Your Call Is Now Being Monitored: Should Municipalities Be Liable for Unauthorized Wiretapping?

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YOUR CALL IS NOW BEING MONITORED:
SHOULD MUNICIPALITIES BE LIABLE FOR
UNAUTHORIZED WIRED TAPPING?

MCKENNA M. PROHOV*


INTRODUCTION

Cities are not subject to suit under the Federal Wiretapping Act (FWA) for wrongfully intercepting and disclosing emails between citizens. That was what the Seventh Circuit held recently in Seitz v. Elgin, Ill. The decision created a circuit split because the Sixth Circuit previously held that the amendments to the FWA did create a cause of action for suits against municipalities.

The amendments to §2520 of the FWA provide a civil cause of action against “the person or entity, other than the United States,” who intentionally uses another person’s electronic communication in violation of the act’s provisions. The statute, however, did not always read this way. The original 1968 version of the Act provided a cause of action only against any “person,” but Congress expanded the scope of liability in a 1986 amendment to include “person or entity,” and then

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1 Seitz v. City of Elgin, 719 F.3d 654, 657 (7th Cir. 2013).
2 Adams v. City of Battle Creek, 250 F.3d 980, 985 (6th Cir. 2001).
4 Id.
to a “person or entity, other than the United States,” under the USA PATRIOT Act in 2001.5

The definitions of “person” and “entity” matter because in Seitz, the plaintiffs sued the City of Elgin under §2511(1)(c-d) of the FWA, which prohibits “any person” from intentionally disclosing or using communications intercepted in violation of the FWA.6 The Seventh Circuit concluded that the definition of “person” did not include municipalities.7 And because §2520 only created a cause of action for violations of the FWA, it follows that §2520 confers a cause of action to enforce §2511(1) only against a “person” as defined by the statute.8

In determining whether someone may vindicate a particular statutory right, the Seventh Circuit said courts should look to the scope and nature of the specific substantive right at issue,9 meaning two things: 1) the statute confers a right on identifiable persons; and 2) the plaintiff is a member of that class of identifiable persons.10 Here, §2511(1) confers rights on identifiable persons, but it limits those plaintiffs to those that were harmed by a “person” as defined in §2510(6) of the Act. Thus, the plaintiffs in Seitz are not the intended beneficiaries of the statutory right conferred by §2511(1), and they can have no cause of action under §2520 because their communications were intercepted by the City of Elgin.11

In Adams v. City of Battle Creek, however, the Sixth Circuit held that §2520 created a cause of action against municipalities for all violations of the FWA.12 The court simply determined that municipalities were “entities” within the meaning of the statute and

7 Seitz, 719 F.3d at 655.
8 Id. at 658.
9 Id. at 657.
10 Id. at n.4.
11 Id. at n.4.
12 Adams v. City of Battle Creek, 250 F.3d 980, 985 (6th Cir. 2001).
thus held that rights conferred elsewhere in the statute were made actionable by §2520, even if those rights provided for protection against actions taken only by a “person” and not an “entity” as defined by the statute.\textsuperscript{13} The Seventh Circuit in \textit{Seitz} agreed that the meaning of “entity” included municipalities, but split with the Sixth Circuit on whether the amended portion of the statute itself created any substantive rights.\textsuperscript{14}

Who got it right?  
This Comment argues that not only did the majority opinion in \textit{Seitz} correctly analyze the statutory text of the FWA, but it also upheld Congress’s recognition that surveillance plays a crucial role in reducing crime.\textsuperscript{15} Part I of this Note presents the underlying facts in \textit{Seitz}. Part II discusses the creation of the FWA and its related jurisprudence. Part III examines the rationale behind the majority opinion and its split with the Sixth Circuit. Part IV then argues the majority opinion is correct for three reasons: First, the court was prudent to ask whether the amendments created substantive rights because not all provisions of statutes create rights that plaintiffs can assert against defendants in court. Second, the court properly interpreted the federal wiretapping statute by analyzing the text of the amendments to the statute and their relation to the statute as a whole. Third, the court’s decision supported a policy that balances cities’ need to use surveillance as a protective measure and citizens’ right to privacy.

\section*{I. BACKGROUND}

\subsection*{A. Factual Background}

Debra Seitz and Greg Welter are business partners who own a property management company called Wasco Investment

\begin{itemize}
  \item \textsuperscript{13} \textit{Id.} at 659.
  \item \textsuperscript{14} \textit{Id.}
  \item \textsuperscript{15} H.R. 5037, 90th Cong. (1968) (enacted).
\end{itemize}
Corporation.\textsuperscript{16} Greg, at the time, was also a police officer with the City of Elgin. In order to carry out the company’s day-to-day operations, Seitz and Welter created email accounts with Yahoo!\textsuperscript{17}

In 2010, an employee from the City of Elgin approached Seitz with emails that she and Greg had exchanged through their Yahoo! email accounts.\textsuperscript{18} Tamara, Greg’s ex-wife, and fellow Elgin police officer, Robert Beeter, allegedly sent an anonymous letter to Elgin’s corporation counsel informing them of Greg’s use of LEADS in conjunction with his business.\textsuperscript{19} Tamara and Beeter accessed Greg’s email account, read through emails, printed the emails that are at the heart of this litigation, and sent an anonymous letter regarding those emails to the corporation counsel.\textsuperscript{20} The emails showed that Greg used the Law Enforcement Agencies Data System (“LEADS”) in conjunction with he and Seitz’s investment business.\textsuperscript{21} Greg had used LEADS to research vehicles that were parked outside the business.\textsuperscript{22} A few days later, the Chief of Police approached Greg with the emails and notified him that the city would be conducting a misconduct investigation regarding Greg’s use of LEADS.\textsuperscript{23}

\textbf{B. Procedural Background}

Seitz and Welter sued Tamara and Beeter under the FWA, the Stored Communications Act (SCA), and the Computer Fraud and Abuse Act (CFAA).\textsuperscript{24} In addition, plaintiffs sued the city of Elgin

\textsuperscript{16} Seitz v. City of Elgin, 719 F.3d 654, 655 (7th Cir. 2013).
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
under the FWA. The complaint against the city was dismissed. The court issued a minute order indicating that its decision concerning municipal liability in a prior case, *Abbott v. Village of Winthrop Harbor*, controlled: In that case, §2520 authorized no cause of action against municipalities because it did not alter the scope of §2511(1) by expanding it beyond “persons” as defined in §2510(6) of the FWA. The *Seitz* court confirmed the validity of *Abbott* and held that the 1986 amendments permit suit against government units through the addition of the word “entity” to the statutory text only through substantive provisions that identify an entity as a potential violator of that provision.

