

Table of Contents

Volume 1

CHAPTER 1. OVERVIEW

I. OVERVIEW OF TREATISE

- § 1:1 Scope of treatise
- § 1:2 —Methods of surveillance—Wiretapping and bugging
- § 1:3 — —Acquisition of electronic communications and identifying information
- § 1:4 —Governmental versus private activities
- § 1:5 Organization of treatise

II. OVERVIEW OF ELECTRONIC SURVEILLANCE LAW

- § 1:6 Generally
- § 1:7 Interception of communications during transmission: Fourth Amendment issues
- § 1:8 —Wire and oral communications
- § 1:9 —Electronic communications
- § 1:10 Interception of communications during transmission: statutory framework
- § 1:11 —Scope of substantive prohibition
- § 1:12 —Court-authorized interception
- § 1:13 — —Wire and oral communications
- § 1:14 — —Electronic communications
- § 1:15 —Remedies for unauthorized interception
- § 1:16 Acquisition of stored communications: Fourth Amendment issues
- § 1:17 Acquisition of stored communications: Statutory framework
- § 1:18 —Scope of substantive prohibition
- § 1:19 —Court-authorized access to communications
- § 1:20 —Remedies for unauthorized acquisition of stored communications
- § 1:21 Acquisition of source, destination, and other identifying information: Fourth Amendment issues
- § 1:22 —Wire communications
- § 1:23 —Electronic communications
- § 1:24 Acquisition of source, destination, and other identifying information: Statutory framework
- § 1:25 —Scope of substantive prohibition
- § 1:26 —Court-authorized access to information
- § 1:27 —Remedies for unauthorized acquisition of information

§ 1:28 Foreign intelligence surveillance

CHAPTER 2. ENACTMENT AND CONSTITUTIONALITY OF TITLE III AND RELATED SURVEILLANCE STATUTES

I. BACKGROUND

§ 2:1 Generally

II. OBJECTIVES OF ELECTRONIC SURVEILLANCE LAW

§ 2:2 Generally

§ 2:3 Strategic intelligence

§ 2:4 Scope of organizations and identities of participants

§ 2:5 Specific evidence

III. LAW PRIOR TO 1968 PERTAINING TO WIRETAPPING

§ 2:6 Generally

§ 2:7 *Olmstead v. U.S*

§ 2:8 47 U.S.C.A. § 605

§ 2:9 —Wiretap evidence in federal courts under § 605

§ 2:10 —Wiretap evidence in state proceedings

§ 2:11 —Exceptions to § 605

§ 2:12 — —Consent surveillance

§ 2:13 — —Telephone company activities

§ 2:14 — —National security wiretapping

§ 2:15 —Civil liability

§ 2:16 —Criminal sanctions

§ 2:17 Federal agency regulations

§ 2:18 State legislation

§ 2:19 —Prohibition of wiretapping

§ 2:20 —Sanctions for injury to telephone company property

§ 2:21 —Court-ordered wiretapping

§ 2:22 — —Wiretapping in New York between *Berger v. New York*
and Title III

IV. LAW PRIOR TO 1968 PERTAINING TO BUGGING

§ 2:23 Generally

§ 2:24 Illegality of trespassory entry under *Olmstead*

§ 2:25 Statutes and regulations pertaining to nontrespassory entry

§ 2:26 —Inapplicability of § 605

§ 2:27 —Statutes and regulations pertaining to radio transmission

§ 2:28 —State legislation

§ 2:29 Nontrespassory entry by wired informants

§ 2:30 Entry upon court order: *Berger v. New York*

§ 2:31 Elimination of the trespass doctrine: *Katz v. U.S*

TABLE OF CONTENTS

V. LEGISLATIVE FORERUNNERS OF TITLE III

§ 2:32 Generally

VI. ENACTMENT OF TITLE III

§ 2:33 Generally

§ 2:34 Basis for federal regulation of wiretapping

§ 2:35 Basis for federal regulation of bugging

§ 2:36 Basis for imposition of the federal statutory exclusionary rule

§ 2:37 Necessity for legislation authorizing court-ordered electronic surveillance

**VII. ENACTMENT OF STATE LEGISLATION
AUTHORIZING ELECTRONIC SURVEILLANCE**

§ 2:38 Generally

§ 2:39 Preemption by Title III of state regulatory authority

§ 2:40 Requirement that states enact legislation authorizing electronic surveillance

