NOTE

Electronic Surveillance and Antitrust Investigations: The Effect of the Reauthorized Patriot Act

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INTRODUCTION

A corporate executive goes about his daily tasks, debating the merits of different business strategies with his colleagues.[1] He feels secure discussing highly confidential plans and potential tactics with others.[2] He knows he and his coworkers must keep such information to themselves.[3]

One morning he picks up the newspaper to find his company's plans and strategic decisions strewn across the front page. Remembering the duties he owes to the company, he wonders how such information could have leaked. He later learns law enforcement officials used electronic surveillance to eavesdrop on his business in an attempt to gather evidence for an antitrust investigation. The government then made its recordings public during court proceedings.

Although this scenario seems shocking from the standpoint of businesses, it is now a very real possibility.[4] As part of the ongoing "War on Terror," Congress expanded federal wiretapping provisions in the USA PATRIOT Improvement and Reauthorization Act ("Reauthorized Patriot Act").[5] According to section 113(g)(3) of the Reauthorized Patriot Act, federal law enforcement officials may use electronic surveillance in antitrust investigations.[6] The new grant of

[1] The following hypothetical is based on *The Informant*, a novel recounting the events surrounding the antitrust case against Archer Daniels Midland Company ("ADM"). KURT EICHENWALD, THE INFORMANT (2000). In *The Informant*, a corporate executive agreed to become a confidential government witness in an antitrust investigation of ADM. *Id.* at 7-8. The witness gathered much of the evidence against ADM by secretly recording conversations about illegal activities while wearing a wire. *Id.*

[2] *See id.*

[3] *See* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (explaining fiduciary relationship involves highest degree of honor and trust); MODEL BUS. CORP. ACT §§ 8.30, 8.42 (3d ed. rev. 2005) (imposing fiduciary duties on directors and officers of corporations); RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006) (stating principal-agent relationship exists between corporation and officer); *supra* note 1.

[4] *See* 18 U.S.C. § 2518 (2000) (providing guidelines for law enforcement officials to disclose information from electronic surveillance); USA PATRIOT Improvement and Reauthorization Act of 2005 § 113(g)(3), Pub. L. No. 109-177, 120 Stat. 192, 210 (2006) (authorizing DOJ to use wiretapping in antitrust investigations); *see also* discussion *infra* Parts II-III.A.

[5] *See* § 113(g)(3); *see also infra* Part II (discussing parameters of Reauthorized Patriot Act).

[6] § 113(g)(3); *see* 18 U.S.C. § 2516(1)(r) (Supp. IV 2004) (including violations of Sherman Antitrust Act as offense predicating use of electronic surveillance).

authority, however, risks catching innocent communications in its net.[7]

Section 113(g)(3) allows the Department of Justice ("DOJ") to listen in on businesses.[8] When the DOJ overhears sensitive information, an issue arises with respect to the wiretapping of legitimate business interactions.[9] The new provision opens the door for the DOJ to release such sensitive information to the public.[10]

This Note proposes courts should narrowly interpret section 113(g)(3) to only apply to antitrust investigations connected with terrorism.[11] Part I begins with an overview of applicable laws.[12] It discusses federal wiretapping provisions, the Sherman Antitrust Act ("Sherman Act"), state business laws, and canons of statutory construction.[13] Part II examines the specific terms of section 113.[14] Part III analyzes the possible effects of the statute and suggests how courts could mitigate those effects.[15] Finally, the Conclusion urges courts to adopt a narrow interpretation of section 113(g)(3).[16]

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[7] *See supra* note 1; *see also* § 2518 (providing guidelines for law enforcement officials to disclose information from electronic surveillance); *infra* Part II (noting broad applicability of literal language in section 113(g)(3) due to wide scope of Sherman Act).

[8] *See* 15 U.S.C. §§ 1-2 (2000 & Supp. IV 2004) (prohibiting trusts, monopolies, and other combinations in restraint of trade); § 113(g)(3).

[9] *See supra* notes 1, 7; *infra* Part III.A (discussing how literal application of section 113(g)(3) would undermine general corporate law).

[10] 18 U.S.C. § 2517(1), (3) (2000). Law enforcement officers are not required to keep surveillance contents private. *Id.* The statute specifically authorizes officers to communicate information obtained through electronic surveillance to other officers as well as in open court. *Id.* (authorizing officers to disclose contents of electronic surveillance while giving testimony under oath, and to other law enforcement officers where appropriate). Where court proceedings are public, such an authorized communication could make any confidential information obtained by electronic surveillance public. *See supra* note 1. *See generally* United States v. Rosenthal, 763 F.2d 1291 (11th Cir. 1985) (holding public has right to access judicial materials with respect to wiretapping materials that DOJ legally intercepted and court admitted into evidence).

[11] Such an interpretation would be in accordance with the provision's context and legislative intent. § 113; H.R. REP. NO. 109-333, at 94 (2005) (stating section 113 adds new wiretap predicates relating to crimes of terrorism to 18 U.S.C. § 2516).

[12] *See* discussion *infra* Part I.

[13] *See* discussion *infra* Part I.

[14] *See* discussion *infra* Part II.

[15] *See* discussion *infra* Part III.

[16] *See* discussion *infra* CONCLUSION.

I. BACKGROUND

Section 113(g)(3) of the Reauthorized Patriot Act authorizes the DOJ to use wiretapping in investigations of Sherman Act violations.[17] Section 113(g)(3) wiretaps must meet federal wiretapping requirements.[18] Yet, this provision also implicates state law because the Sherman Act regulates businesses, which are creatures of state law.[19] Thus, the interplay of state and federal law is relevant to the application of section 113(g)(3).[20]

A. Wiretapping Provisions

Congress set out the federal wiretapping provisions in two sections of the U.S. Code: 18 U.S.C. § 2516 and 18 U.S.C. § 2518.[21] Federal authorities may use electronic surveillance in connection with the predicating offenses enumerated in § 2516(1).[22] Generally, the statute permits the use of wiretaps as an investigative technique in combating

[17] USA PATRIOT Improvement and Reauthorization Act of 2005 § 113(g)(3), Pub. L. No. 109-177, 120 Stat. 192, 210 (2006) (adding violations of Sherman Antitrust Act as offense predicating use of electronic surveillance).

[18] *See* 18 U.S.C. § 2518(3) (2000) (requiring judicial approval and setting forth prerequisites for obtaining such approval).

[19] 15 U.S.C. §§ 1-2 (2000 & Supp. IV 2004) (prohibiting trusts, monopolies, and other combinations in restraint of trade); United States v. Bestfoods, 524 U.S. 51, 63 (1998) (deferring to state law over federal law on issue of corporate law); United States v. Texas, 507 U.S. 529, 534 (1993) (holding statute must speak directly on issue covered in common law to abrogate common law principle); Burks v. Lasker, 441 U.S. 471, 478 (1979) (finding state corporation law still relevant even though action based on federal statute); Kerrigan's Estate v. Joseph E. Seagram & Sons, 199 F.2d 694, 697 (3d Cir. 1952) (holding partnership governed by laws of state where partnership was formed); Koh v. Inno-Pac. Holdings, Ltd., 54 P.3d 1270, 1272 (Wash. Ct. App. 2002) (noting partnership interest governed by laws of state where partnership was formed); *see also* 59A AM. JUR. 2D *Partnership* § 28 (2003) (stating rights and obligations of partners among themselves are generally determined by law of state where partnership contract is made); discussion *infra* Part III.A. States generally define partnership to include limited liability partnerships. *See, e.g.*, ARIZ. REV. STAT. ANN. § 29-1001(7) (1998) (stating "limited liability partnership" means partnership or limited partnership that has filed statement of qualification); DEL. CODE ANN. tit. 6, § 15-202 (2005) (noting limited liability partnership means partnership formed pursuant to agreement governed by laws of state); *see also* CAL. BUS. & PROF. CODE § 16601 (West 1997 & Supp. 2007); FLA. STAT. ANN. § 620.8101 (West 2007); N.Y. P'SHIP LAW § 121-1500 (McKinney 2006 & Supp. 2007).

[20] *See Bestfoods*, 524 U.S. at 63; *Texas*, 507 U.S. at 534; *Burks*, 441 U.S. at 478.

[21] 18 U.S.C. § 2516 (2000 & Supp. IV 2004); § 2518.

[22] § 2516(1).

inherently serious crimes, especially those involving aspects of organized crime.[23]

Section 2518 describes the procedure for obtaining authorization for electronic surveillance.[24] It enumerates strict requirements for obtaining judicial approval of electronic surveillance and places limitations on the surveillance once a court has given authorization.[25] This section represents a congressional balancing of the need for crime control and the protection of the right to privacy.[26] Although Congress provided an additional tool for law enforcement, courts have noted that Congress's primary concern was protecting privacy.[27] In light of this concern, courts interpret the requirements of the wiretapping provisions strictly.[28] Despite the difficulty in suppressing authorized surveillance in court proceedings, the detailed

[23] *See* United States v. Frederickson, 581 F.2d 711, 715 (8th Cir. 1978) (holding electronic surveillance is available for investigation of any offense enumerated in § 2516, whether or not felony).