II. THE LAW: BIRTH OF THE FWA AND RELATED SUPREME COURT JURISPRUDENCE

A. The Old FWA

The origins of the FWA can be traced back to early American law. At common law, eavesdropping was a crime. However, the crime

25 *Id.*
26 *Id.*
28 *Abbott* v. *Village of Winthrop Harbor*, 205 F. 3d 976, 980 (7th Cir. 2000). In *Abbott*, the village of Winthrop Harbor decided to overhaul the emergency telephone system in 1991. The new telephone lines were hooked up to a recording device, with the exception of one line that was used by employees to make personal phone calls. In 1992, the police chief instructed an independent contractor to hook a recording device to the personal calls line, and not to tell anyone about the connection. Recordings took place for three months before the recording device was discovered. The phone line continued to be tapped until 1993 when the police chief learned of a lawsuit against the county for tapping the line without notice.
29 “Eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet; or are indictable at the sessions, and punishable by fine and finding of sureties for [their]
was seldom prosecuted, and by the end of the nineteenth century the crime had essentially vanished. But with the invention of the telegraph and telephone, states began enacting laws proscribing wiretapping, thereby preserving the common law crime of eavesdropping. Congress then enacted the first federal wiretapping statute in World War I. The statute was enacted in response to a national discovery that New York City police had been tapping telephone wires since the 1890’s. At first, the police denied using wiretaps, but then they proffered that they used wiretapping because they did not believe that the state statute prohibiting use of unauthorized wiretapping applied to them. While the first federal wiretap statute was intended to protect the leaking of government secrets during World War I, the federal government found the statute good behavior.”

4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 169 (1769).

GINA STEVES & CHARLES DOYLE, CONG. RESEARCH SERV., PRIVACY: AN OVERVIEW OF FEDERAL STATUTES GOVERNING WIRETAPPING AND ELECTRONIC EAVESDROPPING 2 (2012).

Id. at n.3 (quoting 1 BISHOP, COMMENTARIES ON THE CRIMINAL LAW, 670 (1882): “Eavesdropping is indictable at the common law, not only in England but in our states. It is seldom brought to the attention of the courts, and our books contain too few decisions upon it to enable an author to define it with confidence.... It never occupied much space in the law, and it has nearly faded from the legal horizon.”).

Id. at 2.

Id. at n.4 (citing 40 Stat.1017-18 (1918) “whoever during the period of governmental operation of the telephone and telegraph systems of the United States shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line ... or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized or entitled the receive the same, shall be fined not exceeding $1,000 or imprisoned for not more than one year or both.”); 56 CONG. REC. 10761-765 (1918).

Ayers, supra note 5, at 658.

Id.

STEVES & DOYLE, supra note 30, at 2. Congress also proscribed intercepting and intentionally disclosing or using private radio communications. The act provides that (“... no person not being authorized by the sender shall intercept any message

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increasingly useful in apprehending bootleggers during the prohibition era. Wiretaps became so prevalent that the Supreme Court decided to step in and issued a landmark decision in *Olmstead v. United States*.

In *Olmstead*, four federal prohibition officers gathered evidence for months against a gang selling liquor on the black market. The scheme was elaborate, consisting of two steamboats to take liquor to Canada, several smaller tugboats to transport liquor to places along Puget Sound near Seattle, WA, bookkeepers, salesmen, accountants, runners, and an attorney. The operation also included an office with operators. There were three telephones with three different telephone lines available from the main office.

The leading conspirator, and the general manager of the business, was a man named Olmstead. Olmstead had a telephone in his home, as did his associates. These phones, along with others in the city, were used to schedule pick up and delivery times for the liquor. One man always remained in the main office to take orders from customers, who were secretly given the call number. Sometimes, 200 orders for the sales of liquor were placed per day.

It was from this office, back and forth between Olmstead and his associates, that the federal officers planted wire-listening devices on the telephone wires. The police made the insertions without trespassing on the defendants’ property: the taps for the building were

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37 Ayers, supra note 5, at 658.
38 *Id.*
40 *Id.*
41 *Id.* at 456.
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.*
47 *Id.*
made in the basement, the tap for the residences in the streets outside. 48

The conversations heard over these wires, testified to by government witnesses, demonstrated/helped prove the conspiracy charged in the indictment. 49 Olmstead sued the federal government, claiming that the conversations obtained between him and the other defendants via wiretapping violated the Fifth and Fourth Amendments. 50

The court held that there was no Fourth Amendment violation because there was no search or seizure. 51 In addition, the police did not enter the houses or offices of the defendants. 52 The court pointed out that, even if wires were a part of the houses, which they were not, the police did not intercept defendants’ conversations from within their homes. 53 Thus, there was no fourth amendment violation and the evidence obtained from wiretapping was admissible. 54

In what has become a famous dissent, 55 Justice Brandeis noted that new ways of invading peoples’ privacy had developed, including

48 Id. at 457.
49 Id.
50 Id. at 455. The Fourth Amendment provides: 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. And the Fifth: No person… shall be compelled in any criminal case to be a witness against himself. U.S. Const. Amend IV; U.S. Const. Amend. V.
51 Olmstead, 277 U.S. at 466. The court held that Olmstead’s Fourth Amendment rights were not violated because there was no “official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure.”
52 Id.
53 Id. at 464-65.
54 Id. at 464.
55 “The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations
invasions beyond an individual’s notice. Thus, Justice Brandeis proposed that the court adopt a broad view when analyzing a Fourth Amendment violation. Specifically, Justice Brandeis argued that it does not matter where the telephone wire interception occurred. In this case, he said, an unlawful violation of defendants’ Fourth Amendment rights had occurred because the officers has listened to defendants’ telephone conversations without a warrant, with the purpose of using those conversations against defendants in court. Wiretapping constituted search and seizure, and the police officers could no more listen in to defendants’ telephone conversations without a warrant than they could seize defendants’ personal papers, for both actions involve an intrusion on defendants’ privacy.