§ 2:41 —Specification of offenses

**VIII. CONSTITUTIONAL ASPECTS OF ELECTRONIC
SURVEILLANCE AND TITLE III**

§ 2:42 Generally

§ 2:43 Differences between conventional and electronic searches

§ 2:44 Electronic surveillance as an unreasonable search

§ 2:45 Constitutionality of Title III on its face under the Fourth Amendment

§ 2:46 —Particularity requirement

§ 2:47 — —Offense being investigated

§ 2:48 — —Place to be searched

§ 2:49 — —Things to be seized: Type of communication

§ 2:50 —Failure to limit surveillance to known and named persons

§ 2:51 —Length of surveillance: Duration and termination

§ 2:52 —Notice requirement

§ 2:53 — —Showing of exigency to waive pre-surveillance notice

§ 2:54 — —Time of service

§ 2:55 — —Content of notice

§ 2:56 — —Persons entitled to notice

§ 2:57 Other constitutional issues

§ 2:58 —First Amendment: Effect on free speech

§ 2:59 —Fourth Amendment—Warrantless playing of seized recordings

§ 2:60 — —Incidental interception

§ 2:61 —Fifth Amendment—Privilege against self-incrimination

§ 2:62 —Other Fifth Amendment claims

§ 2:63 —Sixth Amendment: Right to counsel

§ 2:64 — —Breach of ethical restrictions on contacts with persons represented by counsel

- § 2:65 —Sixth Amendment: Right of confrontation
- § 2:66 —Sixth amendment: Right to a public trial
- § 2:67 —Separation of powers
- § 2:68 —Speech and debate clause
- § 2:69 Necessity for strict construction of Title III

CHAPTER 3. ELECTRONIC SURVEILLANCE WITHOUT A COURT ORDER

I. INTRODUCTION

- § 3:1 Generally

II. LIMITED OR UNCERTAIN REACH OF DEFINITIONS IN TITLE III

- § 3:2 Generally
- § 3:3 Wire communication
- § 3:4 —Monitoring of wire communications of persons in custody or confinement
- § 3:5 Oral communications
- § 3:6 —Subjective expectation of privacy
- § 3:7 —Whether expectation of privacy was reasonable
- § 3:8 —Monitoring of oral communications of persons who are imprisoned, jailed, or otherwise in law enforcement custody or confinement
- § 3:9 Electronic communications
- § 3:10 —Monitoring of electronic communications of persons who are detained or in custody, in confinement, or under supervision
- § 3:11 Radio communications
- § 3:12 Interception
- § 3:13 —Recording as interception
- § 3:14 — —Unmonitored recording
- § 3:15 — —Recording by a participant in the conversation
- § 3:16 —Activities not constituting interception
- § 3:17 — —Examination of telephone company, service provider, and similar records
- § 3:18 — —Pen registers and similar devices
- § 3:19 — —Acquisition of non-content information
- § 3:20 — —Trap and trace devices
- § 3:21 — —Location monitoring
- § 3:22 — —Installation of inactive listening device
- § 3:23 — —Unaided overhearing
- § 3:24 — —Monitoring incoming calls and messages
- § 3:25 — —Examination of data in cell phones and similar devices
- § 3:26 — —Inadvertent interception
- § 3:27 — —Sharing, replaying or re-recording previously recorded communications
- § 3:28 — —Transmitted, stored, and forwarded electronic communications

TABLE OF CONTENTS

- § 3:29 — —Key logger systems and spyware
- § 3:30 Electronic, mechanical, or other device
- § 3:31 —Equipment furnished and used in the ordinary course of business
- § 3:32 —Equipment used by law enforcement officers in the ordinary course of duty—The “law enforcement” exception
- § 3:33 Contents
- § 3:34 Electronic communications systems
- § 3:35 Electronic communications service
- § 3:36 —User of electronic communications service

III. SURVEILLANCE ACTIVITIES BY TELEPHONE COMPANIES AND OTHER PROVIDERS OF ELECTRONIC COMMUNICATIONS SERVICES UNDER TITLE III: GENERAL LIMITATIONS

- § 3:37 Generally
- § 3:38 Telephone company, service provider, and similar records
- § 3:39 Pen registers
- § 3:40 Trap and trace devices
- § 3:41 —Caller identification services
- § 3:42 Equipment used by providers of wire or electronic communications services
- § 3:43 Authority to engage in interception of communications
- § 3:44 —Interception necessarily incident to rendition of service
- § 3:45 —Interception of communications to detect fraudulent use
- § 3:46 Service observation
- § 3:47 Supervisory monitoring
- § 3:48 Providing information and assistance to law enforcement officers