[24] § 2518. First, the DOJ must have probable cause for belief that a particular offense enumerated in 18 U.S.C. § 2516 has been, or is about to be, committed. *Id.* Second, the DOJ must have probable cause for belief that it will intercept the particular communications concerning that offense. *Id.* Moreover, electronic surveillance is available only where the DOJ has already tried other, less invasive investigative procedures that have failed, or appeared unlikely to succeed. *Id.* Finally, the DOJ must have probable cause for belief that criminals will use a particular communication facility in connection with the offense. *Id.*

[25] § 2518(3), (5). The DOJ must limit the duration of its surveillance to the time necessary to achieve the authorization's goal. § 2518(5). In any event, surveillance may not exceed 30 days. *Id.* The DOJ must also conduct the surveillance to minimize the interception of communications not subject to interception under § 2516. *Id.*

[26] The purpose of such restrictions is to protect the public from the invasiveness of electronic surveillance. *See* United States v. King, 478 F.2d 494, 505 (9th Cir. 1973) (noting requirements of § 2518 represent heart of congressional scheme rather than mere technicalities); *see also* United States v. Lyons, 507 F. Supp. 551, 553-54 (D. Md. 1981) (noting protection of privacy was overriding congressional concern in enacting § 2518); *cf.* United States v. Giacalone, 455 F. Supp. 26, 38 (E.D. Mich. 1977) (noting statutory requirements evidence congressional intention to limit use of interception procedures to situations clearly calling for such extraordinary investigative devices).

[27] *See* Gelbard v. United States, 408 U.S. 41, 47 (1972) (holding fundamental policy of chapter is to safeguard privacy of innocent persons); *King*, 478 F.2d at 505; *Lyons*, 507 F. Supp. at 553-54.

[28] *See* Berger v. New York, 388 U.S. 41, 63 (1967); *King*, 478 F.2d at 505; *see also Lyons*, 507 F. Supp. at 553 (quoting United States v. Clemente, 482 F. Supp. 102, 106 (S.D.N.Y. 1979)) (noting courts view electronic surveillance as one of greatest existing threats to liberty).

prerequisites and their strict enforcement emphasize the protective nature of the wiretapping provisions.[29]

B. The Sherman Antitrust Act

Section 113(g)(3) amends the list of predicate offenses in § 2516, but ultimately addresses investigations of Sherman Act violations.[30] Congress enacted the Sherman Act in 1890 to protect commerce from trade restraints and monopolies.[31] The economic theory behind the Sherman Act is that, over time, a competitive market spurs production and results in efficient prices.[32] Unfettered competition leads to the most efficient allocation of resources, lowest prices, and highest quality goods.[33] Specifically, the Sherman Act prohibits: (1) trusts and other combinations in restraint of trade or commerce and (2) monopolies of trade or commerce.[34] Violations include, *inter alia*, price fixing, unduly restrictive agreements not to compete, certain vertical arrangements, and horizontal agreements between

[29] *See* 18 U.S.C. § 2518(10)(a)(i)-(iii) (setting forth circumstances under which courts may suppress such evidence); 29 AM. JUR. 2D *Evidence* §§ 618-619 (1994) (noting facial invalidity and failure to comply with authorization order as grounds for suppression in court); *supra* notes 24, 28 and accompanying text.

[30] USA PATRIOT Improvement and Reauthorization Act of 2005 § 113(g)(3), Pub. L. No. 109-177, 120 Stat. 192, 210 (2006) (adding Sherman Act violations to wiretap predicates in § 2516); *see* 15 U.S.C. §§ 1-7 (2000 & Supp. IV 2004); 18 U.S.C. § 2516 (2000 & Supp. IV 2004).

[31] Sherman Antitrust Act, ch. 647, §§ 1-3, 26 Stat. 209, 209 (1890) (stating purpose of act is to protect trade and commerce from unlawful restraints and monopolies). *See generally* 58 C.J.S. *Monopolies* § 21 (1998) (discussing congressional response to combinations in restraint of trade); George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985) (discussing history of Sherman Act).

[32] *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (noting Sherman Act reflects legislative judgment that competition yields lower prices and better goods and services); *see also* Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) (noting competition is heart of national economic policy); United States v. Nat'l Lead Co., 63 F. Supp. 513, 525 (S.D.N.Y. 1945) (finding competition to be most effective stimulus to production and better regulator of prices than any less-than-competitive economy).

[33] *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (noting unrestrained interaction of competitive forces yields efficient allocation of resources); *see also Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695; 58 C.J.S., *supra* note 31, § 21.

[34] 15 U.S.C. §§ 1-2.

competitors.[35] These limitations preserve competitiveness and efficiency in the market.[36]

A unique feature of the Sherman Act is its lack of differentiation between civil and criminal offenses.[37] Thus, the DOJ decides whether to pursue a possible violation civilly or criminally.[38] This choice is appropriate within the framework of the Sherman Act.[39] Violations are often a matter of degree, making bright line rules unworkable.[40] The DOJ's policy is to handle lesser offenses through civil or administrative proceedings.[41] Although the Sherman Act purports to

[35] *See generally* Standard Oil Co. v. United States, 283 U.S. 163 (1931) (holding courts must scrutinize any agreement between competitors to determine whether restrictions are reasonable or unduly restrictive of competition); John D. Park & Sons Co. v. Hartman, 153 F. 24 (6th Cir. 1907) (holding system of contracts fixing prices stifles competition and is unreasonable restraint of trade in violation of Sherman Act); Carvel Corp. v. Eisenberg, 692 F. Supp. 182 (S.D.N.Y. 1988) (finding no violation where restriction is of reasonable duration and is reasonably related to party's interest in protecting its know-how); J.T. Gibbons, Inc. v. Crawford Fitting Co., 565 F. Supp. 167 (E.D. La. 1981) (holding vertical agreements may achieve efficiencies, and thus courts must analyze them under rule of reason).

[36] *See* cases cited *supra* note 33.

[37] *See* 15 U.S.C. §§ 1, 2, 4 (making restraints of trade illegal and failing to distinguish between civil and criminal liability).

[38] *See id.*; United States v. Standard Oil Co., 23 F. Supp. 937, 938 (W.D. Wis. 1938) (noting DOJ's choice of civil or criminal proceedings); *see also* 2 STEVEN C. ALBERTY, ADVISING SMALL BUSINESSES § 29:7 (2007) (noting DOJ's choice of civil or criminal proceedings based on seriousness of offense).

[39] *See Standard Oil*, 23 F. Supp. at 938-39.

[40] *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (construing Sherman Act as precluding only contracts or combinations that unreasonably restrain competition, despite all-encompassing language); *J.T. Gibbons*, 565 F. Supp. at 178 (recognizing applicability of rule of reason); *Standard Oil*, 23 F. Supp. at 939; *supra* note 35.

[41] DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL ch. III(C)(5), *available at* http://www.usdoj.gov/atr/foia/divisionmanual/ch3.htm#c5 (last visited Oct. 15, 2007) (setting forth DOJ standards for determining whether to proceed by civil or criminal investigation). The current policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements. *Id.* Such agreements include price fixing, bid rigging, and horizontal customer and territorial allocations. *Id.* The DOJ uses civil process and, if necessary, civil prosecution with respect to other suspected antitrust violations. *Id.* Other violations include those requiring analysis under the rule of reason and some offenses historically labeled "per se" by the courts. *Id.*; *see also* ALBERTY, *supra* note 38 (noting DOJ brings criminal charges against most serious offenses while seeking civil remedies for lesser offenses); Skip Oliva, *Patriot Act Authorizes Antitrust Wiretaps*, VOLUNTARY TRADE COUNCIL, Mar. 15, 2006, http://www.voluntarytrade.org/newsite/modules/news/article.php?storyid=96 (noting DOJ's choice of civil or criminal proceedings).

regulate business combinations and strategies, it leaves much discretion in the hands of the DOJ.[42]

C. Relevant State Law and Policy

In addition to the DOJ, state law also affects the application of the Sherman Act in the wiretapping context.[43] Business entities are creations of state law, and state law largely governs them.[44] To protect their businesses from the harms accompanying the release of confidential business information, states have policies protecting such information.[45] Specifically, state agency and trade secret laws encompass the principle that sensitive business information deserves protection.[46]

Under state agency law, an agent has a duty not to use or disclose information he acquires in the course of his agency.[47] This duty stems from the information's potential value to those outside the principal-agent relationship.[48] Information the agent gathers during

[42] *See supra* notes 37-38, 41 and accompanying text.

[43] United States v. Bestfoods, 524 U.S. 51, 63 (1998) (holding state law is relevant to interpreting and applying federal statutes affecting corporations); United States v. Texas, 507 U.S. 529, 534 (1993) (holding to abrogate common law principle, statute must speak directly on issue covered in common law); Burks v. Lasker, 441 U.S. 471, 478 (1979) (holding federal law does not preempt state corporation law where Congress has not manifested specific intent to do so).

[44] *See* cases cited *supra* note 19; *see also* 59 AM. JUR. 2D, *supra* note 19, § 28 (stating rights and obligations among partners are generally determined by law of state of formation of partnership contract).

[45] *See* Coulter Corp. v. Leinert, 869 F. Supp. 732, 735 (E.D. Mo. 1994) (finding agent had duty of confidentiality and loyalty to his principal, scope of which is not limited to protecting principal against disclosure of trade secrets); Defcon, Inc. v. Webb, 687 So. 2d 639, 642 (La. 1997) (finding former employee had fiduciary duty to employer and enjoining him from disclosing to competitor confidential information, even if not trade secret); Lamorte Burns & Co. v. Walters, 770 A.2d 1158, 1167 (N.J. 2001) (finding breach of duty of loyalty where employees misused firm's confidential and proprietary information); *see also* discussion *infra* Part I.C (explaining agent has duty not to disclose information learned in confidence during agency and holder has privilege not to disclose trade secret).

