, 488-89 (1965) (Goldberg, J., concurring)). Since "necessary aids to criminal investigation, such as mail covers" do not involve such matters they are not covered by the ninth amendment. 576 F.2d at 181.

The majority did not fully address the first amendment issues raised by the use of mail covers since the district court opinion did not rely on a first amendment argument and the amici briefs relied principally on the fourth amendment. It further dismissed the possibility that a mail cover may implicate the first amendment by stating that no first amendment rights of defendant were violated. *Id.* at 180-81.

However, it appears that the imposition of a mail cover potentially implicates the first amendment rights of an addressee in three ways: (1) a recipient of mail has an independent first amendment right to receive information (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)); (2) a recipient's free associational rights may be affected by the imposition of a mail cover (*Buckley v. Valeo*, 424 U.S. 1 (1976); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958)); and (3) a recipient's freedom of expression may be inhibited when he refrains from communicating with correspondents in order to reduce the effect of the mail cover (*Gitlow v. New York*, 268 U.S. 652 (1925)).

Whether a mail cover interferes with an addressee's first amendment right to receive information is arguable since the mail cover procedure does not unduly delay or prevent the addressee's receipt of his mail (*see Lustiger v. United States*, 386 F.2d 132 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *Cohen v. United States*, 378 F.2d 751 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967); *United States v. Costello*, 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958)). However, if a sender refrains from corresponding with an addressee solely because of an outstanding mail cover, the recipient's right to receive information is clearly affected.

Similarly, an addressee's first amendment associational rights are chilled by the imposition of a mail cover when a sender, aware of the mail cover in effect on the addressee, refrains from associating with the addressee by mail. Even if, as in *Choate*, a sender is not aware of the existence of the mail cover, subsequent contact with the sender by law enforcement personnel affects the addressee's future association with the sender long after the mail cover has been discontinued. Citing *Runyon v. McCrary*, 427 U.S. 160 (1976), the majority stated that "the practice of associating with compatriots in crime is not a protected associational right." 576 F.2d at 181. Although the mail cover on Choate was originally requested in order to help identify an alleged South American criminal connection, the information obtained was actually the identity of the Bank of America, Carte Blanche, and Diner's Club, hardly Choate's "compatriots in crime."

Because the mail cover only revealed information taken from the outside of envelopes, the majority found no abridgement of Choate's freedom of speech. *Id.* However, any chill on this right occurs prior to the time incoming letters are subject to recordation; it occurs when

A. Did the Cover of Choate's Mail Reasonably Comply with Postal Regulations?

In analyzing the Bureau of Customs request for the mail cover, the Ninth Circuit noted that the postal regulations that authorize the mail cover procedure²² require only that the requesting authority "stipulate and specify the reasonable grounds" that demonstrate the necessity for the mail cover.²³ The majority found that this requirement was easily satisfied since Choate had been under investigation for narcotics smuggling and the requesting letter stated that fact.²⁴ However, the defendant claimed that the statements in the letter were inaccurate for two reasons. First, although the requesting letter asserted that the mail cover was necessary to identify Choate's narcotics source, the Bureau of Customs agent testified that the inquiry was actually aimed at tracing Choate's assets rather than identifying an alleged South American connection.²⁵ Next, defendant asserted that the agent erroneously indicated that Choate was *currently* suspected of federal narcotics violations when, in fact, the agent had no current knowledge in that regard but had based his statement on a year-old report in the closed Bureau of Narcotics Enforcement file.²⁶

The majority was not persuaded by these arguments. It found that even if the Bureau of Customs were attempting to trace assets, it did so

the addressee himself refrains from expressing ideas in correspondence so as to reduce return communication subject to the mail cover.

The majority recognized that first amendment associational rights of *senders* may be implicated by the use of mail covers, but indicated that these rights could not be raised by Choate. *Id.* However, even when an addressee is foreclosed from asserting his own first amendment rights in attacking a mail cover, it appears that the assertion of the senders' rights pursuant to the exception announced in *Barrows v. Jackson*, 346 U.S. 249, 255-57 (1953) would be possible since (1) the addressee has sustained injury in connection with the mail cover, (2) there is a clear connection between the senders and the addressee, and (3) it would be impossible for senders to make the constitutional claim when their own rights have not been injured. For a more detailed discussion of this exception see notes 127 & 128 *infra* and accompanying text.

The United States Supreme Court has recently emphasized, that when first amendment rights are implicated, "the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' . . . Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." *Zurcher v. The Stanford Daily*, 98 S. Ct. 1970, 1981 (1978), citing *Stanford v. Texas*, 379 U.S. 476, 458 (1965). This would seem to require a careful scrutiny of the mail cover procedure in light of the obvious first amendment issues raised by the use of this law enforcement aid.

22. See note 8 *supra*.

23. 39 C.F.R. § 233.2(d)(2)(ii) (1977).

24. See note 14 *supra*.

25. 576 F.2d at 194 & n.38 (Hufstedler, J., concurring and dissenting).

26. *Id.* at 193.

as a continuation of the narcotics investigation.²⁷ The majority also believed it inappropriate to "impugn the truthfulness" of the Bureau of Customs agent since neither the district judge nor defendant on appeal questioned his veracity and because the record could be read consistently with the contents of the letter.²⁸

In granting defendant's motion to suppress, the district court had held that the agent's letter to the postal inspector failed to specify reasonable grounds for conducting the cover.²⁹ In the letter, the agent stated: "It is *felt* that CHOATE and the source in South America correspond by mail."³⁰ The district judge believed that an agent's mere "feeling" that criminal activity was afoot was not sufficient to satisfy the postal regulations.³¹ In reversing the district court, however, the Ninth Circuit majority viewed the requesting letter, which had been drafted by a non-lawyer, in a "practical and not abstract . . . common-sense and realistic fashion."³² It stated that the request satisfied the postal regulations because "hypertechnical niceties should not be applied to this mail cover request."³³

Dissenting to the Ninth Circuit's opinion, Judge Hufstedler felt that the requesting letter failed to satisfy the postal regulations. She believed that the letter contained numerous misrepresentations³⁴ and that the results of the cover were not used for the purpose specified.³⁵

27. 576 F.2d at 173.

28. *Id.*

29. *United States v. Choate*, 422 F. Supp. 261, 266-67 (C.D. Cal. 1976).

30. *Id.* at 264 n.5 (emphasis added).

31. *Id.* at 266.

32. 576 F.2d at 173.

33. *Id.*

34. *Id.* at 193-94 (Hufstedler, J., concurring and dissenting). Judge Hufstedler stated each material representation in the request was false and known to be false by [the Customs agent] at the time it was made. It was a bare-faced abuse of the mail cover procedure to obtain information and pursue an investigation apparently outside [the customs agent's] jurisdiction—asset tracing to establish a basis for an IRS prosecution—by reciting false material facts which, if true, would logically have justified surveillance.

Id. at 194.

35. *Id.* at 209. Judge Hufstedler found that even if a search warrant is not required for mail covers, the "search" of Choate's mail was unreasonable under the fourth amendment "because the scope of the search unreasonably exceeded the purpose which justified it." *Id.*

Because the results of the mail cover were not used for the purpose specified in the requesting letter, the district court also deemed the mail cover a general search, "regarded as inherently unreasonable and . . . particularly offensive to the Constitution." 422 F. Supp. at 268 n.12 (citing *Marron v. United States*, 275 U.S. 192 (1927) (fourth amendment requires that warrants particularly describe the thing to be seized, makes general searches impossible, and prohibits the seizure of one thing under a warrant describing a different thing)). The district judge distinguished the circumstances surrounding the mail cover in *Lustiger v. United States*, 386 F.2d 132 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968) (wherein a mail

Specifically, she observed that the request contained three material misrepresentations in that the customs agent possessed insufficient information to support the statements (1) that Choate was currently organizing a narcotics smuggling ring with a South American source, (2) that he corresponded with that source and (3) that the mail cover would aid in identifying the source.³⁶ She stated that such intentional and material misrepresentations rendered the mail cover request illegal in the same way that "intentional misstatement of material facts in an affidavit by a government agent serves to vitiate a search warrant. . . ."³⁷ She further noted that the facts in the request were inconsistent with a surveillance of *all* of the defendant's domestic mail if the Bureau of Customs was in fact seeking only the identity of a South American correspondent.³⁸

The majority did not address the argument that the scope of the cover unreasonably exceeded the reasons advanced for its justification. It reasoned that the requesting letter clearly satisfied the regulations because it was replete with "reasonable grounds" to conduct the cover and that too strict an interpretation of the regulations was, therefore, neither required nor necessary. It dismissed any factual deficiencies in the letter by stating: "The regulations . . . do not require the specification of the factual predicate upon which the requesting agency basis [*sic*] its conclusion that the . . . subject is involved in the commission . . . of a crime."³⁹

B. Does the Mail Cover Procedure Violate the Fourth Amendment?

The United States Supreme Court has not yet dealt with the issue of

cover was found to comply reasonably with postal regulations), from those surrounding the cover of Choate's mail. In *Lustiger*, "the mail cover was limited to a particular post office box where all mail received was related to a scheme already under investigation; here, a general search of *all* envelopes was undertaken." 422 F. Supp. at 268 (footnotes omitted)(emphasis in original).