IV. SURVEILLANCE OF COMPUTER TRESPASSERS

- § 3:49 Generally

V. SURVEILLANCE BY EMPLOYEES OF THE FEDERAL COMMUNICATIONS COMMISSION

- § 3:50 Generally
- § 3:51 Communications security monitoring

VI. SURVEILLANCE OF PUBLIC RADIO TRANSMISSIONS

- § 3:52 Generally

VII. SURVEILLANCE WITH THE CONSENT OF A PARTY TO THE CONVERSATION

- § 3:53 Generally
- § 3:54 Law enforcement consent surveillance

- § 3:55 —Constitutional considerations: *U.S. v. White*
- § 3:56 —Consent surveillance by federal officers: Justice department procedures
- § 3:57 —Consent surveillance by state officers
- § 3:58 Consent surveillance by a private party
- § 3:59 —State law
- § 3:60 Ethical restrictions on recording by attorneys
- § 3:61 Determining the validity of consent
- § 3:62 —Burden and standard of proof
- § 3:63 — —Duty to call the consenting party to testify
- § 3:64 — —Determining the voluntariness of consent
- § 3:65 — —Implied consent
- § 3:66 —Persons with authority to consent
- § 3:67 — —Party to the conversation
- § 3:68 — —Consent by the defendant

VIII. INTERSPOUSAL AND INTRAFAMILIAL SURVEILLANCE

- § 3:69 Generally

IX. ELECTRONIC SURVEILLANCE IN CASES OF EMERGENCY WITHOUT A COURT ORDER

- § 3:70 Generally
- § 3:71 Constitutional considerations
- § 3:72 Controls on emergency surveillance
- § 3:73 —Definition of emergency
- § 3:74 —Who may undertake emergency surveillance
- § 3:75 —Activities which may be investigated
- § 3:76 —Existence of basis to obtain a surveillance order
- § 3:77 —Review of the decision to conduct emergency surveillance

X. VIDEO SURVEILLANCE

- § 3:78 Generally

XI. ACCESS NOT RESTRICTED OR REGULATED BY ECPA TO STORED WIRE OR ELECTRONIC COMMUNICATIONS

- § 3:79 Generally
- § 3:80 Limits of “electronic communication service”
- § 3:81 Accessibility to public
- § 3:82 Limits of “facility”
- § 3:83 Authorized access
- § 3:84 Permitted disclosures

XII. ELECTRONIC SURVEILLANCE IN ANOTHER JURISDICTION

- § 3:85 Generally

TABLE OF CONTENTS

**CHAPTER 4. CONTENTS OF APPLICATIONS
AND ORDERS FOR COURT-ORDERED
ELECTRONIC SURVEILLANCE**

I. INTRODUCTION

§ 4:1 Generally

**II. CRIMES FOR WHICH COURT-ORDERED
ELECTRONIC SURVEILLANCE MAY BE USED AS AN
INVESTIGATORY TECHNIQUE**

§ 4:2 Generally

§ 4:3 Federal crimes

§ 4:4 —National security offenses

§ 4:5 —Intrinsically serious offenses

§ 4:6 —Offenses characteristic of organized crime

§ 4:7 State crimes

§ 4:8 —Misdemeanors

**III. PROCEDURE BY WHICH A SURVEILLANCE
APPLICATION IS FILED**

§ 4:9 Generally

§ 4:10 Authorization to file by United States Attorney General or
designated high-level officials

§ 4:11 —Requisite quality of review by authorizing official

§ 4:12 —Method of communication of decisions under § 2516(1)

§ 4:13 —Applications for surveillance orders relating to electronic
communications

§ 4:14 State provisions

§ 4:15 —Delegation of the principal prosecuting attorney's authority

§ 4:16 —Appearance by the principal prosecuting attorney

IV. CONTENTS OF APPLICATIONS

§ 4:17 Generally

§ 4:18 Statement of applicant's authority to apply

§ 4:19 Identification of the applicant

§ 4:20 Identification of the applicant and the officer authorizing the
application—Identification of applicant

§ 4:21 Centralized review: Identification of the Justice Department
official authorizing the application

§ 4:22 Statement of facts justifying the request: The probable cause
standard

§ 4:23 —Details as to the particular offense

§ 4:24 — —Offenses about to be committed

§ 4:25 —Nature and location of facilities or place where surveillance
is to be conducted