[46] *See supra* note 45.

[47] *See Lamorte Burns & Co.*, 770 A.2d at 1167 (noting confidential information includes information acquired through principal during course of agency unless matter of general knowledge); Costanzo v. Nationwide Mut. Ins. Co., 832 N.E.2d 71, 76 (Ohio Ct. App. 2005) (finding agents had duty not to use information their principals confidentially gave to them in course of their agency); RESTATEMENT (THIRD) OF AGENCY § 395 (2006) (noting agent has duty to his principal not to use or disclose confidential information).

[48] *See* RESTATEMENT (THIRD) OF AGENCY § 395 cmt. a (noting agent's position to

employment about management plans or client lists is often highly valuable to the employer's competitors.[49] Thus, agency law works to preserve the employer's competitiveness.[50]

The California Supreme Court highlighted this policy in *Bancroft-Whitney Co. v. Glen*.[51] The defendant in *Bancroft* was the president of the plaintiff's publishing company when a competing company recruited him.[52] Prior to leaving the plaintiff's company, the defendant disclosed to the competitor information about the salaries of desirable employees along with other confidential information.[53] With this information, the competitor was able to attract more than fifteen of the plaintiff's employees to its employ.[54] The plaintiff then brought an action alleging breach of fiduciary duty by a corporate officer and unfair competition.[55]

The trial court found for the defendant, holding he did not breach his fiduciary duty or engage in unfair competition.[56] On appeal, the California Supreme Court reversed.[57] The court held that the defendant's actions constituted a breach of fiduciary duty as a matter of law.[58] Agency law prohibits an agent from disclosing confidential information.[59] Confidential information includes both information the principal states is confidential and information the agent should know is confidential.[60] The court held the defendant had a duty not to disclose the salaries of employees because they were not common knowledge.[61] The *Bancroft* court applied agency law to protect the competitiveness of an employer.[62] The court held the defendant's

gain information of great use to his principal's competitors); *see also supra* note 45.

[49] *See supra* note 48.

[50] *See supra* note 48.

[51] Bancroft-Whitney Co. v. Glen, 411 P.2d 921, 925, 939 (Cal. 1966) (finding violation of fiduciary duty where agent's conduct was designed to obtain principal's employees for competitor company and divulged confidential business information).

[52] *Id.* at 924-25.

[53] *Id.* at 925, 931.

[54] *Id.* at 925.

[55] *Id.* at 924.

[56] *Id.* at 925-26.

[57] *Id.* at 942.

[58] *Id.* at 936.

[59] *Id.* at 939; *see supra* notes 45, 47 and accompanying text.

[60] *See Bancroft-Whitney*, 411 P.2d at 939 (holding rule applies to communications principal makes explicitly confidential as well as impliedly confidential communications).

[61] *Id.*

[62] *See id.* (holding disclosure of confidential information to employer's competitor

disclosure, which allowed the competitor to lure away key employees, constituted a breach of duty.[63]

Trade secret laws similarly protect sensitive business information and competitiveness.[64] As with agency laws, liability for misappropriating trade secrets is rooted in the secrets' value to competitors.[65] The definition of a trade secret encompasses this recognition.[66] Trade secrets include any information the holder uses in a business that gives him an advantage over competitors who do not know or use it.[67] Misappropriation of a trade secret occurs when disclosure violates the confidence in which the holder revealed the secret.[68]

This doctrine, however, is more specific than the general duty not to disclose in the principal-agent relationship.[69] Protection is not limited to secrets a holder discloses to an agent.[70] While a duty may arise

was breach of agent's duty).

[63] *Id.*

[64] *See* Dionne v. Se. Foam Converting & Packaging, Inc., 397 S.E.2d 110, 113 (Va. 1990) (finding trade secret where process gave competitive advantage to secret holder); Ed Nowogroski Ins., Inc. v. Rucker, 971 P.2d 936, 944 (Wash. 1999) (holding confidential client list to be trade secret); RESTATEMENT (FIRST) OF TORTS § 757 (1939); 54A AM. JUR. 2D *Monopolies* § 1114 (1996); 86 C.J.S. *Torts* § 60 (2006).

[65] *See Dionne*, 397 S.E.2d at 113 (finding confidential manufacturing process is trade secret where process gave company competitive advantage and was generally unknown in company's sales area); *Ed Nowogroski Ins.*, 971 P.2d at 944 (holding confidential client list to be trade secret); RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (noting value of trade secret depends on its secrecy).

[66] *See* RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (defining trade secret to include any formula, pattern, device, or compilation used in business and giving holder opportunity to obtain advantage over competitors); *see also* 54A AM. JUR. 2D, *supra* note 64, § 1114 (noting courts protect trade secrets to encourage innovation and competition); 86 C.J.S., *supra* note 64, § 60 (noting trade secret protects and rewards innovation and competition); *cf.* Lincoln Towers Ins. Agency v. Farrell, 425 N.E.2d 1034, 1036 (Ill. App. Ct. 1981) (noting courts have generally sought to encourage competition through trade secret decisions).

[67] *See supra* note 66.

[68] *See* Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1245 (10th Cir. 2006) (finding no trade secret misappropriation where those outside business could easily acquire or duplicate information disclosed); *Ed Nowogroski Ins.*, 971 P.2d at 948 (finding misappropriation where employees used employer's confidential customer list to solicit clients); RESTATEMENT (FIRST) OF TORTS § 757 cmt. j (defining misappropriation as disclosure of another's trade secret, without privilege to do so, in breach of confidence).

[69] *See* RESTATEMENT (FIRST) OF TORTS § 757 cmt. j (stating holder may communicate trade secret to agents as well as others in confidence).

[70] *See* IAC, Ltd. v. Bell Helicopter Textron, Inc., 160 S.W.3d 191, 199 (Tex. App. 2005) (granting trade secret protection to information holder confidentially revealed

between a principal and agent, the duty not to reveal trade secrets extends further to those receiving confidential disclosures outside the agency relationship.[71] Additionally, a trade secret is not information about a single event.[72] Rather, a trade secret entails a process or system the holder utilizes in the continuous operation of the business.[73] For example, a method of bookkeeping or office management may constitute a trade secret.[74]

States also protect trade secrets through procedural safeguards.[75] In California, the holder has a statutory privilege to prevent another from disclosing the secret in both civil and criminal proceedings.[76] Under the California statute, a court may make an exception to the privilege only where nondisclosure would conceal fraud or otherwise work injustice.[77] In addition, the trial court must take reasonable steps to ensure the continued secrecy of the trade secret.[78] To prevent disclosure of the secret, courts may grant protective orders, hold in-camera hearings, and, in criminal proceedings, exclude the public.[79]

to competitors); B.C. Ziegler & Co. v. Ehren, 414 N.W.2d 48, 53 (Wis. Ct. App. 1987) (granting trade secret protection to information holder accidentally disclosed); RESTATEMENT (FIRST) OF TORTS § 757.

[71] *See Bell Helicopter*, 160 S.W.3d at 199 (granting trade secret protection to information confidentially revealed to competitors and noting no principal-agent relationship); Mabrey v. SandStream, Inc., 124 S.W.3d 302, 310 (Tex. App. 2003) (granting trade secret protection where holder confidentially revealed information to potential investor); RESTATEMENT (FIRST) OF TORTS § 757.

[72] Dionne v. Se. Foam Converting & Packaging, Inc., 397 S.E.2d 110, 113 (Va. 1990) (finding confidential manufacturing process to be trade secret); *Ed Nowogroski Ins.*, 971 P.2d at 944 (finding misappropriation where employees used employer's confidential customer list to solicit clients); RESTATEMENT (FIRST) OF TORTS § 757 (noting trade secrets are not single events as they relate to ongoing operation of business, such as information relating to marketing or production of goods).

[73] *See supra* note 72.

[74] *See supra* note 72.

[75] *See, e.g.*, CAL. EVID. CODE § 1061 (West 1995) (stating holder of trade secret has privilege not to disclose and to prevent others from disclosing secret and court shall take protective measures); FLA. STAT. ANN. § 90.506 (West 1999) (same); ALA. R. EVID. 507 (same).

[76] *See* CAL. EVID. CODE §§ 1060-1061 (West 1995); *see also* Bridgestone/Firestone, Inc. v. Super. Ct., 9 Cal. Rptr. 2d 709, 711-12 (Ct. App. 1992) (requiring party seeking discovery to show information is relevant and necessary to prove or defend material element of case before disclosure).

[77] CAL. EVID. CODE § 1060.

[78] *See* CAL. CIV. CODE § 3426.5 (West 1997); Raymond Handling Concepts Corp. v. Super. Ct., 45 Cal. Rptr. 2d 885, 888 (Ct. App. 1995) (granting protective order governing dissemination of defendant's trade secret to counsel in other actions against defendant).

[79] CAL. CIV. CODE § 3426.5; CAL. EVID. CODE § 1062(a) (West 1995).