36. 576 F.2d at 193-94 (Hufstedler, J., concurring and dissenting).

37. *Id.* at 194.

38. *Id.* at 209. Cf. *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971). In *Piazzola*, defendants were arrested after a search of their dormitory rooms, conducted pursuant to a university regulation, revealed the presence of narcotics. The Fifth Circuit held that a university regulation authorizing entry into student rooms for purposes of making a search, although reasonable when the search is in furtherance of the university's function as an educational institution, is an impermissible invasion of privacy when the search is used solely to acquire criminal evidence. Superimposing *Piazzola* on *Choate*, the "search" of the cover of mail may be reasonable as long as it is limited to the purpose identified in the request or the purpose of moving the mail, but when used to obtain criminal evidence, the procedure violates the fourth amendment.

39. 576 F.2d at 172.

whether mail covers violate the fourth amendment, although the constitutionality of mail covers has recently been challenged in two circuits.⁴⁰ In the early cases dealing with the issue, circuit courts did not engage in any fourth amendment analysis, but upheld the legality of the mail covers on the ground that they did not violate postal statutes prohibiting the obstruction, detention, or delay of the mails.⁴¹ In light of *Katz v. United States*,⁴² the Ninth Circuit in *Choate* was required to analyze the mail cover procedure in terms of the fourth amendment—whether the defendant had a reasonable expectation of privacy as to the information on the surface of his mail, and whether such expectation was violated.

1. Prior Case History

The first case in which a mail cover was challenged as a violation of postal statutes was *United States v. Costello*.⁴³ There, the Second Circuit relied on *Ex Parte Jackson*,⁴⁴ in which the United States Supreme Court upheld the constitutionality of a statute prohibiting the sending of lottery information through the mail. In *Ex Parte Jackson*, the Supreme Court drew a distinction between sealed mail matter and matter open for inspection in determining which articles of mail could be examined in enforcing the statute.⁴⁵ The Court stated that

letters and sealed packages . . . in the mail are as fully guarded from

40. See *United States v. Bianco*, 534 F.2d 501 (2d Cir. 1976), *cert. denied*, 429 U.S. 822 (1977); *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States v. Balistreri*, 403 F.2d 472 (7th Cir. 1968), *cert. denied*, 402 U.S. 953 (1971). These cases are discussed in text accompanying notes 134-147 *infra*.

41. The applicable postal statutes are found at 18 U.S.C. §§ 1701-1703 (1976).

42. 389 U.S. 347 (1967). See also notes 107-09 *infra* and accompanying text.

43. 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). *Costello* was convicted on three counts of tax evasion. His motion for a new trial was based upon a claim of newly discovered evidence showing, among other things, that the fruits of an allegedly illegal mail cover had been used at his trial. In affirming the lower court's denial of the motion, the court of appeals found that while some delay of defendant's mail was probable, it was very limited, and that there was never a delay of more than one delivery. That delay did not come within the proscription of 18 U.S.C. § 1701, which makes it a crime for anyone to "knowingly and willfully" obstruct or retard the passage of the mail. Also, since nothing more was done to the letters than to record the information on the outside of the envelopes while they were within the post office, the court did not believe that there had been any violation of 18 U.S.C. § 1702, which makes it a crime for anyone to take any letter "out of any post office . . . or which has been in any post office . . . before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another. . . ." 255 F.2d at 881. Similarly, the court did not find that 18 U.S.C. § 1703(a) was violated since detention alone, without proof that it was for an unlawful purpose, is not sufficient to constitute a violation. *Id.* at 881-82.

44. 96 U.S. 727 (1878).

45. The Court stated that the postal regulations do not permit an examination into sealed

examination and inspection, *except as to their outward form and weight*, as if they were retained by the parties forwarding them in their own domiciles. The Constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, *thus closed against inspection*, wherever they may be.⁴⁶

The *Costello* court concluded that since only the *outside* of Costello's mail had been inspected and no piece of mail had been removed from the post office or delayed more than one delivery, writing appearing on the outside of envelopes could be read and used without offense to the Constitution or federal statutes.⁴⁷

Eight years after *Costello* was decided, in *Canaday v. United States*,⁴⁸ a defendant appealed his conviction for tax evasion on several grounds. He alleged that a mail cover constituted an illegal tampering with and delay in the delivery of his mail and an invasion of his privacy.⁴⁹ The Eighth Circuit relied primarily on *United States v. Costello*⁵⁰ in upholding the validity of the mail cover on Canaday. It found that the mail cover did not involve tampering or delay of defendant's mail. Further, it dismissed the privacy argument, deeming it unnecessary to reiterate the reasons for concluding that the mail cover was not a violation of defendant's rights.⁵¹

The Ninth Circuit first dealt with the mail cover issue in two 1967 cases, *Cohen v. United States*⁵² and *Lustiger v. United States*.⁵³ Both cases involved objections to mail covers based upon alleged violations of postal statutes.⁵⁴ In *Cohen*, the defendant was convicted of "knowing utilization of interstate telephone facilities for the transmission of wagers and wagering information."⁵⁵ One of defendant's assertions on appeal was that the trial court erred in denying his motion to suppress evidence obtained by a mail cover which allegedly violated the postal

packages subject to letter postage, but do permit it in the search for "prohibited matter" upon "evidence of their violations obtained in other ways." *Id.* at 735.

46. *Id.* at 733 (emphasis added).

47. 255 F.2d at 881.

48. 354 F.2d 849 (8th Cir. 1966).

49. Canaday also asserted that an IRS agent was not a proper party to receive information acquired by the mail cover. In dismissing this argument, the court cited *United States v. Schwartz*, 283 F.2d 107 (3d Cir. 1960), *cert. denied*, 364 U.S. 942 (1961), which held that postal regulations do not prohibit transmittal of "mail watch" information from postmaster to postal inspector to prosecuting authorities. 354 F.2d at 856.

50. 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958).

51. 354 F.2d at 856-57.

52. 378 F.2d 751 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967).

53. 386 F.2d 132 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

54. The objections were based upon 18 U.S.C. §§ 1701-1703 (1976). See note 43 *supra*.

55. 378 F.2d at 754.

statutes. Defendant contended that IRS agents were familiar with the contents of correspondence subjected to the mail cover and thus concluded that his first-class mail had been tampered with. The Ninth Circuit agreed with the district court finding that defendant's allegations consisted of "generalizations and blanket charges," and found that the evidence adequately supported the government's contention that the mail cover had been properly conducted. Relying on *Canaday*,⁵⁶ *United States v. Schwartz*,⁵⁷ and *Costello*,⁵⁸ the *Cohen* court concluded that the mail cover in *Cohen* did not violate the pertinent postal statutes.⁵⁹

Lustiger v. United States was important to the holding in *Choate* because, in addition to alleging violations of the postal statutes and regulations, the defendant also contended that the mail cover procedure itself was an unreasonable search and seizure in violation of the fourth amendment. Lustiger was convicted of mail fraud for engaging in a scheme to sell Arizona land through deceptive fact sheets and brochures circulated through the mails. The mail cover was used by the government to obtain proof of the defendant's misuse of the mails by ascertaining the names of Lustiger's defrauded customers. With little discussion, the Ninth Circuit found that the kind of mail cover conducted in the *Lustiger* case did not violate the postal statutes or regulations.⁶⁰ Apparently it was reasonable under the statutes since the criminal charge directly related to the use of the mails.⁶¹

In addressing Lustiger's fourth amendment argument, the Ninth Circuit relied on earlier cases which had held that the opening of first-class mail was a constitutional violation.⁶² Since no piece of Lustiger's mail had been opened, the cases involving the opening of mail were inapplicable and the court held that the mail cover was not an unreasonable search and seizure. It was, therefore, settled in the Ninth Circuit by *Lustiger* that while first-class mail cannot be opened and searched or

56. 354 F.2d 849 (8th Cir. 1966).

