

Forum

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Don't Let the Fed Bugs Bite

By Matthew G. Jacobs

U.S. Attorney Thomas P. O'Brien has said of the number of wiretaps obtained in Los Angeles last year, "Whether we are targeting drug cartels, organized crime, street gangs or human smugglers, Title III wiretaps have proven to be an extremely important tool in our investigations and prosecutions." Notably, O'Brien did not mention offenses typically considered white-collar crimes in his list of violations for which wiretaps can be useful. In a similar vein, the well-respected Electronic Frontier Foundation has written on the risk of being wiretapped, concluding, "[I]t's still clear that unless you're suspected of dealing drugs (or targeted for foreign intelligence surveillance), the chances of you or your organization's phone lines being tapped are fairly low, and the chances of your Internet communications being tapped are even lower."

Although both of these comments are consistent with the traditional wisdom in the white-collar defense bar that our clients' phones have not been and are not being tapped, we may have to change our thinking. In fact, based on recent experience, the chances of being caught on tape appear greater than ever for those suspected of white-collar crimes. If this recent experience indicates a trend, this would be a radical change from past investigative practice, and one of which all lawyers should be aware.

Federal wiretaps are governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510-2522. Similar to an application for a search warrant, an application for a wiretap must include a full and complete statement of the facts and circumstances suggesting that a particular crime is being or is about to be committed. It must also include a full and complete statement as to why other investigative procedures have been tried and failed, or why they would fail or are too

dangerous to utilize. According to 18 U.S.C. Section 2518(5), all court orders authorizing wiretaps must include a statement that the interception "shall be conducted in such a way as to minimize the interception of communication not otherwise subject to interception." This "minimization" requirement means that government agents must monitor the wiretap and turn it off when the discussion turns to non-criminal matters.

An authorizing court may require the government to notify third parties that their conversations have been intercepted. However, such notice can typically be delayed until sometime after the investigation has been completed, or at least has advanced from a covert stage to an overt one.

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In 11 years as a federal prosecutor — two in the Antitrust Division and nine in the U.S. attorney's office — I was either directly involved in, or supervised, literally hundreds of investigations of white-collar crimes. These included some very high-profile cases. Yet not once did I or any of my fellow white-collar prosecutors apply for or obtain a wiretap. "T3's" — the nickname for wiretaps authorized by Title III — were the exclusive province of the drug and organized crime prosecutors.

While white-collar prosecutors were certainly *aware* of their ability to obtain wiretaps, they may have been deterred by several factors. One is Title III's requirement that any wiretap application include a "full and complete" explanation of why