Although the laws protecting business confidentiality are state laws, they remain relevant to interpreting federal statutes.[80]

D. Intersection of State and Federal Law

Corporations are state entities; thus, courts will consider general corporate law in interpreting federal legislation affecting corporations.[81] The Supreme Court in *United States v. Bestfoods* interpreted a federal statute in light of this policy.[82] In *Bestfoods*, the United States brought an action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[83] The government sought to recover damages for the costs of cleaning up industrial waste from a chemical plant.[84] Instead of bringing the action against the chemical plant, however, the government sought damages from its parent corporation.[85] The issue in the case therefore centered on how liability could attach to the parent corporation.[86]

CERCLA imposes liability on those who own or operate the polluting facility.[87] The district court found operator liability could attach directly where the parent exercised control over the subsidiary's business during the period of contamination.[88] Such liability, however, is inconsistent with the general corporate principle that parents are generally not liable for the actions of subsidiaries.[89] Under

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[80] *See* United States v. Bestfoods, 524 U.S. 51, 63 (1998) (deferring to state law over federal on issue of corporate law); Burks v. Lasker, 441 U.S. 471, 478 (1979) (finding state corporation law still relevant even though action based on federal statute); *see also* discussion *infra* Part I.D; discussion *infra* Part III.A (discussing relevance of state corporate law to interpreting federal law affecting corporations); *cf.* United States v. Texas, 507 U.S. 529, 534 (1993) (holding to abrogate common law principle, statute must speak directly on issue covered in common law).

[81] *See supra* note 80.

[82] *Bestfoods*, 524 U.S. at 51 (holding federal law applied to corporations does not necessarily preempt state corporation law where Congress does not clearly evidence intent to do so).

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See id.*

[88] *Id.*

[89] *See id.*; Buechner v. Farbenfabriken Bayer Aktiengesellschaft, 154 A.2d 684, 687 (Del. 1959); Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 58 (N.Y. 1926). *See generally* William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193 (1929) (noting concept of parent corporations not

the general corporate doctrine of veil-piercing, a shareholder is liable for acts of the corporation only where the shareholder abused the corporate form.[90] Recognizing that states create and generally govern corporations, the Sixth Circuit reversed the district court.[91] The court pierced the corporate veil, holding the parent vicariously liable for the actions of the subsidiary.[92] The Supreme Court affirmed the Sixth Circuit's holding.[93]

In affirming the Sixth Circuit's analysis, the Supreme Court noted the language of CERCLA does not specifically preempt general corporate law.[94] Congress did not indicate that courts should disregard general corporate law merely because federal law is the basis for the cause of action.[95] Congress was instead silent on the fundamental issue of the liability implications of a parent-subsidiary relationship.[96] The Supreme Court held general corporate principles apply unless the federal statute directly preempted the general corporate law at issue in the case.[97] Moreover, CERCLA did not speak directly to the general corporate law because it did not address the liability implications of corporate ownership.[98] Thus, CERCLA did not preempt the general corporate veil-piercing requirements necessary to hold a parent company liable in the place of its subsidiary.[99] Consequently, the Court found the parent company would not be liable without satisfying the veil-piercing requirements.[100]

In *Bestfoods*, the Court recognized federal law affecting corporations does not exist in a vacuum.[101] Courts must apply general corporate

being liable for acts of subsidiaries is deeply ingrained in our economic and legal systems).

[90] *See Bestfoods*, 524 U.S at 52; *see also supra* note 89.

[91] *Bestfoods*, 524 U.S. at 51.

[92] *Id.*

[93] *Id.* at 52-53.

[94] *Id.* at 63-64.

[95] See *id.* at 63 (quoting Burks v. Lasker, 441 U.S. 471, 478 (1979)) (noting CERCLA gives no indication that courts should disregard entire body of state corporation law where cause of action is based on federal statute).

[96] *Id.* at 52.

[97] *Id.* at 63 (quoting United States v. Texas, 507 U.S. 529, 534 (1993)) (holding before court will abrogate common law principle in favor of statute, statute must directly address issue common law addresses).

[98] *Id.*

[99] *Id.*

[100] *Id.* at 63-64.

[101] *See supra* note 95 and accompanying text.

law where Congress has not specifically preempted it.[102] Where Congress has not done so, federal courts will not abrogate the general corporate law.[103] In addition to the *Bestfoods* policy, canons of construction also determine how courts should interpret section 113(g)(3).[104]

E. Canons of Construction

When applying a statute, courts must interpret the language of the statute.[105] Canons of construction are rules to aid the court in statutory construction.[106] Three canons will be particularly helpful in interpreting the language of section 113(g)(3).[107] The first two canons limit the interpretation of statutory language based on legislative intent, and the third interprets statutory scope in light of related statutes.[108]

Courts will not give effect to the literal meaning of a statute where literal application would have "mischievous" or absurd consequences.[109] Statutes do not exist in a sterile environment; courts

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[102] *See supra* note 95 and accompanying text.

[103] *See Bestfoods*, 524 U.S at 63; Burks v. Lasker, 441 U.S. 471, 478 (1979) (holding that in suits alleging violations of certain federal statutes, courts should apply state law governing authority of independent directors to discontinue shareholders' derivative actions); *see also* United States v. Texas, 507 U.S. 529, 534 (1993) (holding Federal Debt Collection Act did not abrogate government's common law right to collect prejudgment interest on debts owed by states).

[104] *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:3 (7th ed. 2007); Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1259 (1947); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 399 (1950) (noting canons of construction aid courts in correctly interpreting statutes); discussion *infra* Part I.E (discussing applicable canons).

[105] *See* 2A SINGER, *supra* note 104, § 45:3; Frank, *supra* note 104, at 1259; Llewellyn, *supra* note 104, at 399.

[106] *See* 2A SINGER, *supra* note 104, § 45:3 (noting every occasion courts have for determining applicability of statutes is also occasion for interpreting them); Frank, *supra* note 104, at 1259; Llewellyn, *supra* note 104, at 399.

[107] *See infra* notes 109-23 and accompanying text.

[108] *See infra* notes 109-23 and accompanying text.

[109] *See* Dalmasso v. Dalmasso, 9 P.3d 551, 560 (Kan. 2000) (noting court should interpret language of statute to avoid absurd or unreasonable result); State *ex rel.* Besser v. Ohio State Univ., 721 N.E.2d 1044, 1049 (Ohio 2000) (noting courts must construe statutes to avoid absurd results); 73 AM. JUR. 2D *Statutes* § 172 (2001); Llewellyn, *supra* note 104, at 403.

must consider them in a realistic context.[110] Courts favor a rational construction and presume legislatures intend sensible interpretations of their statutes.[111] Thus, a court will not follow the plain meaning of the statutory language where literal application would lead to unreasonable consequences.[112] Rather, a court will construe the statute to give effect to the apparent intent of the legislature.[113]

Similarly, courts will limit a statute's application when it speaks in generalities and there is doubt as to its inclusiveness.[114] Where a court could reasonably find statutory language to embrace more than necessary, the statute's intended scope and purpose serve as limits.[115] The rule is an equitable one; it operates to restrict the statute to conform to the legislative purpose.[116] While these first two canons look to legislative intent for guidance, the third interprets statutes according to the scope of similar statutes.[117]

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[110] *See* Dep't of Corr. v. Worsham, 638 A.2d 1104, 1107 (Del. 1994); Sauls v. State, 467 N.W.2d 1, 2 (Iowa Ct. App. 1990); Curran v. Price, 638 A.2d 93, 104-05 (Md. 1994); 2A SINGER, *supra* note 104, § 45:12.

[111] JOSEPH R. NOLAN & LAURIE J. SARTORIO, MASSACHUSETTS PRACTICE SERIES § 33 (2d ed. 2006) (noting courts have well established that law favors rational construction); *see also* Am. Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982); Kuzma v. IRS, 821 F.2d 930, 932 (2d Cir. 1987) (noting principles of statutory construction compel court to seek rational construction); 73 AM. JUR. 2D, *supra* note 109, § 172 (2001); 2A SINGER, *supra* note 104, § 45:12.

[112] *See supra* note 109.

[113] *See* People v. Jenkins, 893 P.2d 1224, 1231 (Cal. 1995) (noting in such situations courts should choose construction comporting most closely with apparent intent of legislature with view to promoting statute's purpose); Robinson v. Meadows, 561 N.E.2d 111, 114 (Ill. App. Ct. 1990) (noting in such situations courts should construe statute to give effect to what must have been reasonable intent of legislature); 2A SINGER, *supra* note 104, § 45:12.

[114] *See, e.g.*, Conley v. Sousa, 554 S.W.2d 87 (Ky. 1977) (determining scope of statute with reference to problem legislature intended statute to solve); Me. Merchs. Ass'n v. Campbell, 287 A.2d 430 (Me. 1972) (taking into account policy consideration which brought about legislature's action); Rector of Univ. of Va. v. Harris, 387 S.E.2d 772 (Va. 1990) (noting courts should read statutes to remedy mischief legislature enacted statute to prevent); *see* 2B NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 54:4 (6th ed. 2006); Llewellyn, *supra* note 104, at 405.

[115] *See* 2B SINGER, *supra* note 114, § 54:4; Llewellyn, *supra* note 104, at 405; *see also* Miller v. Bank of Am., 166 F.2d 415, 417 (9th Cir. 1948) (limiting scope of provision where literal interpretation would defeat scope Congress intended); Porter v. Nowak, 157 F.2d 824, 825-26 (1st Cir. 1946) (limiting application of statute where literal reading would be harsh according to legislative policy).