57. 283 F.2d 107 (3d Cir. 1960), *cert. denied*, 364 U.S. 942 (1961).

58. 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958).

59. 378 F.2d at 760.

60. 386 F.2d at 139.

61. Although the court in *Lustiger* did not expressly state this reasoning, Judge Hufstedler noted in her partial dissent to *Choate* that a post office mail cover conducted on a person suspected of mail fraud is to be distinguished from the use of a mail cover to discover evidence of a crime unrelated to the use of the mails. 576 F.2d at 196 n.46 (Hufstedler, J., concurring and dissenting).

62. The court relied on *Ex Parte Jackson*, 96 U.S. 727 (1878), discussed in notes 44-46 *supra* and accompanying text, and *Oliver v. United States*, 239 F.2d 818, 820-21 (8th Cir. 1957) (warrantless opening of a package sent by first-class mail constitutes an illegal search and seizure).

seized and retained without a search warrant, the fourth amendment does not preclude postal inspectors from copying information contained on the outside of such mail.⁶³

In *Choate*, the majority relied heavily on *Lustiger* to conclude that the fourth amendment does not prohibit the use of mail covers.⁶⁴ However, Judge Hufstедler did not believe herself bound by the prior Ninth Circuit decision since "Fourth Amendment jurisprudence has been transformed since *Lustiger* was decided by the Supreme Court's decision in *Katz v. United States* . . . and its spawn."⁶⁵ In *Katz*, the defendant made a telephone call from a closed phone booth. He was subsequently convicted of transmitting wagering information by telephone on the basis of evidence obtained through an electronic listening device attached to the outside of the booth. In its landmark decision, the Supreme Court rejected the traditional theory that fourth amendment protections are limited to "constitutionally-protected areas."⁶⁶ It held instead that the fourth amendment protects that which one seeks to preserve as private, even in an area accessible to the public.⁶⁷ The Court found that *Katz* had sought privacy and demonstrated a reasonable expectation that it would be preserved when he entered the phone booth and closed the door behind him.

Thus, after *Katz*, if an addressee has an expectation that information on the outside cover of incoming mail will remain private and if such an expectation is reasonable, a mail cover conducted without a search warrant is a violation of the fourth amendment unless it falls within an exception to the warrant requirement.⁶⁸ Although the majority applied the *Katz* criteria in determining whether the mail cover constituted a search, it did not find the required privacy expectations to be present.

63. 386 F.2d at 139. The court stated: "[T]he fourth amendment does not preclude postal inspectors from copying information contained on the outside of sealed envelopes in the mail, where there is no substantial delay in the delivery of the mail involved." *Id.* (citation omitted). This implies that had defendant's mail been substantially delayed, the mail cover would have violated the applicable postal statutes. It is implicit that a due process violation of the fifth amendment would result. See also *United States v. Isaacs*, 347 F. Supp. 743 (N.D. Ill. 1972). *Isaacs*, a post-*Katz* case, upheld the mail cover procedure based on pre-*Katz* authority (see notes 43 through 63 *supra* and accompanying text for discussion of pre-*Katz* cases). The defendant, former Seventh Circuit Judge Otto Kerner, Jr., also raised a fourth amendment argument. The district court found that an examination of the rationale of *Katz* did not indicate that mail cover operations were unconstitutional. 347 F. Supp. at 750.

64. 576 F.2d at 174-80.

65. *Id.* at 196 (Hufstедler, J., concurring and dissenting).

66. 389 U.S. at 350. "[T]he Fourth Amendment protects people, not places." *Id.* at 351.

67. *Id.* at 351-52.

68. See notes 74-76 *infra* and accompanying text.

2. Does the Mail Cover Procedure Constitute a Search Within the Meaning of the Fourth Amendment?

Procedurally, the term "search" implies an exploratory investigation or invasion with a view to discovering contraband or some other evidence of guilt to be used in the prosecution of a criminal action.⁶⁹ Since the postal regulations authorize a mail cover for the purpose of "obtaining evidence of commission or attempted commission of a crime,"⁷⁰ it would appear that the mail cover procedure is an exploratory investigation that falls within the meaning of a search.

When a search is necessary, the Supreme Court has made quite clear what the fourth amendment requires:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.⁷¹

The Supreme Court stated in *Aguilar v. Texas*⁷² that

[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.⁷³

However, there are certain circumstances that present an exception to the warrant requirement so that a search and seizure does not violate constitutional principles despite the absence of a warrant.⁷⁴ Such situa-

69. 79 C.J.S. *Searches and Seizures* § 1 (1952).

70. 39 C.F.R. § 233.2(c)(1)(iii) (1977).

71. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (although the procedure for obtaining a warrant cannot be followed when swift action based upon on-the-spot observations of an officer is necessary, a search based on nothing more substantial than an unarticulated hunch intrudes upon constitutionally protected rights).

72. 378 U.S. 108 (1964) (search warrant invalid when magistrate fails to perform in a neutral and detached manner but serves merely as a "rubber stamp" for police).

73. *Id.* at 111 (quoting *Johnson v. United States*, 333 U.S. 10 (1947) (question of when the right of privacy must reasonably yield to the right of search is to be decided by a judicial officer, not by a law enforcement agent)). See also *United States v. United States District Court*, 407 U.S. 297 (1972) (the executive branch of government may not authorize electronic surveillance for domestic security purposes without a warrant); *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1974), *cert. denied*, 425 U.S. 944 (1976) (warrantless wiretap on domestic organization authorized by Attorney General for domestic security purposes is not permissible and would be equally impermissible even if installed under presidential directive).

74. *United States v. Santana*, 427 U.S. 38 (1976) (hot pursuit); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (search incident to border crossing); *Coolidge v. New*

tions are supported by valid consent⁷⁵ or by probable cause and exigent circumstances.⁷⁶

The majority in *Choate* had some question as to whether the mail cover procedure constitutes a search but, for purposes of analysis, assumed that a search was involved.⁷⁷ The court concluded that fourth amendment protections of a person's papers and effects apply only to the warrantless opening of sealed mail and not, as here, to information in plain view,⁷⁸ since that which is in plain view is generally not considered to be the subject of a search.⁷⁹ In support of the application of the plain view doctrine to the mail cover on Choate, the court cited its opinion in *United States v. Solis*:⁸⁰ "generally evidence acquired by unaided human senses from without a protected area is not considered an illegal invasion of privacy, but is usable under doctrines of plain view or open view or the equivalent."⁸¹

The application of the plain view doctrine to mail in the custody of the post office appears inappropriate for two reasons.⁸² First, it is a requirement of the doctrine that the evidence seized be of a character by which "it is immediately apparent to police that they have evidence before them."⁸³ Absent facts that would support the issuance of a search warrant, the information on the front of an envelope would

Hampshire, 403 U.S. 443 (1971) (seizure of items in plain view); *Chambers v. Maroney*, 399 U.S. 42 (1970) (vehicle search); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest); *Terry v. Ohio*, 392 U.S. 1 (1968) (limited search incident to investigative detention); *Chapman v. United States*, 365 U.S. 610 (1961) (exigent circumstances).

75. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (consent to search may not be result of express or implied duress or coercion); *Bumper v. North Carolina*, 391 U.S. 543 (1968) (probable cause to conduct search not necessary when consent is freely and voluntarily given).

76. *United States v. Santana*, 427 U.S. 38 (1976) (the need to prevent destruction of evidence when officers are in hot pursuit of suspect will justify a warrantless search); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (exigent circumstances are absent when search conducted a year after car impounded pursuant to invalid warrant); *Chimel v. California*, 395 U.S. 752 (1968) (exigencies of circumstances surrounding arrest justify only a search of the area within immediate control of person arrested); *Chapman v. United States*, 365 U.S. 610 (1961) (inconvenience of officers and delay necessary to prepare papers will not justify warrantless search when destruction of evidence is not threatened).