§ 4:26 — —Public telephone or area

- § 4:27 — —Covert entry
- § 4:28 — —Roving surveillance
- § 4:29 — —Cellular telephones
- § 4:30 —Type of communication
- § 4:31 — —Offense under investigation
- § 4:32 — —Parties to the conversation
- § 4:33 — —Location of the conversation
- § 4:34 — —Time of conversation
- § 4:35 — —Privileged communications
- § 4:36 —Identity of persons to be overheard, if known
- § 4:37 — —Elements of probable cause to establish identity
- § 4:38 —Identity of persons subject to interception, if known—Efforts required to discover a person’s identity, complicity or use of telephone or facilities
- § 4:39 Inadequacy of alternative investigatory procedures—
“Necessity”
- § 4:40 — —Necessity as a constitutional requirement
- § 4:41 — —Determining whether necessity has been shown
- § 4:42 — —Statement of investigatory objectives
- § 4:43 — —When electronic surveillance is most useful
- § 4:44 — —Case-specific representations
- § 4:45 — —Consequences of failure to show necessity
- § 4:46 —Failure of other methods
- § 4:47 — —Initial course and scope of investigatory efforts
- § 4:48 — —Informants and undercover agents
- § 4:49 — —Physical surveillance
- § 4:50 — —Other observation and monitoring techniques
- § 4:51 — —Obtaining tangible evidence and witnesses
- § 4:52 — —Electronic surveillance and data acquisition
- § 4:53 — —Other methods that need not have been tried
- § 4:54 —Unlikelihood of success
- § 4:55 — —Informants and undercover agents
- § 4:56 — —Physical surveillance
- § 4:57 — —Other observation and monitoring techniques
- § 4:58 — —Obtaining tangible evidence and witnesses
- § 4:59 — —Electronic surveillance and data acquisition
- § 4:60 —Danger from other methods
- § 4:61 Period for which authorization is sought
- § 4:62 Details concerning prior applications
- § 4:63 Details concerning results obtained from prior orders
- § 4:64 Statement of the objective sought to be obtained
- § 4:65 Statement as to who will conduct the surveillance
- § 4:66 Additional requirements imposed by state statutes

V. TO WHOM APPLICATIONS MAY BE PRESENTED

- § 4:67 Generally

VI. JUDICIAL REVIEW OF THE APPLICATION

- § 4:68 Generally

TABLE OF CONTENTS

- § 4:69 Questions to the applicant and other procedures
- § 4:70 Findings and determinations
- § 4:71 —Additional requirements imposed by state statutes

VII. CONTENTS OF SURVEILLANCE ORDERS

- § 4:72 Generally
- § 4:73 Telephone or other device located outside issuing judge's territorial jurisdiction
- § 4:74 Person whose communications are to be intercepted
- § 4:75 Facilities or place at which surveillance is to occur
- § 4:76 —Directive concerning the assistance of others in the installation of surveillance devices
- § 4:77 —Directive regulating the installation of surveillance devices by authorized officers
- § 4:78 —Directive regarding devices which may be used
- § 4:79 Type of conversation to be intercepted
- § 4:80 —Background communications
- § 4:81 Identity of the agency authorized to conduct surveillance and the person authorizing the application
- § 4:82 Directives concerning execution of the surveillance order
- § 4:83 —Regulating the time of surveillance
- § 4:84 — —Execution as soon as practicable
- § 4:85 — —Limiting surveillance to specific hours
- § 4:86 — —Duration directive
- § 4:87 — —Termination directive
- § 4:88 —Minimization directive
- § 4:89 —Reports to the court

VIII. SEALING AND STORAGE OF APPLICATIONS AND ORDERS

- § 4:90 Generally

IX. COURT ORDERS AUTHORIZING VIDEO SURVEILLANCE

- § 4:91 Generally

X. STORED WIRE OR ELECTRONIC COMMUNICATIONS AND RELATED INFORMATION

- § 4:92 Generally
- § 4:93 Constitutional issues—Constitutional issues regarding searches of computers, cell phones, and other mobile devices
- § 4:94 —Constitutional issues regarding acquisition of electronic communications held by third parties
- § 4:95 Scope of the stored communications access provisions of Electronic Communications Privacy Act—Types of providers
- § 4:96 —Types of information
- § 4:97 Disclosures not requiring prior service of a subpoena, court order, or warrant

- § 4:98 Obtaining access to stored communications and related records
- § 4:99 Compelling access to stored communications and related records—Contents of communications in electronic storage for fewer than 181 days
- § 4:100 —Contents of other communications
- § 4:101 —Customer records
- § 4:102 Summary of SCA disclosure rules