The Supreme Court next confronted the admissibility of evidence obtained through wiretapping in Nardone v. United States in 1937. By way of legal background, Congress had just passed the Federal Communications Act (FCA) in 1934. Thus, Congress had done as

between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man’s telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.” Id. at 475-76.

Id. at 475-76. Brandeis compared the federal mail system to telephone service: both are services provided by the government, and can thus be abused in the same way.

Ayers, supra note 5, at 661.

Olmstead, 277 U.S. at 478. Justice Brandeis used an analogy to demonstrate that physical intervention need not be present for a violation of Fourth Amendment rights: if an officer unlawfully reads the contents of someone’s information on a piece of paper, the officer has not physically seized the paper, but may still be acting in violation of Fourth Amendment protections.

Id. at 478-79.

See id. at 475-76.


STEVES & DOYLE, supra note 30, at 2. 47 U.S.C.A. §605 provides: “No person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through
Justice Taft said in *Olmstead* that it was free to do: provide protection against wiretapping where the Constitution did not. 63 However, the FCA did not protect against the use of machines to record and transmit face-to-face conversations. 64 In the absence of such a statutory provision, cases challenging the use of such recording devices surged and began to erode the rationale in *Olmstead*, albeit slowly. 65

In *Nardone*, the petitioners were convicted in the lower court for conspiracy to smuggle and possess alcohol. 66 Like the police in *Olmstead*, the police in *Nardone* tapped petitioners’ telephone wires authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, to a person employed or authorized to forward such communication to its destination, to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, to the master of a ship under whom he is serving, in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority. No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.” 47 U.S.C.A. § 605 (Westlaw 2013).

63 Judge Taft wrote: “Congress may of course protect the secrecy of telephone messages by making them, when intercepted inadmissible in evidence in federal criminal trials, by direct legislation.” *Olmstead*, 277 U.S. at 465.
64 STEVES & DOYLE, supra note 30, at 3.
65 Id.
66 *Nardone*, 302 U.S. at 380.
and testified to the information thus obtained in court at trial. The Circuit Court of Appeals affirmed the convictions, and the petitioners sought certiorari. Arguing for a plain meaning interpretation of the statute, the government maintained that federal agents should not fall under the term “person” under § 605.121. However, the court found the opposite: at face value, ‘no person’ included federal agents. Thus, the Supreme Court held that the information was inadmissible because it was obtained from illegal wiretapping. The case was reversed and remanded to the district court.

The 1940’s witnessed a lack of enforcement of wiretapping laws, and thus the practice of wiretapping enjoyed resurgence. World War II precipitated the need for soldiers to intercept messages during wartime, at home and abroad. Thus, a Department of Treasury officer estimated that he installed over 10,000 wiretaps on American soil in one decade. During this time, the Supreme Court adjudicated a case where the petitioner claimed a violation of the FCA in *Goldman v. United States*. In this case, two federal offices tapped the telephone wires of petitioner to listen and record conversations within his office. Petitioner claimed that the evidence obtained from wiretapping could not be admissible at trial. The court held that the wiretapping was not a violation of the FCA because it did not meet the requirements of the statute, which provide that a communication and

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67 See id.
68 Nardone v. U.S., 90 F. 2d 630, 632 (2nd Cir. 1937).
69 *Nardone*, 302 U.S. at 380.
70 Id. at 383.
71 Id. at 381.
72 Id. at 383.
73 Id. at 385.
74 *Samuel Dash et al., The Eavesdroppers* 30 (1959).
75 Id.
76 Ayers, *supra* note 5, at 664.
78 Id. at 130.
79 Id. at 132.
interception must occur.\footnote{Id. at 133.} The court argued that there was no communication because the federal agents only heard half of the petitioner’s conversations.\footnote{Id.} Second, there was no interception, because the agents did not actually intercept the communication, rather they heard the conversations spoken into the telephone receiver.\footnote{Id.}

At the pinnacle of judicial leeway for wiretapping, and a good example of the freedom courts had to allow wiretapping due to lack of statutory provision regarding recording devices,\footnote{STEVES & DOYLE, supra note 30, at 3.} is Irvine v. United States.\footnote{347 U.S. 128, 130-31 (1954).} In that case, police were suspicious of illegal bookkeeping and so planted a concealed microphone in defendant’s hallway.\footnote{Id. at 130-31.} The microphone picked up sounds that were sent to a nearby garage where officers could listen.\footnote{Id. at 131.} The officers subsequently moved the microphone from the hallway to the bedroom, then from the bedroom to the closet.\footnote{Id.} The officers gained access to defendant’s home by having a locksmith go to the home and make a key.\footnote{Id. at 130-31.} Citing to Wolf v. Colorado,\footnote{338 U.S. 25 (1949).} the Court held that the Fourteenth Amendment does not prevent evidence obtained through unlawful search and seizure from being presented in court.\footnote{Irvine, 347 U.S. at 133-33, 136-37.}

The application of wiretapping law saw a turn with Silverman v. United States.\footnote{365 U.S. 505 (1961).} In 1958, the owner of an empty house in Washington,
D.C. allowed local officials to use the house as an observation house to help determine whether petitioner was using his premises for illicit gambling activity. The police used a “spike mike” to listen in on petitioner’s conversations. The Court of Appeals held that, like the court in Goldman, there was no violation of the FCA because there was neither a communication nor an interception. The petitioner asked that the court reconsider its holding in Olmstead and Goldman because now, new technologies were available to law enforcement officials, thereby changing the scope of municipal liability because of the possibility of invasions of privacy not previously contemplated by the legislature. The Supreme Court did not reconsider Olmstead or Goldman, but it did distinguish them. Whereas those cases involved an unknown intrusion into petitioner’s privacy via wiretapping, Silverman involved a complete trespass of petitioner’s property. This, the Court held, was a flagrant violation of petitioner’s Fourth Amendment rights.