77. 576 F.2d at 174.

78. *Id.*

79. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

80. 536 F.2d 880 (9th Cir. 1976).

81. *Id.* at 881.

82. See *Collins v. Wolff*, 337 F. Supp. 114 (D. Neb. 1972), *aff'd*, 467 F.2d 359 (8th Cir. 1972) (plain view doctrine does not apply to mail in the custody of the Postal Service to justify seizure of package the contents of which were revealed due to post office negligence).

83. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) (plain view doctrine inapplicable to a car clearly visible to police who therefore seized it).

rarely meet this requirement. Second, mail in the custody of the post office cannot be considered to be "without a protected area" because of the government's "monopolistic right to provide the public with mail facilities."⁸⁴ Since a person has little alternative to using the United States Postal Service, the federal government has established policies protecting property and information in the custody of the post office through the formulation of regulations and the enactment of statutes governing employee conduct and the release of private information.⁸⁵

If the mail cover procedure is a search and the plain view exception does not apply, fourth amendment search warrant requirements must be met. In *Choate*, the mail cover request from the Bureau of Customs agent investigating the defendant was approved not by an impartial, objective magistrate, but by a postal inspector employed by a sister governmental agency and unfamiliar with constitutional principles of law. Thus, the inferences drawn by a neutral and detached magistrate that support a lawful search were not present. Further, even had probable cause existed to cover Choate's mail,⁸⁶ a thirty-day surveillance of envelopes does not present the exigencies that would support dispensing with a warrant.⁸⁷

Even if viewed merely as an administrative procedure, a mail cover authorized in the unchecked discretion of a postal inspector or his designee can be analogized to the warrantless administrative searches of private property struck down in *Camara v. Municipal Court*⁸⁸ and its

84. *Oliver v. United States*, 239 F.2d 818, 821 (8th Cir. 1957) (plain view doctrine not applicable when postal officials opened first-class package, discovered narcotics, resealed package, and transmitted it for delivery to addressee who was arrested when he called for it). See also *National Ass'n of Letter Carriers v. Independent Postal System*, 470 F.2d 265 (10th Cir. 1972) (18 U.S.C. § 1696 and 39 U.S.C. §§ 601, 604 (controlling private express for letters) reflect Congress' intent that the United States have a monopoly in the delivery of mail).

85. See 18 U.S.C. § 1703 (1976) (making it a felony for a Postal Service employee to unlawfully detain, delay, or open mail in his possession); 18 U.S.C. § 1709 (1976) (making it a felony for a Postal Service employee to take any piece of mail or remove anything from any piece of mail); 39 C.F.R. § 267.1 (1977) (Postal Service purpose and policy with respect to protection of information); 39 C.F.R. § 268.1 (1977) (Postal Service employee rules of conduct and consequences of noncompliance with respect to private information); 39 C.F.R. § 447.21 (1977) (standards of conduct for Postal Service Personnel).

86. Probable cause means reasonable cause to believe that the search will produce the instrumentality of a crime or evidence pertaining to a crime. 68 AM. JUR. 2d *Searches and Seizures* § 42 (1973).

87. In Choate's case, the requesting letter to the postal inspector in charge was dated July 19, 1972; the mail cover commenced on July 31, 1972. 576 F.2d at 168-69. See *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (when an exception to the warrant requirement is sought, there must be a showing that exigent circumstances make searching without a warrant imperative); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (when speed is essential to prevent endangering lives, escaping of suspect, or secreting of evidence, a warrantless search is valid).

88. 387 U.S. 523 (1967). In *Camara*, defendant was charged with violating the San Fran-

companion case, *See v. City of Seattle*.⁸⁹ In *Camara* and *See*, the Supreme Court concluded that administrative searches of private property without warrant are unreasonable even though routine inspection of the physical condition of private property "is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime."⁹⁰ The Court reasoned that the purposes behind the warrant machinery apply to protect the occupant subject to the search from the unbridled discretion of the official in the field.⁹¹

It would appear that the mail cover procedure, although ostensibly less intrusive than an administrative search, is also subject to the "unbridled discretion" of a postal inspector. While the mail cover seems relatively benign, the potential for abuse by the official in the field may bring it within the confines of the fourth amendment just as administrative searches are now subject to those protections.

3. Even if the Mail Cover Procedure Does Not Constitute a Search Per Se, is There Sufficient Abuse of the Device to Implicate the Fourth Amendment?

Amici asserted on behalf of the defendant, that postal regulations governing mail covers are inadequate to avoid systematic infringements of constitutionally protected rights.⁹² They pointed out that the cover imposed on Choate's mail was just one of thousands of mail covers authorized by a procedure that is systematically abused by indiscriminate requests and routinely granted authorizations.⁹³ For

cisco Housing Code by refusing to permit city housing inspectors to make a warrantless inspection of his quarters which allegedly violated the building's occupancy permit.

89. 387 U.S. 541 (1967). In *See*, defendant was convicted for refusing to allow a City of Seattle Fire Department representative to inspect his locked commercial warehouse as part of a routine, periodic city-wide canvass to obtain compliance with the fire code.

90. 387 U.S. at 530.

91. *Id.* at 532. Even the executive branch of government may not authorize electronic surveillance for domestic security purposes without a warrant. Such was the holding in *United States v. United States District Court*, 407 U.S. 297 (1972), a case dismissed by the *Choate* majority as inapt, although the analogy of electronic eavesdropping approved solely by the executive branch to that of mail surveillance solely with the discretion of a postal inspector appears appropriate. See also *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) which held that a warrantless wiretap on a domestic organization authorized by the Attorney General for domestic security purposes is not permissible, and would be equally impermissible even if installed under presidential directive.

92. Brief for Committee for Public Justice and ACLU Foundation of Southern California as amici curiae for defendant-Appellee at 5-7 [hereinafter cited as Brief for Appellee], *United States v. Choate*, 576 F.2d 165 (9th Cir.), *cert. denied*, 47 U.S.L.W. 3311 (1978).

93. "In 1973-74, some 9,130 Postal Service 'mail covers' were in effect a total of 339,425 days, monitoring and recording postmarks, postage meter numbers, return addresses and other data intercepted from private correspondence and transmitted to the requesting local

example, congressional hearings revealed that “[o]f the approximately 48,000 mail covers requested in the years 1961-64, all but 70 were approved,”⁹⁴ and from 1973 through the third quarter of 1975, only 450 of the 13,479 mail covers requested were disapproved.⁹⁵ Further, since no federal law sanctions or regulates the use of mail covers, the general citizenry is not aware of postal surveillance practices. This factor compounds the detriment which may result from widespread misuse of the procedure.⁹⁶

The majority recognized that when mail covers are abused, the fourth amendment may be implicated,⁹⁷ but found no abuse surrounding the cover of Choate’s mail. It believed that the hearings relied upon by the defendant⁹⁸ to prove such abuse of the mail cover procedure instead supported the government’s position that a mail cover falls outside the protections of the fourth amendment.⁹⁹ The court first noted that “an established federal agency was requesting the mail cover here, so that [defendant] cannot properly argue that this mail cover per-

state or federal law enforcement agency.” *Id.* at 4. The brief relied upon *Hearings before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (Surveillance)*, 94th Cong., 1st Sess. Part I, 232-35 (1975) [hereinafter cited as *Hearings on Surveillance*].

94. Brief for Appellee, *supra* note 92, at 5. The brief cited to *Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Invasions of Privacy (Governmental Agencies)*, 89th Cong., 1st Sess. (1965) [hereinafter cited as *Hearings on Invasions of Privacy*].

95. 576 F.2d at 188 n.18 (Hufstедler, J., concurring and dissenting) citing *Hearings before the Subcomm. on Postal Facilities, Mail and Labor Management of the House Comm. on Post Office and Civil Service*, 94th Cong., 1st Sess. (1975). Judge Hufstедler stated: “Far from being few in number, there were 4,528 other mail covers in effect during 1972 when Choate’s was requested and 5,171 in 1973.” *Id.* at 188 (citing *Hearings on Surveillance*, *supra* note 93).