[116] *See* San Francisco v. San Mateo County, 213 P.2d 505, 510 (Cal. Dist. Ct. App. 1950); Karlson v. Murphy, 56 N.E.2d 839, 842 (Ill. 1944); Thornhill v. Ford, 56 So. 2d 23, 30 (Miss. 1952); 2B SINGER, *supra* note 114, § 54:4.

[117] *See* Llewellyn, *supra* note 104, at 402 (stating courts must construe statutes *in*

The third canon indicates courts must construe statutes *in pari materia* in light of one another.[118] Statutes are *in pari materia* when they relate to the same subject or have the same purpose.[119] Courts will consider whether the statutes are included in the same legislation and whether the legislature obviously designed them to have the same purpose.[120] Courts presume Congress intended them to interpret statutes *in pari materia* in accordance with one another, and therefore will construe the statutes together.[121] This construction applies unless the scope of the provisions is distinct or if legislative intent of one provision departs from the general purpose.[122]

pari materia in light of one another).

[118] *See* 2B SINGER, *supra* note 114, § 51:2; Llewellyn, *supra* note 104, at 402; *see also* Sanford's Estate v. Comm'r, 308 U.S. 39, 42-43 (1939) (construing gift tax laws in light of related revenue laws taxing transfers at death); United States v. Morgan, 118 F. Supp. 621, 691-92 (S.D.N.Y. 1953) (reading Securities Act of 1933 and Securities Exchange Act of 1934, as well as amendments thereto, as comprehensive scheme of regulation).

[119] *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (interpreting Age Discrimination in Employment Act in accordance with Civil Rights Act of 1964 based on their shared purpose of preventing discrimination); United States v. Fillman, 162 F.3d 1055, 1057 (10th Cir. 1998) (noting statutes are *in pari materia* when they have same subject); United States v. Carr, 880 F.2d 1550, 1553 (2d Cir. 1989) (giving statutory language of CERCLA meaning according to its use in another statute with same purpose); 2B SINGER, *supra* note 114, § 51:3.

[120] *See* 2B SINGER, *supra* note 114, § 51:3; *see also Ex parte* Wilkinson, 641 S.W.2d 927, 932 (Tex. Crim. App. 1982) (noting purpose of statutes is most important factor in determining if court should find them *in pari materia*); Segura v. State, 100 S.W.3d 652, 654 (Tex. App. 2003) (stating legislature must have enacted two provisions with same purpose for doctrine of *in pari materia* to apply).

[121] *See* Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 541-42 (1954) (interpreting legislation in connection with previous legislation on same subject); Anderson v. Fed. Deposit Ins. Corp., 918 F.2d 1139, 1143 (4th Cir. 1990) (noting courts should construe statutes harmoniously, especially where statutes involve same subject matter); 2B SINGER, *supra* note 114, § 51:2.

[122] *See* Llewellyn, *supra* note 104, at 402 (stating statutes are not *in pari materia* if scopes and aims are distinct, or if legislative intent indicates departure from general purpose of previous enactments); *cf.* House v. Cullman County, 593 So. 2d 69, 76-77 (Ala. 1992) (finding congressional intent for similar language to have different meanings); Doe v. Statewide Grievance Comm., 677 A.2d 960, 963 (Conn. App. Ct. 1996) (finding legislative history does not support reading statutes together); Kroh v. Am. Family Ins., 487 N.W.2d 306, 308 (N.D. 1992) (reading statutes separately where reading them together would cause ambiguity).

Canons help the courts interpret statutes continuously and harmoniously.[123] In this case, the statute courts must interpret is section 113(g)(3) of the Reauthorized Patriot Act.[124]

II. THE STATUTE: SECTION 113(G)(3)

Section 113(g)(3) is an amendment to the Reauthorized Patriot Act, which went into effect in March 2006.[125] The Act extended and modified the original USA PATRIOT Act of 2001 ("Patriot Act"), which Congress enacted in the wake of September 11, 2001.[126] Although the Patriot Act contained some provisions unrelated to terrorism, it was a congressional reaction to the terrorist attacks.[127] As such, its focus was terrorism.[128] The Patriot Act's stated purpose is to prevent and punish terrorist acts in the United States and around the world.[129] It sought to accomplish these goals by providing law enforcement with enhanced investigatory tools.[130] The Reauthorized Patriot Act similarly focuses on terrorism.[131] Generally, it enhances existing law enforcement capabilities and provides additional tools needed to combat terrorism.[132]

One provision of the Reauthorized Patriot Act is section 113.[133] Section 113 modified 18 U.S.C. § 2516 by adding new offenses that qualify for electronic surveillance.[134] The additional predicate crimes include violence at international airports, terrorist attacks against mass

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[123] *See* 2A SINGER, *supra* note 104, § 45:3; Frank, *supra* note 104, at 1259; Llewellyn, *supra* note 104, at 399 (citing Frank, *supra* note 104).

[124] USA PATRIOT Improvement and Reauthorization Act of 2005 § 113(g)(3), Pub. L. No. 109-177, 120 Stat. 192, 210 (2006).

[125] *See* § 113(g)(3).

[126] USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. Its full title is the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism." *See* CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, THE USA PATRIOT ACT: A LEGAL ANALYSIS 1 (2002), *available at* http://www.fas.org/irp/crs/RL31377.pdf (commenting on history of Patriot Act and surveying its provisions).

[127] *See* DOYLE, *supra* note 126, at 8.

[128] *See* 115 Stat. 272, at 272.

[129] *Id.* (stating purpose of Patriot Act is to "deter and punish terrorist acts" and enhance investigatory tools of law enforcement).

[130] *See id.*

[131] *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192, 210 (2006).

[132] *Id.*

[133] *Id.* § 113.

[134] *See* 18 U.S.C. § 2516(1) (2000 & Supp. IV 2004); § 113.

transportation, aircraft piracy, and use of incendiary devices.[135] Less violent crimes such as identity theft, structuring transactions to evade reporting requirements, and bank fraud now constitute predicate offenses as well.[136] The Conference Committee explained that the new section 113 wiretap predicates relate to crimes of terrorism.[137]

Section 113(g)(3) also provides wiretapping as a tool for the DOJ in its investigations of criminal antitrust violations.[138] The DOJ must still obtain judicial approval for any electronic surveillance it seeks to conduct.[139] It must also follow the duration and scope limitations § 2518(5) imposes.[140] However, wiretapping will be available in a broad range of antitrust investigations, despite the narrow congressional purpose.[141] Although electronic surveillance under section 113(g)(3) is subject to restrictions, the Sherman Act imposes liability for a wide range of activities.[142] This breadth of scope poses a threat to the state-protected confidentiality of sensitive business information.[143]

III. ANALYSIS

State laws recognize businesses have sensitive information not meant for the public.[144] The full scope of section 113(g)(3) opens the door for the DOJ to undermine the protection these laws provide.[145] Applying *Bestfoods*, courts should defer to state protection of business

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[135] § 113.

[136] *Id.*

[137] H.R. REP. NO. 109-333, at 94 (2005).

[138] *See* 18 U.S.C. § 2516(1).

[139] *See* 18 U.S.C. § 2518(1)-(5) (2000).

[140] *See id.*

[141] § 113(g)(3) (adding violations of Sherman Act to wiretapping predicates in 18 U.S.C. § 2516); *see supra* Part I.B (discussing scope of Sherman Act).

[142] *See* 15 U.S.C. §§ 1-7 (2000 & Supp. IV 2004); 18 U.S.C. §§ 2516, 2518; discussion *supra* Part I.A-B (discussing federal wiretapping requirements and scope of Sherman Act).

[143] *See supra* note 1. Law enforcement officers are not bound to keep information from electronic surveillance private. *See* 18 U.S.C. § 2517(1)-(3) (2000) (explaining circumstances in which law enforcement officers may disclose contents of electronic surveillance). The statute specifically authorizes officers to communicate information obtained through electronic surveillance to other officers as well as to courts. *See* § 2517(1), (3) (authorizing law enforcement officers to disclose contents of electronic surveillance while giving testimony under oath).

[144] *See* discussion *supra* Part I.C (discussing state law policies protecting sensitive business information); *see also supra* note 45.

[145] *See supra* note 143.

information and limit the scope of section 113(g)(3).[146] An interpretation consistent with both the legislative intent and the text of the provision will achieve such a limitation.[147] Courts should therefore limit section 113(g)(3) to investigations related to terrorism.[148]

A. Application of United States v. Bestfoods *Supports a Limitation of 113(g)(3)*

Although violations of the Sherman Act create federal causes of action, general corporate law remains relevant.[149] Section 113(g)(3) does not specifically preempt the general corporate law it affects.[150] Courts should therefore construe section 113(g)(3) narrowly to preserve the protection of business information found in state law.[151]

As with CERCLA, a literal application of section 113(g)(3) would lead to a conflict with general corporate principles.[152] Section 113(g)(3) allows the DOJ to use wiretapping in any criminal investigation of any violation of the Sherman Act.[153] The Sherman Act covers a broad range of activities, thus making wiretapping widely available.[154] This situation affords many opportunities for the DOJ to make sensitive business information public.[155] This opportunity

[146] *See* United States v. Bestfoods, 524 U.S 51, 63 (1998); *see also* United States v. Texas, 507 U.S. 529, 534 (1993); Burks v. Lasker, 441 U.S. 471, 478 (1979).

[147] *See* USA PATRIOT Improvement and Reauthorization Act § 113(g)(3), 120 Stat. 192, 210 (2006); H.R. REP. NO. 109-333, at 94 (2005).