Berger v. New York paved the way for a codification of Fourth Amendment rights regarding wiretaps. Berger itself challenged the constitutionality of a 1938 amendment to the New York state constitution to allow wiretapping. In this case, Berger was

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92 Id. at 506.
93 Id.
94 Id. at 507-508.
95 Id. at 508-509.
96 Id. at 509-11.
97 Id. at 511-512.
98 Id.
100 Ayers, supra note 5, at 672.
101 Berger, 388 U.S. at n.1 (“An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained,
convicted of bribing the Chairman of the New York State Liquor Authority.\textsuperscript{103} The State Supreme Court authorized the placing of recording devices in two of Berger’s offices.\textsuperscript{104} The Court found that the statute was unconstitutional\textsuperscript{105} for four reasons: 1) the statute lacked particularity required by the Fourth Amendment; 2) under the statute, searches were allowed to go on for two months without any probable cause; 3) Once the communication was seized, the statute outlined no termination period for eavesdropping; and 4) there was no requirement notice.\textsuperscript{106} The Court concluded, in essence, that the statute unconstitutionally permitted an invasion of home or office without warrant, contrary to the protections guaranteed under the Fourth Amendment.\textsuperscript{107}

Finally, in 1967, the Supreme Court issued its final statement on wiretapping prior to the new federal wiretapping statute.\textsuperscript{108} In \textit{Katz v. Ayers, supra} note 5, at 672.

\textsuperscript{102} \textit{Id.} at 43.
\textsuperscript{103} \textit{Id.} at 44.
\textsuperscript{104} \textit{Id.} at 45.
\textsuperscript{105} \textit{Id.} at 64.
\textsuperscript{106} \textit{Id.} at 58-60.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} Ayers, \textit{supra} note 5, at 672.
United States, the petitioner was convicted of transmitting wagering information over the telephone from California to Miami and Boston. The police attached an electronic listening devise to a public telephone where petitioner made phone calls. The Ninth Circuit rejected petitioner’s argument that his Fourth Amendment rights were violated via this process because the electronic listening device did not actually enter the telephone booth in order to record petitioner’s conversations. On appeal, the government reiterated its argument in front of the Supreme Court that petitioner could not have a reasonable expectation of privacy because the telephone booth was made of glass, so petitioner could not expect to be shielded upon entering the booth to conduct his conversations. The Court rejected this argument, arguing that when petitioner entered the telephone booth, he could close the door behind him, indicating that he could reasonably expect to have private telephone conversations. Justice Harlan’s concurrence adopted a new two-part test to determine when an individual has a reasonable expectation of privacy. Ultimately, the Court’s holding that the procedure used by the FBI was unconstitutional turned on the fact that they did not obtain the proper warrant to conduct their search.

The Court’s decision in Katz came full circle to Justice Brandeis’ dissent in Olmstead. Justice Brandeis disagreed with the majority that the Fourth Amendment’s protection against unlawful search and seizure did not include telephone conversations. When the Fourth

110 Id.
111 Id.
112 Id. at 351-52.
113 Id. at 352.
114 Id. at 361 (“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.’”).
115 Id.
116 Id. at 359.
Amendment was adopted, Brandeis notes, force and violence were the only means the government had of effecting self-incrimination. Now, however, subtler ways of invading individuals’ privacy have become available to the government, like wiretapping. Therefore, courts should extend Fourth Amendment protection to searches and seizures that relate to “the most intimate occurrences in the home,” whether that be what is written on personal papers or spoken to others via new communication devices. The Court in *Katz* agreed, holding that intrusions to privacy need not be physical in order to offend the Fourth Amendment. The Court said:

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the trespass doctrine there enunciated can no longer be regarded as controlling. The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a search and seizure within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth could have no constitutional significance.

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118 *Id.*
119 *Id.* at 473-74. Justice Brandeis said that the government will continue to obtain ways spy on private citizens that go beyond wiretapping. “The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Can it be that the Constitution affords no protection against such invasions of individual security?”
120 *Id.* at 474.
121 *Id.* at 477.
123 *Id.*
After Katz, Congress enacted the Omnibus Crime Control and Safe Streets Act, otherwise known as the Wiretap Act.\textsuperscript{124} The Omnibus Crime Control and Safe Streets Act, otherwise known as the Wiretap Act, was a comprehensive wiretapping and electronic eavesdropping statute.\textsuperscript{125} The Act outlawed both activities generally, but also addressed the concerns of the court in Berger by permitting federal and state law enforcement officers to use wiretapping and electronic eavesdropping devices under limited conditions.\textsuperscript{126} Then, in 1986, Congress enacted the Electronic Communications Privacy Act (ECPA), which did three things: 1) revised the FWA; 2) created the Stored Communications Act; and 3) added provisions governing the use of pen registers and trap and trace devices.\textsuperscript{127}

The 1986 amendments to the federal wiretapping statute added the word “entity” to §2520(a) of the FWA.\textsuperscript{128} The legislature was silent as to why they added the word “entity” to the statute. As a result, the uncertainty as to whether “person or entity” included municipalities paved the way for a circuit split between the Sixth Circuit and the Seventh Circuit.\textsuperscript{129}

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\textsuperscript{125} STEVES & DOYLE, supra note 30, at 5.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 6.
\textsuperscript{128} Seitz v. City of Elgin, 719 F.3d 654, 656 (7th Cir. 2013).
\textsuperscript{129} See generally id.; see Adams v. City of Battle Creek, 250 F.3d 980, 980 (6th Cir. 2001).
\end{flushright}
C. The Circuit Split