96. 39 C.F.R. § 233.2(c)(4) (1977) defines “law enforcement agency” as “any authority of the Federal Government or any authority of a State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime.” Thus, “requests [for mail covers] have been honored from such entities as the U.S. Coast Guard, the Department of Interior, the Royal Canadian Mounted Police, and the Departments of Labor, HEW, and Agriculture in addition to agencies more traditionally associated with law enforcement.” 576 F.2d at 188 n.16 (Hufstедler, J., concurring and dissenting) (citing *Hearings on Surveillance*, *supra* note 93). While the postal regulations require the requesting agency to specify reasonable grounds (39 C.F.R. § 233.2(d)(2)(ii) (1977)), “[t]he meaning of reasonable grounds is undefined . . . and it appears that most requests are routinely granted if they seem to state reasons why a mail cover will prove helpful to the requesting agency.” 576 F.2d at 188 (Hufstедler, J., concurring and dissenting) (footnote omitted).

97. 576 F.2d at 177.

98. See notes 93 & 94 *supra*.

99. 576 F.2d at 178-79.

mits snooping by obscure local agencies."¹⁰⁰ By this, the court implied that the cover was justified because it was requested by a federal agency of the magnitude of the Bureau of Customs, and not by some little-known local agency. In addition, the majority attached great weight to testimony before the Senate Hearings on Invasions of Privacy¹⁰¹ in which the Chief Postal Inspector testified that he trusted the agencies requesting mail covers and did not believe they would do so without good reason and some suspicion that a crime had been committed. The Chief Postal Inspector also testified that the Post Office had received no complaints of mail cover abuses, and that he felt that law enforcement agencies did not indiscriminately request mail covers.¹⁰² The court also quoted from the Postmaster General's confidential instructions to postal inspectors relating to mail covers which emphasized the importance of avoiding indiscriminate use of the procedure.¹⁰³ In light of this evidence, the majority felt that there were sufficient precautions within the Postal Service system to avoid abuse of the mail cover procedure.¹⁰⁴

Although the majority implied that a mail cover may be justified when requested by an "established federal agency,"¹⁰⁵ the fourth amendment does not distinguish between large federal agencies and small local ones where governmental intrusion is prohibited.¹⁰⁶ While Postal Service policy appears to provide precautions against abuse, this may be insufficient when the privacy rights of large numbers of people are potentially affected. Thus, the general law enforcement use of the mail cover device may constitute widespread governmental intrusion offensive to the fourth amendment.

C. Does a Mail Cover Intrude Upon Any Privacy Interest Protected by the Fourth Amendment?

Since *Katz v. United States*,¹⁰⁷ a governmental intrusion upon individual privacy rights is unreasonable under the fourth amendment

100. *Id.* at 178.

101. *Hearings on Invasions of Privacy*, *supra* note 94.

102. *Id.*

103. 576 F.2d at 179.

104. *Id.* at 179-80.

105. *Id.* at 178.

106. *United States v. Raines*, 362 U.S. 17 (1960) (racial discrimination practiced by county deputy voting registrar is just as violative of the federal constitution as if practiced by the state's highest official); *Cooper v. Aaron*, 358 U.S. 1 (1958) (discrimination practiced by a state governor and legislature is just as violative of federal law as if practiced by federal officials).

107. 389 U.S. 347 (1967).

where an individual exhibits an expectation of privacy, and when such expectation is one which society recognizes as reasonable.¹⁰⁸ The *Choate* majority, in applying the criteria of *Katz*, held that no privacy rights had been violated by the mail cover.¹⁰⁹

1. The Sender's Privacy Right

Amici argued that the mail cover procedure violated not only defendant's privacy rights, but those of senders as well.¹¹⁰ The court found senders' rights were not in issue because "only the senders would be entitled to raise any question as to the intrusion into their Fourth Amendment rights. . . . And none of them has complained."¹¹¹ The majority reiterated that, pursuant to the criteria set forth in *Katz*,¹¹² the fourth amendment only bars intrusion upon a person's *reasonable* expectation of privacy.¹¹³ Since names and addresses were foreseeably available to postal employees looking at the outside of the mail, the court held that the sender had waived any claim to privacy.¹¹⁴ Thus, the mail cover would not have violated his "reasonable expectations."¹¹⁵

The only case in which a sender has alleged a constitutional violation resulting from a mail cover is the 1975 case of *Paton v. La Prade*.¹¹⁶ There, sixteen-year-old Lori Paton, doing research for a high school political theory class, sent a letter intended for the Socialist Labor Party but addressed to the Socialist Workers' Party, upon which a mail cover was in effect.¹¹⁷ From information thus received, the FBI began an investigation of Lori and her parents, which included an interview with the local police chief and the principal and vice-principal of her high school.¹¹⁸ Although she was ultimately cleared of any wrongdoing, the permanent FBI file on Lori presented an obstacle to her future. She sued the FBI agents responsible pursuant to 18 U.S.C. section 1702¹¹⁹

108. *Id.* at 361 (Harlan, J., concurring).

109. 576 F.2d at 176, 180.

110. *Id.* at 177.

111. *Id.* at 178. Presumably, there was no need for any of *Choate's* correspondents to complain since the information obtained from the mail cover did not lead to a governmental investigation of any sender. Such a situation did occur in *Paton v. La Prade*, 524 F.2d 862, 873 (3d Cir. 1975) discussed in note 116 *infra* and accompanying text.

112. See text accompanying note 108 *supra*.

113. 576 F.2d at 174-75.

114. *Id.* at 177.

115. *Id.*

116. 524 F.2d 862 (3d Cir. 1975).

117. *Id.* at 865.

118. *Id.* at 865-66.

119. 18 U.S.C. § 1702 (1976) provides in part:

and 42 U.S.C. section 1983¹²⁰ for damages and an injunction ordering the file destroyed.¹²¹ Owing to the inadequacy of the factual record, the Third Circuit was unable to resolve the question of the constitutionality of the mail cover procedure.¹²² The court did, however, determine that plaintiff had standing to challenge the constitutionality of the postal regulation authorizing mail covers "since she may have sustained or be immediately in danger of sustaining a direct injury as a result of [the mail cover and the FBI field investigation and file]."¹²³ The *Choate* majority, however, distinguished *Paton* on the ground that it involved a mixup occurring from human error, and there had been no such assertion in the *Choate* case.¹²⁴

Despite the *Choate* majority's conclusion, it appears not only reasonable, but logical for a sender to expect that his name and return address will be used by post office personnel for post office-related purposes only. He places his name and address on the outside of the mail to ensure against its loss or delivery to a dead-letter area when it is otherwise undeliverable. In this connection, all data is placed on the envelope for the convenience of the post office.¹²⁵ It is reasonably to be anticipated that such information will be used solely to aid the Postal Service in performing its functions and duties. An expectation that information on the front of an envelope will be used to launch a governmental investigation of either the sender or the addressee is neither reasonable nor foreseeable.

In addition, the majority's holding that only a sender would have standing to challenge the constitutionality of a mail cover is subject to

Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter . . . before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, . . . shall be fined not more than \$2000 or imprisoned not more than five years, or both.

Plaintiff asked for certification as a class action and demanded a declaratory judgment that mail surveillance violated not only the above statute, but the first amendment as well. 524 F.2d at 866.

120. 42 U.S.C. § 1983 (1976) provides in part:

Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, powers, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

121. 524 F.2d at 866-67.

122. *Id.* at 872.

123. *Id.* at 873.

124. 576 F.2d at 180.

125. The Postal Service requires use of return addresses by the senders in order "to enable the Postal Service to return [mail] when it is undeliverable. . . ." POSTAL SERVICE MANUAL § 122.13.

limitation.¹²⁶ Normally a party claiming a constitutional violation must assert his own rights and not those of others.¹²⁷ But exceptions to this rule are recognized where (1) the one asserting the non-party's rights has been injured, (2) there is a close connection between the litigant and the purpose of the conduct being challenged, and (3) the constitutional rights of the non-party would be impaired since he has no effective way to preserve them himself.¹²⁸ Choate should, therefore, have standing to assert the senders' rights since evidence obtained by the allegedly unconstitutional procedure was used to indict him, the relationship between him and the government's action was direct, and it would be impractical for Choate's correspondents to raise the invasion of their privacy rights when a mail cover had not been used against them.