[148] *See* discussion *infra* Part III.A-C.

[149] *See Bestfoods*, 524 U.S at 63; *Burks*, 441 U.S. at 477 (interpreting Investment Company Act and Investment Advisers Act in light of state corporation law on powers of directors); De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (holding scope of federal rights is federal question, but state law, rather than federal, may nevertheless determine scope); *see also Texas*, 507 U.S. at 534 (holding to abrogate common law principle, statute must speak directly on issue covered in common law).

[150] *See* § 113(g)(3) (specifying only that violations of Sherman Act are predicates for wiretapping without mentioning any state policies or laws).

[151] *See supra* note 149.

[152] *See Bestfoods*, 524 U.S at 63 (finding literal application of CERCLA would conflict with state law requirement for piercing corporate veil before holding shareholder liable); discussion *supra* Part I.C (discussing state policies protecting confidential business information).

[153] § 113(g)(3).

[154] *See* 15 U.S.C. §§ 1-7 (2000 & Supp. IV 2004); *see also* discussion *supra* Part I.B (noting any unreasonable restraint of trade violates Sherman Act and Sherman Act creates very few bright line rules for what constitutes violation).

[155] *See supra* note 1.

undermines general corporate laws, such as agency and trade secret laws, that protect businesses from disclosure of sensitive information.[156] By providing the DOJ an opportunity to release information states seek to protect from disclosure, section 113(g)(3) conflicts with state governance of businesses.[157]

Where federal corporate law does not specifically preempt general corporate law on the same issue, there is a presumption against preemption.[158] In applying section 113(g)(3), Congress did not indicate it intended for courts to disregard the general corporate law protecting businesses from disclosure of confidential information.[159] Section 113(g)(3) fails to mention any such existing law, let alone indicate section 113(g)(3) preempts it.[160] As in *Bestfoods*, the congressional silence relates to a fundamental issue — a business's privilege not to disclose confidential information.[161] Congress intended for section 113(g)(3) to aid in fighting terrorism.[162] Thus, to the extent Congress manifested any intent to preempt general corporate law, it was only with respect to cases involving terrorism.[163] Congress must clearly state its intent in order for a federal corporate law to preempt general corporate law.[164] Because Congress stated its intent only with respect to cases involving terrorism, limiting section 113(g)(3)'s application to such cases is appropriate.[165] Therefore,

[156] *See* discussion *supra* Part I.C (discussing how state agency and trade secret laws work to protect confidential business information, thus preserving competitiveness).

[157] *See supra* note 156 and accompanying text.

[158] *See* United States v. Bestfoods, 524 U.S. 51, 63 (1998) (requiring congressional intent before abrogating state corporate law in favor of federal statute); United States v. Texas, 507 U.S. 529, 534 (1993) (holding to abrogate common law principle, statute must speak directly on issue covered in common law); Burks v. Lasker, 441 U.S. 471, 478 (1979); discussion *supra* Part I.D (discussing circumstances under which federal corporation law will preempt state corporation law).

[159] USA PATRIOT Improvement and Reauthorization Act of 2005 § 113, Pub. L. No. 109-177, 120 Stat. 192, 209 (2006); *see also Bestfoods*, 524 U.S. at 63.

[160] *See* § 113(g)(3).

[161] *See id.*; *Bestfoods*, 524 U.S. at 62.

[162] *See* 120 Stat. at 192 (stating purpose of Reauthorized Patriot Act is to extend and modify tools needed to combat terrorism); H.R. REP. NO. 109-333, at 94 (2005) (stating section 113 predicates relate to crimes of terrorism); *see also supra* discussion Part II (discussing terms of Reauthorized Patriot Act and section 113).

[163] *See supra* note 162.

[164] *See supra* note 95 and accompanying text; *see also* discussion *supra* Part I.D (discussing circumstances in which courts will defer to general corporate law over federal statutes affecting corporations).

[165] *See supra* notes 162, 164.

courts should read section 113(g)(3) narrowly to apply only to investigations involving terrorism.[166]

Proponents of a literal interpretation of section 113(g)(3) might argue *Bestfoods* is inapplicable.[167] CERCLA and section 113(g)(3) do not conflict with general corporate law in the same way; they conflict with different types of state laws.[168] CERCLA conflicts with general corporate law that applies exclusively to corporations.[169] Under general corporate law, shareholders are not liable without piercing the corporate veil.[170] Section 113(g)(3), on the other hand, conflicts with agency and trade secret laws.[171] Such laws apply to businesses generally, not specifically to corporations.[172] While corporate laws are a subset of business laws generally, not all business laws apply to

[166] *See supra* notes 162, 164.

[167] *See infra* notes 175-79 and accompanying text.

[168] *Compare* United States v. Bestfoods, 524 U.S. 51, 63 (1998) (noting states require piercing corporate veil before shareholders can be held liable for corporate acts), *and* Comprehensive Environmental Response, Compensation, and Liability Act § 107(a)(2), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (providing for parent corporation liability without veil piercing), *with* USA PATRIOT Improvement and Reauthorization Act of 2005 § 113(g)(3), Pub. L. No. 109-177, 120 Stat. 192, 210 (2006) (authorizing DOJ to wiretap businesses), RESTATEMENT (THIRD) OF AGENCY § 395 (2006) (stating agent has duty to principal not to disclose information acquired during course of his agency), *and* RESTATEMENT (FIRST) OF TORTS § 757 (1939) (imposing liability on anyone disclosing trade secret holder gave in confidence).

[169] *See Bestfoods*, 524 U.S. at 63 (finding literal application of CERCLA in conflict with state requirement for corporate veil piercing). The veil-piercing doctrine applies in the corporate setting. *See* CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 544 (5th ed. 2006) (noting veil-piercing is exception to general rule that corporate form exists to insulate individual owners (shareholders) from obligations of business). *See generally* K.C. Roofing Ctr. v. On Top Roofing, Inc., 807 S.W.2d 545 (Mo. Ct. App. 1991) (finding actual fraud is not necessary for piercing corporate veil as courts may also pierce to prevent injustice or inequitable consequences); Consumer's Co-op of Walworth County v. Olsen, 419 N.W.2d 211 (Wis. 1988) (requiring shareholder to completely dominate or control corporation, and use control to commit fraud or for another improper purpose, before piercing corporate veil).

[170] *See* discussion and cases cited *supra* note 169.

[171] *Compare* § 113(g)(3), *and supra* note 1 and accompanying text (describing potential effect of Reauthorized Patriot Act on business), *with* RESTATEMENT (THIRD) OF AGENCY § 395 (discussing agent's duty not to disclose confidential information acquired in course of agency), *and* RESTATEMENT (FIRST) OF TORTS § 757 (discussing liability of one disclosing trade secret holder gave him in confidence).

[172] *See* RESTATEMENT (THIRD) OF AGENCY § 395 (applying to all principal-agent relationships, not just those in corporate context); RESTATEMENT (FIRST) OF TORTS § 757 (applying to all disclosures of trade secrets given in confidence, regardless of whether trade secret was initially shared in corporate context).

corporations.[173] Because *Bestfoods* only considered corporate law, courts should not extend its holding to the broader category of state business laws.[174]

Under *Bestfoods*, where federal corporate law does not specifically preempt general corporate law, courts should defer to general corporate law.[175] A narrow reading of *Bestfoods* would require specific preemption only where federal law conflicts with a state law exclusive to corporations.[176] Under this reading, because agency and trade secret laws are not exclusive to corporations, the *Bestfoods* holding would not apply.[177] If *Bestfoods* does not apply, courts will not require specific language for federal law to preempt state law.[178] Therefore, courts should not limit section 113(g)(3)'s application.[179]

This reasoning, however, is flawed.[180] Although agency and trade secret laws are not exclusively corporate laws, the *Bestfoods* rationale indicates that its holding remains applicable.[181] *Bestfoods* deferred to general corporate law over a federal law affecting corporations because of the nature of corporations.[182] Corporations are creatures of state law.[183] State law creates them and state law generally governs them.[184]

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[173] *Compare* RESTATEMENT (THIRD) OF AGENCY § 395 (applying to all principal-agent relationships, not just those in corporate context), *and* RESTATEMENT (FIRST) OF TORTS § 757 (applying to all disclosures of trade secrets given in confidence, regardless of whether trade secret was initially shared in corporate context), *with* Buechner v. Farbenfabriken Bayer Aktiengesellschaft, 154 A.2d 684, 687 (Del. 1959) (applying veil-piercing principle in corporate context only), *and* Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 58 (N.Y. 1926) (applying veil-piercing in corporate context only).

[174] *See Bestfoods*, 524 U.S. at 61.

[175] *See id.* at 63-64.

[176] *See id.* at 61.

[177] *Cf.* RESTATEMENT (THIRD) OF AGENCY § 395 (applying to all principal-agent relationships, not just those in corporate context); RESTATEMENT (FIRST) OF TORTS § 757 (applying to all disclosures of trade secrets given in confidence, regardless of whether trade secret was initially shared in corporate context).

[178] *See Bestfoods*, 524 U.S. at 63 (finding specifically that state corporate laws were particularly relevant to interpreting federal statutes); United States v. Texas, 507 U.S. 529, 534 (1993); Burks v. Lasker, 441 U.S. 471, 478 (1979) (finding state corporation law relevant even though action based on federal statute); *see also* discussion *supra* Part I.D; discussion *infra* Part III.A (discussing relevance of state corporate law to interpreting federal law affecting corporations).