Amati v. City of Woodstock was the first case to consider whether municipalities were liable under the FWA since the 1986 amendments to the FWA statute.\(^{130}\) In Amati, several Woodstock policemen brought suit against the City of Woodstock and the Chief of Police, as well as another police officer, for intercepting calls on a telephone line reserved for private calls at the police department.\(^{131}\) The telephone system maintained for the transmission of telephone communications to and from the police department had, at least since 1982, kept one telephone wire untapped for the private communications of department personnel.\(^{132}\) In December of 1982, the police department circulated a memorandum indicating that line 338-7799 was intentionally left untapped for personal phone calls.\(^{133}\) In June of 1991, the Chief of Police sought and received authorization to intercept the private line.\(^{134}\) Personal were never notified, and the practice continued until 1992.\(^{135}\) At that time, the Chief of Police told another police officer, one plaintiff, that the department had been intercepting calls on the private line since 1991.\(^{136}\) That was the first notice plaintiffs received that the policy set forth in the 1982 memorandum was no longer effective.\(^{137}\)

The Plaintiffs argued that the addition of the word “entity” to §2520 of the FWA authorized recovery of civil damages against governmental units.\(^ {138}\) But in order to determine whether the police could prevail against the city for violating the wiretapping statute, the

\(^{130}\) Brief of the Defendant-Appellee City of Elgin, Seitz v. City of Elgin, 719 F.3d 654 (7th Cir. 2013), at 24.
\(^{132}\) Id.
\(^{133}\) Id. at 1001.
\(^{134}\) Id.
\(^{135}\) Id.
\(^{136}\) Id.
\(^{137}\) Id.
\(^{138}\) Id. at 1002.
court looked to a congressional comment concerning the definition of “person” and found that Congress was clear about excluding governmental units from its definition. The court concluded that the legislative history of the 1986 amendments clearly did not support suit against government entities simply by adding the word “entity” to §2520 of the statute.

Then, in Abbott v. Village of Winthrop Harbor, the court held again that §2520 authorized no cause of action against municipalities because it did not alter the scope of §2511(1) by expanding it beyond “persons” as defined in §2510(6) of the FWA. In Abbott, the village of Winthrop Harbor decided to overhaul the emergency telephone system in 1991. The new telephone lines were hooked up to a recording device, with the exception of one line that was used by employees to make personal phone calls. In 1992, the police chief instructed an independent contractor to hook a recording device to the personal calls line, and not to tell anyone about the connection. Recordings took place for three months before the recording device was discovered. The phone line continued to be tapped until 1993 when the police chief learned of a lawsuit against the county for tapping the line without notice. The court rejected plaintiff’s argument that adding the word “entity” to §2520 evinced congressional intent to subject cities to suit under the statute. Rather, the court was persuaded by the fact that Congress did not modify the definition of the word “person” in §2510(6), which expressly excludes governmental entities.

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139 Id.
140 Id. at 1003.
141 Abbott v. Village of Winthrop Harbor, 205 F.3d 976, 980 (7th Cir. 2000).
142 Id. at 978.
143 Id.
144 Id. at 979.
145 Id.
146 Id.
147 Id. at 980.
148 Id.
The only other Circuit to decide whether municipalities are subject to suit under the FWA was the Sixth Circuit in *Adams v. City of Battle Creek*.

In that case, The City of Battle Creek Police Department tapped a police officer’s pager because they believed he was assisting drug dealers.

The police department had no warrant for tapping the officer’s pager and did not give him notice.

The Sixth Circuit argued that the proper approach to determining liability for municipalities under the FWA was to look at the legislative history.

The Court said: “The provision of the Act providing for civil liability, § 2520, was amended in 1986 and made part of the 1986 Privacy Act. The amendment added the words "or entity" to those who may be held liable under the Act. The addition of the words "entity" can only mean a governmental entity because prior to the 1986 amendments, the definition of "person" already included business entities. In order for the term not to be superfluous, the term "entity" necessarily means governmental entities.”

Then, the court drew support from the legislative history of the Stored Communications Act, which expressly included government entities in the definition of “entity.” Based on the 1986 amendments and their legislative history, the court held that government entities are liable under §2520.

The Seventh Circuit in *Seitz* agreed that the meaning of “entity” included municipalities, but split with the Sixth Circuit on whether the amended portion of the statute itself created any substantive rights.

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150 *Adams v. City of Battle Creek*, 250 F.3d 980, 982 (6th Cir. 2001).
151 *Id.*
152 *Id.* at 985.
153 *Id.*
155 *Adams*, 250 F. 3d at 985.
156 *Id.*
157 Seitz v. City of Elgin, 719 F.3d 654, 659 (7th Cir. 2013).
D. The Seitz Rationale

Seitz and Welter sued Tamara and Beeter under the FWA, the Stored Communications Act (SCA), and the Computer Fraud and Abuse Act (CFAA). Plaintiffs also sued the city of Elgin under the FWA. Judge Lefkow dismissed the complaint against the city. The court held that cities could not be liable under §2511(c-d) of the FWA. On appeal, a three-member panel of the Seventh Circuit affirmed Judge Lefkow’s decision, finding that “§ 2520 itself creates no substantive rights. Rather, it simply provides a cause of action to vindicate rights identified in other portions of the FWA, specifically communications “intercepted, disclosed, or intentionally used in violation of this chapter.” Plaintiffs accused the City of violating § 2511(1)(c-d), which prohibits only “any person” from intentionally disclosing or using communications intercepted in violation of the FWA. The definition of “person,” the court stated, does not include municipalities. Therefore, § 2511(1)(c-d) is not made actionable by § 2520.