2. The Addressee's Privacy Right

In determining that the mail cover did not present a threat to Choate's privacy, the court found that any privacy claims were waived by the senders when they placed their names and addresses on the mail.¹²⁹ Such a finding appears inconsistent in light of the fact that a sender was not making a constitutional claim in the first instance. Since it was the recipient's privacy right at issue, a discussion as to the propriety of the senders' waiver of the addressee's fourth amendment rights was clearly required, but absent from the opinion.¹³⁰

126. 576 F.2d at 178.

127. See *United States v. Raines*, 362 U.S. 17, 20-21 (1960). In *Raines*, the district court's holding that an act of Congress was unconstitutional because it enjoined the action of private parties was reversed on the ground that one who attacks the validity of a statute cannot do so on the basis of its impact on other persons. There, public officials rather than private parties had challenged the statute.

128. See *Barrows v. Jackson*, 346 U.S. 249, 255-56, 257, 259 (1953). The Court allowed a caucasian standing to defend an action which was brought seeking enforcement of a restrictive covenant against non-caucasians. Defendant prevailed because:

- 1) she could enter a direct injury in that she had been sued for \$11,600 in damages;
- 2) there was a close relation between the purpose of the restrictive covenant and defendant's possible securing loss, and
- 3) it would have been "difficult if not impossible" for defendant to have presented her "grievances before any court." *Id.* at 257.

In addition, the Court noted that defendant was "the only effective adversary of the covenant in its last stand." *Id.* at 259.

129. 576 F.2d at 177. The untenable position taken by the majority can best be illustrated with a rhetorical question: If the postal inspector in charge had personally contacted one of Choate's correspondents to obtain permission to copy information on the front of any envelope addressed to Choate from that correspondent for the purpose of obtaining criminal evidence against Choate, would the correspondent's permission waive Choate's constitutional rights?

130. Presumably, it was not necessary for the court to address a due process violation

Effective consent for a warrantless search may be given by any "third party who possesses common authority or other sufficient relationship to the . . . effects sought to be inspected."¹³¹ The majority accepted defendant's concession that the letters, prior to their delivery to him, were still under the legal control of the senders.¹³² Thus, the senders could have no such *common* authority sufficient to justify consent to a waiver of Choate's privacy rights. If the deposit in the mail of letters addressed to Choate constituted some other sufficient relationship which permitted the senders to impliedly consent to a cover search of Choate's mail, the waiver of Choate's fourth amendment rights still cannot be supported. The senders did not know that a mail cover was in effect and, therefore could not knowingly consent. The cases upholding third-party consents make it clear that the third party knew that to which he was consenting.¹³³ At most, any implied consent imputed to

since defendant conceded that the mail cover information derived from an inspection of mail still under the senders' control. 576 F.2d at 174. One rationale for the court's finding is based on the theory that the addressee's rights in the mail had not yet attached at the time the postal employees intercepted the letters for recordation. This theory is rooted in the rule of contract acceptance stating that the sender of an acceptance by mail retains legal control over it until it reaches the addressee. *Rhode Island Tool Co. v. United States*, 128 F. Supp. 417, 419 (Ct. Cl. 1955). The minority rule of contract acceptance (and California's state policy) that acceptance becomes effective upon posting is expressed in *Palo Alto Town & Country Village, Inc. v. BBTC Co.*, 11 Cal. 3d 494, 497, 521 P.2d 1097, 1098 113 Cal. Rptr. 705, 706 (1974). Under this view, a sender relinquishes legal control of the letter at the time it is deposited in the mail. Further support for the theory that a sender does not retain legal control of a letter deposited in the mail is found in copyright law: "[T]he general rule is that the author of a letter retains the ownership of the copyright or literary property contained therein while the recipient of the letter acquires ownership of the tangible physical property of the letter itself . . . The recipient of a letter has the absolute right either to destroy it, or preserve it and permit its limited inspection by others. 1 M. NIMMER, COPYRIGHT § 5.04 (1978). See also *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912).

131. *United States v. Matlock*, 415 U.S. 164, 171 (1974). But cf., *Stoner v. California*, 376 U.S. 483 (1964). In *Stoner*, officers conducted a warrantless search of defendant's hotel room without his consent, but with the permission of the night clerk. The Court held that the consent of the clerk did not render the search lawful—"[t]hat [fourth amendment] protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel." *Id.* at 490. Speaking for a unanimous Court, Justice Stewart said: "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent." *Id.* at 489. See also *United States v. Jeffers*, 342 U.S. 48 (1951); *Lustig v. United States*, 338 U.S. 74 (1949).

132. 576 F.2d at 174. See also note 130, *supra*.

133. *United States v. Matlock*, 415 U.S. 164 (1974) (co-occupant of bedroom allowed police to search in defendant's absence); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (wife spontaneously gave husband's belongings to police in a good-faith effort to clear him); *Frazier v. Cupp*, 394 U.S. 731 (1969) (joint user of a duffel bag allowed police to search the bag).

the senders applies only to the perusal of the front of envelopes for the purpose of delivering the mail.

a. Post-Katz Circuit Court Decisions

In holding that a mail cover does not violate an addressee's fourth amendment rights since any expectation of privacy is not reasonable, the *Choate* court cited several post-*Katz* decisions discussing the privacy issue relating to mail covers. Although these cases did not find mail covers to be invalid, each presented a fact situation clearly distinguishable from the facts in *Choate*.

In *United States v. Balistreri*,¹³⁴ defendant was convicted on two counts of tax evasion. On appeal, he attacked the adequacy of the government's evidence claiming it was obtained through illegal electronic surveillance and mail cover. The primary issue was whether the government had sustained its burden of proof that the evidence thus obtained was free from the taint of the original illegality. Since the court determined that the government met its burden by showing that information acquired by electronic surveillance and mail cover had been independently obtained prior to the use of those sources, the Seventh Circuit was not required to reach the question of whether the mail cover illegally interfered with the defendant's privacy rights. Thus, rather than support the *Choate* holding that no privacy interest attaches to the exterior of one's mail, the *Balistreri* court implied that the mail cover was in fact an illegal search and seizure: "We hold that the evidence relating to Midwest [a corporation whose address was the same as defendant's] was not 'come at by exploitation' of the information obtained in the illegal searches and seizures"¹³⁵

In the Second Circuit case of *United States v. Leonard*,¹³⁶ the New York regional office of the IRS had become concerned over possible losses of tax revenue through the use of Swiss bank accounts. It was suggested that taxpayers having such accounts might be identified by their receipt of statements from the Swiss banks. In the interest of secrecy, however, the banks used envelopes not bearing a return name or address. Agents acquired the postage meter numbers of the banks and requested that the Postal Service conduct a mail cover of all air mail letters lacking return addresses mailed from Switzerland to New York and bearing the relevant meter numbers. Leonard was one of the addressees whose name was thus discovered, and although he was already

134. 403 F.2d 472 (7th Cir. 1968), *cert. denied*, 402 U.S. 953 (1971).

135. *Id.* at 476.

136. 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

under IRS investigation, the government attempted to use mail cover evidence at his trial to show that he had lied in executing an affidavit stating he had no foreign accounts. As to the mail cover, Leonard's attack on appeal centered around the contention that it was an unreasonable search in violation of the fourth amendment.

Judge Friendly recognized that subsequent to *Katz* there was an increased concern for the protection of privacy. He conceded that the Second Circuit's prior statement in *United States v. Costello*¹³⁷ was that writing appearing on the outer cover of mail may be read and used without offense to the Constitution. But, he suggested that the prior holding "should not be read as an absolute, permitting, for example, the Government to copy the outside of every envelope received by every citizen."¹³⁸ Thus, Judge Friendly implied that there could conceivably be circumstances surrounding a mail cover that would violate the fourth amendment. He did not, however, find the *Leonard* case to be an appropriate candidate for creating an exception to the prevailing view that mail covers are constitutional. The *Leonard* court relied on *United States v. Odland*,¹³⁹ a Seventh Circuit case which held that there could be no reasonable expectation of privacy with respect to incoming international mail which is subject to inspection pursuant to customs regulations.¹⁴⁰ Since customs laws permit international mail to be inspected without violation of the fourth amendment, and since the mail cover in *Leonard* merely turned up information required by the Bank Secrecy Act—sustained as constitutional in *California Bankers Ass'n v. Schultz*¹⁴¹—the *Leonard* court could not find the mail cover there offensive to the fourth amendment.