[179] *See supra* note 178.

[180] *See infra* notes 182-89 and accompanying text.

[181] *See Bestfoods*, 524 U.S. at 63 (quoting *Burks*, 441 U.S. at 478) (recognizing state law is preeminent in area of corporation law and that courts should therefore not disregard it in interpreting federal law).

[182] *See Bestfoods*, 524 U.S. at 51-52, 61.

[183] *See id.* at 51-52; *see also* Kerrigan's Estate v. Joseph E. Seagram & Sons, 199

Thus, general corporation law deserves deference.[185] The same is true, however, of business associations generally.[186] States create and govern all business entities, not just corporations.[187] Deferring to state business law is thus consistent with the *Bestfoods* rationale for deferring to general corporate law.[188] Therefore, courts should apply *Bestfoods* to section 113(g)(3) and limit its application to terrorism cases.[189]

B. Legislative Intent Supports Judicial Limitation of Section 113(g)(3)

In addition to *Bestfoods*, the canons of statutory construction also support a narrow interpretation.[190] Where literal application of statutory language would lead to "mischievous consequences," courts will instead apply the statute according to legislative intent.[191] In addition to its effects on state law, literal application of section 113(g)(3) would lead to mischievous consequences by creating a

F.2d 694, 697 (3d Cir. 1952) (holding partnership governed by laws of state where partnership was formed); Koh v. Inno-Pac. Holdings, Ltd., 54 P.3d 1270, 1272 (Wash. Ct. App. 2002) (noting partnership interest governed by laws of state where partnership was formed); 59A AM. JUR. 2D, *supra* note 19, § 28 (stating rights and obligations of partners among themselves are generally determined by law of state where partnership contract is made).

[184] *See* sources cited *supra* note 19.

[185] *See Burks*, 441 U.S. at 478.

[186] *See Kerrigan's Estate*, 199 F.2d at 697 (holding laws of state of partnership formation govern partnership); *Koh*, 54 P.3d at 1272 (noting partnership interest governed by laws of state where partnership was formed); 59A AM. JUR. 2D, *supra* note 19, § 28 (stating rights and obligations among partners are generally determined by law of state where partnership contract is made).

[187] *See supra* note 186.

[188] *See* United States v. Bestfoods, 524 U.S. 51, 51-52, 61 (1998) (reasoning corporations are state entities, and thus general corporation law deserves deference in face of federal law not specifically preempting state law).

[189] *See supra* notes 186-88.

[190] *See* discussion *supra* Part I.E (discussing parameters of canons of construction).

[191] *See* Dalmasso v. Dalmasso, 9 P.3d 551, 560 (Kan. 2000) (noting courts should interpret statutory language to avoid absurd or unreasonable result); State *ex rel.* Besser v. Ohio State Univ., 721 N.E.2d 1044, 1049 (Ohio 2000) (noting courts must construe statutes to avoid absurd results); 73 AM. JUR. 2D, *supra* note 109, § 172; Llewellyn, *supra* note 104, at 403; *see also* discussion *supra* Part I.E (discussing parameters of canons of construction). *See generally* Helvering v. Hammel, 311 U.S. 504 (1941) (adopting restricted meaning of statutory language to avoid absurd result); *In re* Blalock, 31 F.2d 612 (N.D. Ga. 1929) (interpreting statute to avoid absurd and unreasonable outcome).

threat to businesses.[192] This threat comes in the form of expanded criminal liability for antitrust transgressions.[193]

The Sherman Act fails to distinguish between civil and criminal offenses.[194] Consequently, the DOJ alone decides whether to pursue an alleged violation through civil or criminal proceedings.[195] By its terms, section 113(g)(3) only applies to criminal antitrust investigations.[196] Thus, the electronic surveillance tool is available only in connection with criminal antitrust investigations.[197] While the DOJ's policy is to handle lesser offenses civilly, this arrangement could result in the DOJ investigating matters criminally, where prior to section 113(g)(3) it would have handled the matters civilly.[198] Because the DOJ wins more than ninety-five percent of its antitrust cases, more criminal investigations translates to a rise in criminal liability.[199] Although more liability is arguably beneficial, Congress did not make its intent clear in this regard.[200] Moreover, considering the DOJ's ninety-five percent success rate, this result is unnecessary.[201]

Regardless of whether the status of antitrust law warrants additional criminal liability, such an expansion of liability is "mischievous."[202]

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[192] *See infra* notes 195-97 and accompanying text.

[193] *See infra* notes 195-97 and accompanying text.

[194] *See* 15 U.S.C. §§ 1, 2, 4 (2000 & Supp. IV 2004) (imposing liability for all contracts and combinations in restraint of trade, but not indicating what type of liability).

[195] *See* United States v. Standard Oil Co., 23 F. Supp. 937, 938 (W.D. Wis. 1938) (noting DOJ's choice between civil and criminal proceedings).

[196] *See* USA PATRIOT Improvement and Reauthorization Act of 2005 § 113(g)(3), Pub. L. No. 109-177, 120 Stat. 192, 210 (2006).

[197] *See id.*

[198] *See* DEP'T OF JUSTICE, *supra* note 41, at ch. III(C)(5).

[199] *See* Oliva, *supra* note 41 (predicting section 113(g)(3) will lead to more plea bargains, leaving virtually no public or judicial scrutiny of Antitrust Division activities, thus providing prosecutors broad policymaking powers).

[200] *See* § 113(g)(3); H.R. REP. NO. 109-333, at 94 (2005) (indicating additional wiretap predicates related to preventing terrorism and no intent to change liability under Sherman Act); *see also* United States v. Bestfoods, 524 U.S. 51, 61 (1998) (quoting Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979)) (noting congressional silence would be unlikely if Congress were contemplating major and controversial change to existing law).

[201] *See* Oliva *supra* note 41.

[202] *See infra* note 203 and accompanying text. *Compare* USA PATRIOT Improvement and Reauthorization Act of 2005 § 113(g)(3), Pub. L. No. 109-177, 120 Stat. 192, 210 (2006) (stating purpose of Reauthorized Patriot Act is to extend and modify investigative tools to combat terrorism), *with supra* notes 195-97 and accompanying text (discussing potential for increased criminal liability under literal interpretation of section 113(g)(3)).

The language of the provision does not give clear notice of expanded liability; on its face, the statute appears to concern only wiretapping predicates.[203] The placement of a substantive change to criminal antitrust law within legislation designed to combat terrorism is counterintuitive.[204] This "mischievous consequence" mandates that courts interpret section 113(g)(3) according to its purpose — combating terrorism.[205]

The Congressional Conference Committee explained the new wiretap predicates related to terrorism crimes.[206] The preamble to the Reauthorized Patriot Act explains the Act's purpose is to extend the law enforcement capabilities necessary to combat terrorism.[207] Because not all wiretapping cases involve terrorism, this purpose suggests an intent to limit section 113(g)(3)'s application to such cases.[208] Although preambles to statutes do not control, they indicate Congress's rationale and intent, and thus the statute's correct construction.[209] Judicial confinement of section 113(g)(3) to cases involving terrorism would avoid the risks a literal application poses,

[203] *See* § 113(g)(3) (making no mention of potential for increased criminal liability or expanded potential for criminal proceedings).

[204] *Compare* 120 Stat. 192 (stating purpose of Reauthorized Patriot Act is to extend and modify investigative tools to combat terrorism), *with supra* notes 195-97 and accompanying text (discussing potential for increased criminal liability under literal interpretation of section 113(g)(3)).

[205] *See* Dalmasso v. Dalmasso, 9 P.3d 551, 560 (Kan. 2000) (noting courts should interpret statutory language to avoid absurd or unreasonable results); State *ex rel.* Besser v. Ohio State Univ., 721 N.E.2d 1044, 1049 (Ohio 2000) (noting courts must construe statutes to avoid absurd results); H.R. REP. NO. 109-333, at 94 (2005) (indicating additional wiretap predicates related to preventing terrorism); 73 AM. JUR. 2D, *supra* note 109, § 172 (2001); Llewellyn, *supra* note 104, at 403; *see also* discussion *supra* Part I.E (discussing parameters of canons of construction). *See generally* Helvering v. Hammel, 311 U.S. 504 (1941) (adopting restricted meaning of statutory language to avoid absurd result); *In re* Blalock, 31 F.2d 612 (N.D. Ga. 1929) (interpreting statute to avoid absurd and unreasonable outcome).

[206] *See* H.R. REP. NO. 109-333.

[207] *Cf.* 120 Stat. 192 (stating purpose of Act is to expand law enforcement tools needed to combat terrorism).

[208] *See* 18 U.S.C. § 2516 (2000 & Supp. IV 2004) (listing federal wiretapping predicates).

