

TOPICS

Review of Applications/Issuance of Orders

Minimization

Progress Reports

Suppression Issues



Review of Applications/Issuance of
Orders

DOJ/Review / “Read Copy”

Oral Supplementation

Findings – four part probable cause

(Interceptees, crimes,
communications, necessity)


Define “authorized objective”



Necessity/Exhaustion of Alternatives

Constitutional Roots – Berger v. NY:
to avoid prior notice, must show need for
surreptitious eavesdropping

Government has to show objectives of
investigation not otherwise obtainable
due to limitations of conventional
methods




Establishing Necessity

2518(1)(c): Conventional investigative
techniques:

Tried unsuccessfully

If tried, would be unsuccessful OR

If tried, too dangerous



Elements of Necessity Showing

Showing must be case specific

Recurrent circumstances
(conspiracies)

Some boilerplate inevitable
acceptable



Failure of Other Methods:

CIs/UAs

Record searches – banks, phone, isps, law enforcement


Physical surveillance, video, location monitoring

Trash pulls, mail covers

Arrests/Stop & talk – interrogation/interviews

Searches

Prior electronic surveillance (pen registers/consent/T. III)



Success Unlikely/Too Dangerous:

Physical surveillance

Arrests

Interviews/Interrogation

Search warrants

Grand Jury/Immunity



Minimization

Limitation of surveillance to “pertinent” communications = limit interception of non-pertinent communications

Constitutional roots – prohibition against general searches and seizures

Not = conventional search and seizure – more intrusive & prolonged

Lack of immediate notice



How Minimization is Accomplished

Title III only states mandate: court approved procedures


Instructions to agents

Prosecutor & Case Agent supervision

Patterns of callers and calls

Spot monitoring – “two minute up/down” rule

All calls – two minutes



Progress Reports


Constitutional root: judicial control of scope of search

Periodic meetings with issuing Judge (or MJ) –
on record

Judicial Review: Minimization logs (filed)

Update re results

Reconfirm probable cause, necessity, and need to
continue



Suppression Motions/Hearings

Standing – interceptees, owners of premises

Franks v. Delaware

Deliberately false/reckless indifference to truth

T. III applications: omission re. other alternatives/actual or potential success

Defendant must make prima facie showing of misleading omission

Falsehood/omission must be material to obtain suppression



Suppression Review

Review deferential

Necessity – abuse of discretion; clear error

Minimization – efforts reasonable

Must contravene Fourth Amendment or core requirement of T. III

Good faith?



Evaluating Compliance With Minimization Requirement – Scott v. U.S.

Reviewing court considers:

nature/complexity of offenses/# targets

objectives of the investigation and surveillance

numbers, locations of speakers, and device

awareness of risk of interception; evasive techniques

Use of appropriate minimization procedures

Extent of judicial supervision

Minimization re. foreign language communications



SUPPRESSION ONLY OCCURS WHERE GOVERNMENT FAILS TO COMPLY WITH REQUIREMENT THAT IT PRESENT RECORDINGS "IMMEDIATELY" FOR SEALING AND SAFEKEEPING Ojedia – Rios v. US

Can wait until end of entire surveillance (should seal with progress reports)

“Immediate” = within forty-eight hours of termination

Later submission accepted if there is a “satisfactory explanation”

Requirement has nothing to do with Constitution: an anti-tampering provision



Suppression Review

Won't occur, despite, inter alia, failure to:

Identify interceptees/show probable cause re. interceptee

Minimize – partial – only excess, nonpertinent material

Provide post-surveillance notice