Notably, the majority found not only that “nothing in the 1986 amendments altered the scope of the violation by expanding it beyond “persons” as defined by the FWA,” but it also went on to say that this reading of the statute would give meaning to each word of the statute “only if the FWA somewhere else creates a substantive right against an entity.” On this point, the court found that §2511(3)(a)
was added by the same 1986 law that wrote “or entity” into §2520.\textsuperscript{167} §2511(3)(a) prohibits “a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.”\textsuperscript{168} Thus, §2511(3)(a) creates enforceable rights against an entity, and, if Congress had not altered §2520 to add the words “or entity,” plaintiffs could enforce their rights against a “person” in violation of §2511(3)(a) but not an entity, even though §2511(3) includes both.\textsuperscript{169} The court’s decision avoids this pitfall.\textsuperscript{170}

As to the court’s approach to determining whether §2520 creates an enforceable right against municipalities in \textit{Adams}, the majority began by asserting that the court did not consider whether §2520 created any substantive rights and did not consider whether other provisions of the statute provided a civil cause of action against an entity.\textsuperscript{171} The \textit{Adams} court concluded that governmental units were “entities” under §2520 and found that therefore §2520 brought municipalities within the scope of liability.\textsuperscript{172} Writing for the majority in \textit{Seitz}, Judge Flaum said that to reach its decision in \textit{Adams}, the Sixth Circuit inappropriately relied on the legislative history of a closely related act: the SCA.\textsuperscript{173} Judge Flaum described how the legislature created §2707(a)\textsuperscript{174} of the SCA when it amended §2520 of the FWA.\textsuperscript{175} The Senate Committee Report summarizing §2707 states

\begin{itemize}
  \item \textsuperscript{167} \textit{Id.}  
  \item \textsuperscript{168} 18 U.S.C.A. §2511(3)(a).  
  \item \textsuperscript{169} \textit{Seitz}, 719 F.3d at 658-59.  
  \item \textsuperscript{170} \textit{Id.} at 660.  
  \item \textsuperscript{171} \textit{Id.} at 659.  
  \item \textsuperscript{172} \textit{Id.}  
  \item \textsuperscript{173} \textit{Id.}  
  \item \textsuperscript{174} 18 U.S.C.A. §2707(a).  
  \item \textsuperscript{175} \textit{Adams v. City of Battle Creek}, 250 F.3d 980, 985 (6th Cir. 2001).
\end{itemize}
that the word entity includes governmental units.\textsuperscript{176} However, the
Seventh Circuit said, this is where the Court in \textit{Adams} ends its analysis
of the legislative history of the SCA to give meaning to the word
entity.\textsuperscript{177} Noting that the same law that created §2520 created the SCA,
§2707 uses the same “person or entity” language found in §2520.\textsuperscript{178} But §2707, like §2520, does not create any substantive rights.\textsuperscript{179}
Unlike §2511(1) of the FWA, which specifies the word “person,” the
relevant provision of the SCA speaks in much broader terms:

\begin{quote}
[W]hoever--(1) intentionally accesses without authorization a
facility through which an electronic communication service is
provided; or (2) intentionally exceeds an authorization to
access that facility; and thereby obtains, alters, or prevents
authorized access to a wire or electronic communication
while it is in electronic storage in such system shall be
punished as provided in subsection (b) of this section.\textsuperscript{180}
\end{quote}

Thus, the SCA is written in language that includes persons,
entities, business, and governmental units within the scope of liability.
The legislative history of the SCA, then, does not truly parallel the
FWA,\textsuperscript{181} because the broad use of the term “whoever” does not
provide guidance for determining the scope of the word “person”
under §2511(1) of the FWA.\textsuperscript{182}

The majority in \textit{Seitz} agreed with the Sixth Circuit in that
“entities” included government units. In a footnote in the opinion, the
court notes:

\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Seitz}, 719 F.3d at 659-60.
\textsuperscript{178} \textit{Id.} The court notes that Patriot Act later amended §2707, like it did §2520,
to exclude the United States, and that a Senate Report makes clear that “entity”
includes government units.
\textsuperscript{179} \textit{Id.} at 659.
\textsuperscript{180} \textit{Id.} (quoting 18 U.S.C. 2701(a)).
\textsuperscript{181} \textit{Id.} at 659-660.
\textsuperscript{182} \textit{Id.} at 660.
Plaintiffs argue for the first time in their reply brief that the City is vicariously liable even under the original definition of person. Because that definition includes “any employee, or agent of ... any State or political subdivision” and because a municipality may only act through its employees or agents, plaintiffs argue an employee's or agent's violation of the FWA renders the municipality vicariously liable. First, plaintiffs have waived this argument by raising it only in their reply brief. See Bracey v. Grondlin, 712 F.3d 1012 (7th Cir. 2013). Second, plaintiffs offer no argument or authority establishing municipalities as “political subdivisions” of the state under the FWA (a question we leave open in this opinion). But even assuming no such deficiencies, this argument nevertheless falls short. Monell v. Department of Social Services declined to impose vicarious liability on municipalities under § 1983 when neither the text nor the legislative history of the statute offered any support for doing so. 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978). So too here. The statutory text and the legislative history from the original 1968 enactment of the FWA both underscore that §2520 did not impose liability on “governmental units,” either directly or under a theory of vicarious liability.¹⁸³

Additionally, the court noted that if Congress wanted plaintiffs to be able to sue municipalities under the FWA, it would have been clearer.¹⁸⁴

III. ANALYSIS

The Seventh Circuit’s decision in Seitz is correct for three reasons: First, the court asked whether the amendments created substantive rights, meaning did the amendments provide for a cause of action as

¹⁸³ Id. at n.3.
¹⁸⁴ Id. at 660.
opposed to expanding liability as a means of vindicating rights stated elsewhere in the act. The question is important because not all provisions of statutes create rights that plaintiffs can assert against defendants in court. Second, the court properly interpreted the federal wiretapping statute by analyzing the text of the amendments to the statute and their relation to the statute as a whole. Third, the court’s decision supported a policy that balances cities’ need to use surveillance as a protective measure and citizens’ right to privacy.

A. Substantive Rights

The majority opinion properly interpreted the FWA on the question of municipal liability. It did so by asking a simple but crucial question: do the 1986 amendments to the statute allow plaintiffs to assert a legal right? To answer this question, the majority first tackled the statute’s amendments at issue in the litigation, which provide: “(a) In General — Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.”

However, the court also looked to a provision elsewhere in the statute, which addresses liability for municipalities, and concluded that this provision indicates that §2520 does not itself create a right to sue municipalities. § 2511(3)(a) provides: “Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended

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186 Seitz, 719 F.3d at 658.
recipient of such communication or an agent of such addressee or intended recipient.”