[209] *See* Westbrook v. McDonald, 43 S.W.2d 356, 359 (Ark. 1931) (applying general rule that titles, preambles, and section headings do not control); Brown v. Robinson, 175 N.E. 269, 270 (Mass. 1931) (applying exception that courts may use preambles to derive intent, and thus correct interpretation); Llewellyn, *supra* note 104, at 403 (stating preambles to legislation do not expand scope of legislation, but courts may consult them to determine rationale, and thus correct construction).

while simultaneously giving effect to legislative intent.[210] Courts should therefore limit section 113(g)(3) in accordance with legislative intent.[211]

Although congressional intent is clear, proponents of a literal interpretation of the section would argue intent is irrelevant in this case.[212] Where statutory language is clear and unambiguous, courts must give it effect according to its plain meaning.[213] If courts applied the statutory language literally, they would not need to consider the legislative intent behind the statutory language.[214]

On its face, the language of section 113(g)(3) appears unambiguous.[215] It adds violations of the Sherman Act to the list of predicate offenses for wiretapping.[216] The clear meaning is that any criminal investigation of an antitrust violation may utilize electronic surveillance.[217] The only limitations on the DOJ are in § 2518.[218] The legislative intent is therefore irrelevant.[219]

Other canons of statutory interpretation, however, support a limitation based on legislative intent.[220] While courts generally apply statutes according to their plain meaning, they will limit general provisions to the statute's scope and purpose where the statutory language is overinclusive.[221] Section 113(g)(3) is a general statute in

[210] *See supra* notes 195-97 and accompanying text.

[211] *See* 120 Stat. 192 (indicating purpose of Act in general is to aid in fighting terrorism); H.R. REP. NO. 109-333 (indicating purpose of section 113 is to prevent crimes of terrorism).

[212] *See* Llewellyn, *supra* note 104, at 403 (stating that where statutory language is unambiguous courts must give language its plain effect); *see also* Newhall v. Sanger, 92 U.S. 761, 763 (1875) (effectuating unambiguous statute); 59A AM. JUR. 2D, *supra* note 19, § 113; 2A SINGER, *supra* note 104, § 46:1 (stating if statute's language is clear, court may not go outside its language).

[213] *See supra* note 212.

[214] *See supra* note 212.

[215] *See* § 113(g)(3), 120 Stat. at 210 (adding Sherman Act violations to list of wiretap predicates in 18 U.S.C. § 2516).

[216] *See* 18 U.S.C. § 2516(1) (2000 & Supp. IV 2004); § 113(g)(3).

[217] *See* 18 U.S.C. § 2516; *id.* § 2518 (2000); § 113(g)(3).

[218] *See* 18 U.S.C. § 2518 (setting forth requirements for obtaining judicial approval for electronic surveillance and limitations on scope of such approval, including limits on duration and manner of surveillance); § 113(g)(3), 120 Stat. at 210; discussion *supra* Part I.A (describing parameters of federal wiretapping provisions).

[219] *See supra* note 212.

[220] *See infra* notes 221-23 and accompanying text.

[221] *See, e.g.*, Conley v. Sousa, 554 S.W.2d 87, 88 (Ky. 1977) (determining scope of statute with reference to problem legislature intended statute to solve); Me. Merch. Ass'n v. Campbell, 287 A.2d 430, 435-36 (Me. 1972) (taking into account policy

that, according to its literal wording, it applies to all criminal antitrust investigations.[222] In light of the hidden consequences of a literal interpretation of section 113(g)(3), a court could reasonably find the general provision overinclusive.[223]

The purpose of the Reauthorized Patriot Act is to enhance investigatory tools in combating terrorism.[224] Specifically, the scope of section 113(g)(3) is to aid the DOJ in its investigations of antitrust violations that could finance terrorism.[225] Although the terms of section 113(g)(3) are general, courts should limit its application according to its scope and purpose.[226] Thus, courts should apply section 113(g)(3) only where the investigation relates to an antitrust violation involving terrorism.[227]

C. Textual Construction Mandates a Limited Application of Section 113(g)(3)

Courts also depart from applying a statute according to its plain meaning where it is one of several on the same subject.[228] Courts construe statutes *in pari materia* unless their scopes are clearly distinct.[229] Section 113(g)(3) is *in pari materia* with the other wiretap predicates in section 113 and courts must interpret it in accordance with them.[230]

consideration that brought about legislature's action); Rector of Univ. of Va. v. Harris, 387 S.E.2d 772, 776 (Va. 1990) (noting courts should read statutes to remedy mischief legislature enacted statute to prevent); *see* 2B SINGER, *supra* note 114, § 54:4; Llewellyn, *supra* note 104, at 405; *supra* note 212.

[222] *See* § 113(g)(3), 120 Stat. at 210.

[223] *See supra* notes 195-97 and accompanying text (describing potential for expanded criminal liability as result of section 113(g)(3)).

[224] 120 Stat. at 192.

[225] *See* H.R. REP. NO. 109-333, at 94 (2005).

[226] *See* § 113(g)(3), 120 Stat. at 210; *see also supra* note 221.

[227] *See* § 113(g)(3), 120 Stat. at 210; *see also supra* note 221.

[228] *See* 2A SINGER, *supra* note 104, § 51:3; Llewellyn, *supra* note 104, at 402; *see also* Sanford's Estate v. Comm'r, 308 U.S. 39, 42-43 (1939); United States v. Morgan, 118 F. Supp. 621, 691-92 (S.D.N.Y. 1953).

[229] *See* Llewellyn, *supra* note 104, at 402 (stating statutes are not *in pari materia* if scopes and aims are distinct, or if legislative intent indicates departure from general purpose of previous enactments); *cf.* House v. Cullman County, 593 So. 2d 69, 76-77 (Ala. 1992); Doe v. Statewide Grievance Comm., 677 A.2d 960, 963 (Conn. App. Ct. 1996) (finding legislative history does not support reading statutes together); Kroh v. Am. Family Ins., 487 N.W.2d 306, 308 (N.D. 1992) (reading statutes separately where reading them together would cause ambiguity).

[230] *See infra* notes 231-34 and accompanying text.

Section 113 contains several amendments to 18 U.S.C. § 2516.[231] According to the Congressional Conference Committee, all crimes listed in section 113 relate to terrorism.[232] Section 113 does not single out any specific crime as having a different purpose than the others.[233] As such, subparts (a) through (g) of section 113 appear to have the same purpose and scope.[234] Thus, courts must construe them *in pari materia*.[235]

In light of section 113's purpose, it is possible to divide the new predicate offenses into two categories.[236] The first category is composed of crimes directly related to acts of terrorism.[237] It includes violence at international airports, terrorist attacks against mass transportation, aircraft piracy, and the use of incendiary devices.[238] The second is composed of crimes related to the financing of terrorism.[239] It includes identity theft, structuring transactions to evade reporting requirements, and bank fraud.[240] Among the additional predicate offenses in the second category are criminal violations of the Sherman Act.[241] These types of crimes and Congress's statement of purpose indicate an attempt to combat the financing of terrorism.[242] Specifically, Congress enhanced the DOJ's ability to investigate antitrust violations used to fund terrorism.[243] Because the additions have such a clear aim, courts should construe the provisions together and limit their application to investigations involving terrorism.[244]

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[231] § 113(a)-(g), 120 Stat. at 209-10; *see* discussion *supra* Part II (discussing scope of section 113).

[232] *See* H.R. REP. NO. 109-333, at 94 (2005).

[233] *See* § 113, 120 Stat. at 209-10; H.R. REP. NO. 109-333, at 94 (failing to distinguish separate scopes and purposes for different provisions in section 113).

[234] *See* § 113, 120 Stat. at 209-10; H.R. REP. NO. 109-333, at 94.

[235] *See* discussion *supra* Part I.E (stating courts must construe statutes *in pari materia* together).

[236] *See* § 113, 120 Stat. at 209-10; *see* discussion *supra* Part II (discussing scope of section 113).

[237] § 113, 120 Stat. at 209-10; *see infra* text accompanying notes 241-43.

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] § 113(g)(3), 120 Stat. at 210.

[242] *See id.*; *see also* discussion *supra* Part II (noting Congress intended section 113 wiretap predicates to relate to crimes of terrorism).

[243] *See* H.R. REP. NO. 109-333, at 94 (2005); *see also* discussion *supra* Part II (noting Congress intended section 113 wiretap predicates relate to crimes of terrorism).

[244] *See* discussion *supra* Part I.E (stating courts must construe statutes *in pari*

CONCLUSION

Justice Holmes thought it better that criminals go unpunished than the government "play an ignoble part" in bringing them to justice.[245] Congress had a noble intent in enacting section 113(g)(3) — to combat terrorism.[246] Yet, if courts apply section 113(g)(3) literally, the practical effect of the legislation will be ignoble.[247] Its application will undermine state corporation law and subject businesses to increased criminal liability in a backhanded manner.[248] The courts can prevent this result by limiting section 113(g)(3)'s applicability to crimes involving terrorism.[249] The best way to both protect businesses and effectuate the purpose of section 113(g)(3) is for courts to construe the provision narrowly.

materia together).

[245] Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

[246] *See* discussion *supra* Part II (noting Congress designed Patriot Act and Reauthorized Patriot Act to combat terrorism).

[247] *See* discussion *supra* Part III.A (describing mischievous potential for expanded criminal liability due to section 113(g)(3)).

[248] *See* discussion *supra* Part III.B (describing mischievous potential for expanded criminal liability due to section 113(g)(3)).

[249] Section 113(g)(3) was not included in either of the original bills passed in the House of Representatives or the Senate. *Compare* H.R. 3199, 109th Cong. (2005) (as passed by House of Representatives, July 21, 2005), *with* H.R. 3199, 109th Cong. (2005) (as passed by Senate, July 29, 2005). The Congressional Conference Committee added the provision with no debate or discussion, other than the statement regarding section 113 generally. The Congressional Conference Committee added the provision with no debate or discussion, other than the statement regarding section 113 generally. H.R. REP. NO. 109-333, at 94 (2005).