The facts in *Leonard* are easily distinguished from those of *Choate*, making its authority for the *Choate* holding questionable. The information produced by the mail cover on the domestic mail of Choate could not have been used to aid in the enforcement of customs laws.¹⁴² Further, no federal law similar in purpose to the Bank Secrecy Act mandates disclosure of the kind of information revealed by the surveillance of domestic mail.

In *United States v. Bianco*,¹⁴³ the defendant was convicted for failure to file tax returns. On appeal, he challenged admission of evidence de-

137. 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958).

138. 524 F.2d at 1087.

139. 502 F.2d 148 (7th Cir.), *cert. denied*, 419 U.S. 1088 (1974).

140. *Id.* at 150.

141. 416 U.S. 21 (1974).

142. The mail cover on Choate was originally requested by the Federal Bureau of Customs but later used by the IRS to obtain evidence for his tax evasion indictment.

143. 534 F.2d 501 (2d Cir.), *cert. denied*, 429 U.S. 822 (1976).

rived from a mail cover, although he had not raised the objection at trial nor had he moved to suppress the evidence, claiming it would have been futile to do so. He maintained that *United States v. Leonard*,¹⁴⁴ decided after his trial, changed the law with respect to the constitutionality of mail covers. Defendant referred specifically to Judge Friendly's dicta in *Leonard* that although writing appearing on the face of envelopes may be copied and used by the government without offense to the Constitution, increased concerns for privacy interests may preclude the government from copying all envelopes received by all citizens.¹⁴⁵ The Second Circuit held that Bianco's claim could not be raised on appeal.¹⁴⁶ The *Bianco* court nevertheless created its own dicta by interpreting Judge Friendly's statement to mean that "any particular investigative means, including mail covers, are subject to abuse and excesses, and . . . such excesses *might* serve to distinguish this Court's prior decision that the reading of the outside of an envelope does not violate any constitutional principles."¹⁴⁷

Bianco is weak authority for the *Choate* holding, since in *Bianco* the issue as to the expectation of privacy with respect to the surface of defendant's mail was not faced at all. Rather, the language there implies that under appropriate circumstances, a mail cover could be found to be an unreasonable invasion of privacy.

b. Analogous Supreme Court Cases

The *Choate* court acknowledged that the case before it was the "first post-*Katz* situation where the constitutionality of the mail cover device has been squarely presented in a manner requiring extended analysis,"¹⁴⁸ and noted that the Supreme Court has never directly passed on the constitutionality of mail covers. It analogized to three Supreme Court decisions to support its finding that the Court would hold mail covers constitutional.

In *United States v. Miller*,¹⁴⁹ the defendant, charged with various federal offenses, made a pretrial motion to suppress microfilms of checks, deposit slips, and other records maintained by the bank in ac-

144. 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 956 (1976).

145. *Id.* at 1087.

146. The Second Circuit invoked the rule announced in *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966), holding that the failure to make proper objection before the trial court to the admission of challenged evidence forecloses review of the asserted error on appeal.

147. 534 F.2d at 508.

148. 576 F.2d at 175.

149. 425 U.S. 435 (1976).

cordance with a provision of the Bank Secrecy Act of 1970 and obtained pursuant to a defective search warrant. In deciding that a search warrant was not required to obtain the records, the Supreme Court held that there is no legitimate expectation of privacy in information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.¹⁵⁰

While the *Choate* majority analogized a depositor's privacy right to that of an addressee, such a comparison appears inapposite. A depositor voluntarily reveals to his bank information which he expects will be recorded by bank personnel. Although an addressee may expect that information appearing on the front of his letters will be used to deliver the mail, he does not expect such information to be recorded. Further, an addressee does not *voluntarily* reveal information on the surface of his mail to postal authorities because he has little control over those who send him mail and does not know what will be received, when, or from whom. In dissent, Judge Hufstедler correctly pointed out that since mail is surreptitiously examined before it reaches the addressee, he does not know that the information collected even exists.¹⁵¹ Therefore, even if *arguendo* the use of the United States mails constitutes a form of consent to record the data on the front of mail, such consent cannot be knowingly given.

In *United States v. Santana*,¹⁵² defendant was arrested without warrant in the vestibule of her home after officers observed her at the threshold. The Supreme Court held that her fourth amendment rights were not violated since she exhibited no reasonable expectation of privacy when she knowingly exposed herself to public view at the door of her home. The *Choate* court equated the threshold of a home to the outside of a letter; however, *Santana* correctly applies where the warrantless arrest or seizure takes place in an area openly visible to public observation at all times.¹⁵³ The front doorway of a house is exposed to public view twenty-four hours a day and a person wishing to maintain privacy as to certain acts remains indoors. An envelope is not exposed to public view at all—only to the limited view of postal employees. An

150. For a critical view of the holding in *Miller*, see Note, *Is There a Right of Privacy in Bank Records? Different Answers to the Same Question: California vs. Federal Law*, 10 LOY. L.A.L. REV. 378 (1977).

151. 576 F.2d at 205 (Hufstедler, J., concurring and dissenting).

152. 427 U.S. 38 (1976).

153. See *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 1236 (1978) (evidence collected in open parking lot of restaurant not illegally seized); *United States v. Edwards*, 539 F.2d 689 (9th Cir.), *cert. denied*, 429 U.S. 989 (1976) (warrantless arrest on public highway openly visible to observation permissible).

addressee desiring that the information on the front of his mail not be revealed to postal authorities does not have the option of removing his mail from the purview of the post office.

In concluding that a mail cover is not unreasonable within the meaning of the fourth amendment, the court applied the facts and holding of *United States v. Van Leeuwen*¹⁵⁴ where the detention of mail for the purpose of obtaining a search warrant was reasonable in light of appropriate reasons given by the requesting agency. In *Van Leeuwen*, customs officials suspected that packages mailed by defendants contained contraband and delayed the routing of the packages while authorities obtained search warrants. The Supreme Court did not find that the detention of the packages¹⁵⁵ constituted an unreasonable search and seizure under the circumstances. The suspicious nature of the mailings justified the delay in order to obtain warrants, and under such circumstances "even first-class mail is not beyond the reach of all inspection; and the sole question here is whether the conditions for its detention and inspection had been satisfied."¹⁵⁶

In terms of time, per *Van Leeuwen*, up to twenty-nine hours is not a sufficient detention to constitute an unreasonable search where probable cause exists for believing the mail part of an illicit scheme and where, at the end of the period of detention, a search warrant issues. Admittedly, the five or ten minute delay necessary to record the information required by a mail cover is not an unreasonable detention either. However, the analogy to *Van Leeuwen* appears inappropriate, since it was not suspected that letters and packages sent to Choate contained contraband,¹⁵⁷ nor was a warrant being requested. In *Van Leeuwen*, the packages themselves were suspicious. In this mail cover situation, there was no probable cause to suspect the contents of the incoming mail to be criminal evidence.

The three Supreme Court opinions relied upon by the *Choate* majority provide little support for the court's holding. Each case is easily distinguishable. In one, the defendant should have been and actually was aware that information voluntarily revealed was being recorded. In another, the defendant exposed herself to authorities, although she

154. 397 U.S. 249 (1970).

155. One package was detained 1 1/2 hours; the other, 29 hours.

156. 397 U.S. at 252.

157. See, e.g., *United States v. Ramsey*, 431 U.S. 606 (1977) (suspicion that bulky envelopes arriving from country known to be a source of heroin contain contraband justifies warrantless search); *United States v. Milroy*, 538 F.2d 1033 (4th Cir. 1976) (warrantless search of envelopes permitted where officials knew specially trained dogs had sniffed them out as containing narcotics and each envelope felt like it contained more than a letter).

clearly had an option not to do so. In the third, mail was suspicious on its face, so delay for purposes of obtaining a search warrant was reasonable. In *Choate*, the defendant did not expect information on the surface of his mail to be recorded; he could not have avoided exposing this information to postal authorities in any event since he had no other option but to use (nor could he control his senders' use of) the United States Postal Service; his mail was not suspicious on its face.