The majority’s review of §2520 and §2511(3)(a) was necessary because without first making a determination of whether a specific provision confers substantive rights, the court risked bestowing a right upon an unintended beneficiary. Aside from the obvious textual difference that, unlike § 2520, § 2511(1)(c-d) refers only to actions taken by a “person,” the amended portion of the statute clearly does not confer a right that plaintiffs could assert against municipal defendants, because the fact that §2511(3)(a) prohibits a “person or entity” from unlawfully intercepting communications means that each word in § 2520 has meaning. In other words, § 2511(1)(c-d) does not create a cause of action against municipalities because Congress did not change the definition of the word “person” to include municipalities when it added the word “entity” to §2520. § 2511(3)(a) allows for suits against defendants other than persons, and the amendments that altered this provision also had to alter § 2520 to include the word entity, or an absurd result would have occurred.

B. Textualist Statutory Interpretation

The majority opinion stated that the definition of entity excludes municipalities. In doing so, the majority gave proper deference to the doctrine that requires courts to give meaning to every word of the statute. Explained another way, the Seventh Circuit looked to the plain meaning of “person” and “entity” to resolve the ambiguity as to


188 Seitz, 719 F.3d at 660 (“If ‘entity’ does not extend to government units, it adds nothing to the statute. And if we subject governmental units to suit for violations of §2511(1), we ignore the statute’s use of ‘person’ rather than ‘person or entity.’ Our interpretation avoids both of these pitfalls, giving due weight to the addition of ‘entity’ while remaining faithful to the plain text of §2511(1).”).

189 Id. at 658 (quoting Walters v. Metro. Educ. Enters., 519 U.S. 202, 209 (1997); “We must give effect to each word when interpreting statutes”); see Damato v. Hermanson, 153 F.3d 464, 470 (7th Cir. 1998) (“Statutes must be interpreted, if possible, to give each word some operative effect.”).
whether municipalities are liable under the FWA amendments. A plain meaning approach is consistent with a textualist style of statutory interpretation. “Textualists argue that looking beyond the text raises constitutional concerns. Textualists ‘would hold Congress to the words it used…[T]o do otherwise would permit Congress to legislate without completing the required process for enactment of legislation.’”

Consistent with this doctrine, the court looked to the text of § 2510(6) of the FWA. §2510(6) defines the word person. It reads: “A person is “any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation.” The definition of “person” clearly excludes government units.

Thus, the court aptly reasoned in Seitz, under the original composition of the statute in 1968, a plaintiff could sue “persons” but not municipalities, because the meaning of “persons” was inapplicable to municipalities.

The Seventh Circuit thus held to the credo that absent legislative intent to the contrary, statutory language must be regarded as comprehensive. In addition, courts should not only look to the particular statutory language at issues, but they should also look to the language and design of the statute as a whole.

The court’s method for interpreting “entity” is consistent with its textualist approach to resolving the statutory controversy in this case. Textualists look at the language of the statute at issue, the act as a whole, and the language of other statutes to communicate meaning. In addition, textualists consult dictionaries to find the plain meaning of

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190 JELLUM & HRICIK, MODERN STATUTORY INTERPRETATION 17 (quoting Carol Chomsky, Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation, 100 COLUM L. REV. 901, 951 (2000)).
192 Seitz, 719 F.3d at 656.
194 See Seitz, 719 F.3d at 660.
195 JELLUM & HRICIK, supra note 189, at 17.
the language at issue. Thus, here the court relied on the dictionary to define the word “entity.” An entity is: “An organization (such as a business or a governmental unit) that has a legal entity apart from its members or owners.” Thus, the court found that plaintiffs are right: “entity” reaches municipalities. If it did not, the 1986 amendments would not have contributed anything to the statute because the word “persons” already included organizations such as businesses.

Where the court disagreed with plaintiffs, however, and with the Sixth Circuit, is that just because the word “entity” includes government units does not mean it confers a right of action under §2520. Rather than cut its analysis short after determining that “entity” includes government entities, the court held the legislature to their words by recognizing the statute’s use of “person” in § 2511(1) rather than “person or entity.”

In Adams, the Sixth Circuit noted the legislature amended §2707(a) of the SCA when it amended §2520. The Senate Committee Report summarizing §2707 stated that the word entity includes governmental units. The Adams Court ended its analysis of legislative history to give meaning to the word entity here. But, its analysis is conclusory and ignores the statute’s use of “person” in § 2511(1) rather than “person or entity.” The Seventh Circuit steered clear of this mistake by taking a textualist approach to the language of the FWA and “holding Congress to the words it used.”

196 Id.
197 Seitz, 719 F.3d at 657.
198 BLACK’S LAW DICTIONARY 269 (4th pocket ed. 2011).
199 Seitz, 719 F.3d at 657.
200 Id.
201 Id.
202 JELLUM & HRICIK, supra note 189, at 20.
203 Adams v. City of Battle Creek, 250 F.3d 980, 985 (6th Cir. 2001).
204 Id.
205 JELLUM & HRICIK, supra note 189, at 951.
C. Policy

In an important footnote, the majority expressed concern that the court take care to determine, when asking whether someone may vindicate a particular statutory right, that the statute confers a right on identifiable persons, and whether that plaintiff is a member of that class of identifiable persons. Thus the majority, unlike the Sixth Circuit in Adams, was careful not to confer liability on municipalities contrary to Congress’s intent. To have held otherwise would have been tantamount to creating a problem in search of a solution.

In his dissent in Adams, Judge Krupansky said “[i]n enacting the Wiretapping Act, Congress did not intend to prohibit all wiretapping or electronic monitoring.” Indeed, the preamble to the FWA states that the act’s purpose is “[t]o assist State and local government in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government and for other purposes.” Congress recognized that reducing crime and protecting citizens from criminal behavior is a paramount social value. To achieve its goal, law enforcement must have an effective means of keeping pace with criminal activity, and wiretapping has proved to be an effective means of combatting crime.

On the other side of the debate, Justice Posner expressed concern for intrusions upon people’s privacy:

In the absence of market discipline, there is no presumption that the government wills strike an appropriate balance between disclosure and confidentiality. And the enormous power of the government makes the potential consequences
of its snooping into people's private lives far more ominous than those of snooping by a private individual or firm.  