United States v. New York Telephone Co.,¹⁵⁸ in which a pen register¹⁵⁹ was held to constitute a search,¹⁶⁰ provides a more appropriate analogy. Although the majority did not address this opinion, the dissent aptly noted that a pen register, which records that a call was made to a particular number, is less intrusive than a mail cover which reveals that a piece of mail was actually sent and from whom it was received.¹⁶¹ Like a pen register which for purposes of analogy can be termed a phone cover,¹⁶² "a mail cover intrudes into a channel of com-

158. 434 U.S. 159 (1977).

159. "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." *Id.* at 161 n.1.

160. In the *United States v. New York Tel. Co.* case, a district court had issued an order authorizing the FBI to install and use pen registers with respect to two telephones and directing the telephone company to furnish the information, facilities, and technical assistance necessary. The telephone company declined to comply fully with the order and moved in the district court to vacate the portion of the order affecting the company on the ground that such a directive could be issued only in connection with a wiretap order conforming to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (codified at 18 U.S.C. §§ 2510-2520 (1976)). The district court ruled that pen registers are not governed by the proscriptions of Title III because they are not devices used to intercept oral communications and that it had jurisdiction pursuant to the All Writs Act (codified at 28 U.S.C. § 1651 (1976)) to order the company to assist in the installation of pen registers. On appeal the Second Circuit held that a pen register involves a search and seizure under the fourth amendment and a court may issue such an order on a showing of probable cause, but that the district court lacked power to order the company, a third party, to tender assistance. *Application of United States in re Pen Register Order*, 538 F.2d 956 (2d Cir. 1976), *rev'd sub nom.* *United States v. New York Tel. Co.*, 434 U.S. 159 (1977). The Supreme Court affirmed that use of a pen register constitutes a search subject to fourth amendment procedural safeguards but held that the All Writs Act and Federal Rule of Criminal Procedure 41 were broad enough to authorize the district court to order a third party to render technical assistance.

161. 576 F.2d at 201 n.68 (Hufstедler, J., concurring and dissenting).

162. Although the court did not address the Supreme Court opinion in *United States v. New York Tel. Co.*, 434 U.S. 159 (1977), it did note the similarity between pen registers and mail covers, and cited its opinion in *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F.2d 254 (9th Cir. 1977) in which information obtained by a pen register was held not to be entitled to fourth amendment protection. In *Hodge*, a telephone customer filed a civil suit against the telephone company stemming from the company's installation of a pen register on his telephone in connection with a telephone company investigation into obscene telephone calls.

munication and seizes evidence of who is being communicated with,"¹⁶³ and is thus "similar to the seizure of intangibles in the wiretap and bugging areas held within the scope of the Fourth Amendment."¹⁶⁴ Indeed, there is little difference between the surreptitious electronic recording of a person's conversation with a bank receptionist that reveals the identity of his bank, and the written record of the return address on a bank statement delivered to an addressee that reveals the same information. Yet, the discovery of such (and other private information) now permissible without a warrant through use of a mail cover, constitutes an illegal search and seizure when revealed through warrantless wiretap.¹⁶⁵ The *New York Telephone Co.* case presents a more persuasive analogy to the mail cover in the instant case than any of the Supreme Court cases considered analogous by the majority. The court's conclusion, therefore, that the Supreme Court would uphold the constitutionality of mail covers is strongly questionable.

The *Hodge* court stated some reservation that the requisite state action exists when a telephone company installs a pen register device on its own initiative to investigate abuse of its service (555 F.2d at 256 n.3). Assuming that state action does exist, the court concluded that the fourth amendment is not implicated when the content of the communication is not recorded. It likened pen registers to telephone company billing records which were held not entitled to fourth amendment protections in *United States v. Baxter*, 492 F.2d 150 (9th Cir.), cert. denied 414 U.S. 801 (1973) and *United States v. Fithian*, 452 F.2d 505 (9th Cir. 1971) which held that there is no reasonable expectation of privacy in telephone company billing records. Concurring in *Hodge*, Judge Hufstedler noted:

The decision in this case is a narrow one. We do not hold that information recorded by pen registers is never entitled to Fourth Amendment protection. Rather, our holding that the telephone company's use of a pen register to investigate obscene telephone calls does not violate the Fourth Amendment is limited to the facts presented by this appeal. We leave for another day a Fourth Amendment challenge to the telephone company's installation of a pen register at the request of the Government to investigate a crime that is unrelated to the delivery of telephone service.

555 F.2d at 267 (Hufstedler, J., concurring). The possibility that the fourth amendment applies to the use of pen registers has been recognized in other circuits. See, e.g., *United States v. John*, 508 F.2d 1134 (8th Cir.), cert. denied, 421 U.S. 962 (1975); *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975). See also *United States v. Giordano*, 416 U.S. 505 (1974) (Powell, J., concurring in part and dissenting in part).

163. 576 F.2d at 201 (Hufstedler, J., concurring and dissenting).

164. *Id.*, citing *Alderman v. United States*, 394 U.S. 165 (1969) (conversations overheard through electronic surveillance held illegally seized); *Katz v. United States*, 389 U.S. 347 (1967) (same); *Berger v. New York*, 388 U.S. 41 (1967) (the surreptitious recording of conversations for mere evidence held unconstitutional search); *Wong Sun v. United States*, 371 U.S. 471 (1963) (statements made by defendant at time of arrest and surreptitiously recorded by officer held illegally seized).

165. See note 164 *supra*.

IV. CONCLUSION

That a mail cover does not violate a reasonable expectation of privacy is a holding worthy of Supreme Court review.¹⁶⁶ A thirty-day cover on a person's mail reveals a great deal of information ordinarily kept private by the average citizen. In that period of time, a record of return addresses on incoming letters reveals personal correspondents as well as those connected with financial, educational, religious, political, and property interests.¹⁶⁷ Moreover, as the dissent indicates, many of those correspondents maintain files on the addressee which can be discovered and used by an investigating agency, so that the information gleaned from a mail cover used with other investigatory techniques "quickly makes the subject's life an open book"¹⁶⁸

The Ninth Circuit correctly evaluated the mail cover procedure in accordance with the guidelines set forth in *Katz*, but did not find that there is any expectation of privacy as to the outside cover of mail or that such an expectation would be reasonable. It relied on *Ex Parte Jackson*¹⁶⁹ which held that the fourth amendment protects against the warrantless *opening* of sealed mail, and found that a mail cover merely records information placed on the outside of letters and packages which is in plain sight to postal employees and others, and which an addressee could not, therefore, expect to keep private. Yet, it would seem that the facts of *Katz* are closely analogous to a mail cover situation. Although *Katz* himself undoubtedly realized that he was visible through the glass portion of the phone booth that was accessible to public view, he had a reasonable expectation that the content of his conversation and the identity of the person with whom he was communicating would remain private. Indeed, the Court held that the information, discovered via electronic recordation, was illegally seized. Similarly, while an addressee's name and address and the senders' name and return address is clearly visible to postal workers, the recording of that information for the purpose of discovering the nature of the communication presents similar circumstances to the search and seizure struck down as unconstitutional in *Katz*. Thus a reasonable expectation that information appearing on the outer surface of mail will remain private is clearly justified.

166. However, the Supreme Court apparently does not agree. *United States v. Choate*, 576 F.2d 165 (9th Cir.), *cert. denied*, 47 U.S.L.W. 3311 (1978).

167. See note 11, *supra*.

168. 576 F.2d at 187 (Hufstedler, J., concurring and dissenting).

169. 96 U.S. 727 (1878). See also notes 44 & 45 *supra*, and accompanying text.

The holding in *United States v. Choate* indicates a reluctance to apply the full import of *Katz* for the purpose of expanding individual privacy rights and maintains the status quo throughout the circuits as to the constitutionality of mail covers. While the language of *Katz* could have supported a contrary result, the Ninth Circuit's more conservative approach does preserve an effective law enforcement tool. Until the Supreme Court speaks on the subject, however, expanded use of mail covers supported by this holding could conceivably lead to the kinds of abuses dismissed in the opinion as "more ephemeral than real,"¹⁷⁰ but which present actual threats to individual privacy rights.

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170. 576 F.2d at 180.