But, Judge Posner affirmed of the lower court’s dismissal of the suit against a municipality in Amati v. Woodstock. And, while Americans have expressed grave concern for their privacy in the modern technological age, courts have shown that they can uphold these interests while balancing the government’s interest in matters of public safety and security. For example, the Supreme Court rejected the administration’s use of wiretaps on Americans even during wartime. The court said:

Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. . . . The Fourth Amendment contemplates a prior judicial judgment, . . . [and] [t]his judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the difference branches and levels of Government. . . . We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. . . Thus, we conclude that the Government’s concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance.

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211 Ayers, supra note 5, at 688.
214 Id. at 317-21.
Similarly, in his dissent in *Nardone*, Justice Sutherland stated:

I think the word ‘person’ used in this statute does not include an officer of the federal government, actually engaged in the detection of crime and the enforcement of the criminal statutes of the United States, who has good reason to believe that a telephone is being, or is about to be, used as an aid to the commission or concealment of a crime. The decision just made will necessarily have the effect of enabling the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court. If Congress thus intended to tie the hands of the government in its effort to protect the people against lawlessness of the most serious character, it would have said so in a more definite way than by the use of the ambiguous word ‘person.’

Both of the aforementioned language from the Supreme Court are examples of a very important judicial policy: statutes should not be read to curtail government intrusion at the expense of the safety of the people unless it is Congress’s clear intent to enact such a law.

Furthermore, Professor Robert Blakey testified before Congress in 1967:

So it is necessary to subject the known criminals to surveillance, that is, to monitor their activities. It is necessary to identify their criminal and noncriminal associates; it is necessary to identify their areas of operation, both legal and illegal. Strategic intelligence attempts to paint this broad, overall picture of the criminal's activities in order that an investigator can ultimately move in with a specific criminal investigation and prosecution.

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216 *Ayers, supra* note 5, at 676.
continue to possess the authority to safeguard the vital interests of the people.\textsuperscript{217}

It is fair to say that Americans are concerned about government inference with their private lives, particularly through interference with personal technological devices like cell phones and computers.\textsuperscript{218} However, courts should take a balanced approach to upholding civil liberties and security interests. That the Seventh Circuit found cities are immune from suit under the FWA does not mean its decision is “cursory,” as the Sixth Circuit suggested; on the contrary, the court appropriately read meaning in every word of the statute and noted that legislative history did not impose liability on governmental units under §2520.

It is important to note that the Seventh Circuit is not alone in its approach. The Supreme Court declined to bring municipalities within the ambit of potential liability when “neither the text nor the legislative history of the statute offered any support for doing so.”\textsuperscript{219} For example, in \textit{Monell v. Department of Social Services of City of New York},\textsuperscript{220} a class of female employees of the Department of Social Services and of the Board of Education of the City of New York sought injunctive relief and backpay for unlawful forced maternity leaves.\textsuperscript{221} Like the Seventh Circuit in \textit{Seitz}, the Court took note of the legislative history of 42 U.S.C. § 1983, a federal law that allows lawsuits for violations of constitutional rights.\textsuperscript{222} The Court analyzed four distinct stages of the bill that became the Civil Rights Act of 1983\textsuperscript{223}: proposal, amendment, first conference report, and second conference report. The second conference report abandoned municipal

\begin{footnotesize}
\begin{enumerate}
\item Fenrich, \textit{supra} note 212, at 962.
\item \textit{Seitz v. City of Elgin}, 719 F.3d 654 n.3 (7th Cir. 2013).
\item 436 U.S. 658 (1978).
\item \textit{Id.} at 660-61.
\item 42 U.S.C. § 1983.
\item \textit{Monell}, 436 U.S at 665.
\end{enumerate}
\end{footnotesize}
liability and made “any person or persons having knowledge [that a conspiracy to violate civil rights was afoot], and having power to prevent or aid in preventing the same,” liable to any person injured by the conspiracy. Section 1 of that bill is now codified as 42 U.S.C. 1983.

After analyzing the four distinct stages of legislative history through the lens of the debate of the first conference committee, the Court concluded that municipalities and local government units are included among those persons to whom § 1983 applies. However, like the Seventh Circuit, the Court analyzed the language of § 1983 against the backdrop of the legislative history and declined to impose liability on municipalities directly or under a theory of vicarious liability.

§ 1983 provides: “Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ”

The Court reasoned that the plain language of the statute imposes liability on a government that causes an employee to violate another’s

224 Id. at 668.
226 Monell, 436 U.S at 669.
227 Id. at 665.
228 Id. at 724 n.54. The Court notes there is no constitutional impediment to municipal liability. “The Tenth Amendment’s reservation of non-delegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.” (quoting Miliken v. Bradley, 433 U.S. 267, 291 (1977)). “Nor is there any basis for concluding that the Eleventh Amendment is a bar to municipal liability. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Lincoln County v. Luning, 133 U.S. 529, 530 (1890).” Id.
229 Id.
230 Id.
constitutional rights. Furthermore, that statute cannot be read to impose liability on a government vis-a-vis its employee. The fact that Congress did not write that a person is liable for another person’s tort when they caused that person to commit the tort against another suggests that Congress did not intend to bring municipalities within the ambit of liability absent such a cause.

CONCLUSION

In his dissent in Adams, Judge Krupansky said “[i]n enacting the Wiretapping Act, Congress did not intend to prohibit all wiretapping or electronic monitoring.” In declining to bring municipalities within the ambit of potential liability under the FWA unless through substantive provisions that identify an entity as a potential violator of that provision, the Seventh Circuit held Congress to the language it used in the Act and firmly upheld Congress’s policy to balance cities’ need to use surveillance as a protective measure against citizens’ right to privacy. While the Sixth Circuit found §2520 of the FWA alone subjects municipalities to suit, the statute plainly indicates it creates a substantive right against an “entity” elsewhere in the statute. As a result of the split between the Sixth and Seventh circuits on how the FWA applies to municipalities, this issue may yet reach the Supreme Court.

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231 Monell, 436 U.S at 692.
232 Id.
233 Id.
234 Adams v. City of Battle Creek, 250 F.3d 980, 993 (6th Cir. 2001).
235 Seitz, 719 F.3d at 657.

233