XI. PEN REGISTER AND TRAP AND TRACE ORDERS

- § 4:103 Generally
- § 4:104 Acquisition of “post-cut-through” dialed digits

XII. ORDERS TO DETERMINE LOCATION

- § 4:105 Generally
- § 4:106 Acquisition of provider cell site data—Historical data concerning a target phone
- § 4:107 —Prospective data concerning a target phone
- § 4:108 —“Pinging” a target phone
- § 4:109 —Cell tower dumps and geofence warrants
- § 4:110 —Challenges
- § 4:111 —Exceptions to the warrant requirement or suppression not required
- § 4:112 Other methods of real time location tracking
- § 4:113 Communications data warrants/cell site simulator orders

XIII. ORDERS FOR OTHER TYPES OF SURVEILLANCE

- § 4:114 Network Investigative Technique Warrants

CHAPTER 5. EXECUTING ELECTRONIC SURVEILLANCE

I. INTRODUCTION

- § 5:1 Generally

II. PERSONS WHO MAY EXECUTE TITLE III ORDERS

- § 5:2 Generally

III. REQUIREMENT THAT INTERCEPTED COMMUNICATION BE RECORDED

- § 5:3 Generally

IV. INTERCEPTION OF COMMUNICATIONS OF PERSONS NOT NAMED IN THE ORDER

- § 5:4 Generally

TABLE OF CONTENTS

§ 5:5 Background conversations

V. PRIVILEGED COMMUNICATIONS

§ 5:6 Generally

§ 5:7 Adverse effect of surveillance on privileged communication

§ 5:8 —Absolute prohibition of interception of privileged communications

§ 5:9 —Limited interception of privileged communications

§ 5:10 Sanctions for improper interception of privileged communications

VI. SURVEILLANCE OF PERSONS REPRESENTED BY ATTORNEYS OR ENTITLED TO BE REPRESENTED BY ATTORNEYS

§ 5:11 Generally

§ 5:12 Surveillance when represented by counsel before arrest

§ 5:13 Surveillance after arrest when represented by or entitled to counsel

§ 5:14 Surveillance after indictment

VII. DUTY TO MINIMIZE THE INTERCEPTION OF COMMUNICATIONS NOT AUTHORIZED TO BE INTERCEPTED

§ 5:15 Generally

§ 5:16 Constitutional aspects of minimization

§ 5:17 Communications not subject to interception

§ 5:18 Procedures by which minimization is accomplished—Wire and oral communications

§ 5:19 —Electronic communications

§ 5:20 Criteria by which minimization is evaluated

§ 5:21 Consequences of failure to minimize

VIII. REPORTS TO THE COURT

§ 5:22 Generally

IX. AMENDMENT OF THE SURVEILLANCE ORDER

§ 5:23 Generally

§ 5:24 Distinction between amendment, extension, and new application

§ 5:25 Constitutional issues

§ 5:26 When an amendment is required

§ 5:27 Time for filing an amendment

§ 5:28 Procedure for amending a surveillance order—Application and approval

§ 5:29 —Appeals

X. EXTENSION OF PERIOD OF SURVEILLANCE

§ 5:30 Generally

- § 5:31 Authorization of extension application
- § 5:32 Contents of extension application and order

XI. TERMINATION OF SURVEILLANCE

- § 5:33 Generally

XII. DELIVERY, SEALING, AND STORAGE OF RECORDINGS

- § 5:34 Generally
- § 5:35 Time for delivery
- § 5:36 Acceptable length of and explanation for delay
- § 5:37 Sealing and safekeeping of recordings
- § 5:38 —Unsealing
- § 5:39 Retention of recordings
- § 5:40 Consequences of destruction or loss of recordings

XIII. SERVICE OF NOTICE OF THE OCCURRENCE OF SURVEILLANCE

- § 5:41 Generally
- § 5:42 Post-surveillance notice
- § 5:43 —Time of service
- § 5:44 —Ex parte postponement of service
- § 5:45 Persons entitled to receive notice
- § 5:46 Contents of the inventory
- § 5:47 Consequences of failure to comply with § 2518(8)(d)

XIV. FAILURE TO FOLLOW AGENCY GUIDELINES

- § 5:48 Generally

XV. SPECIAL CONSIDERATIONS REGARDING INTERCEPTION OF ELECTRONIC COMMUNICATIONS

- § 5:49 Generally

XVI. ACQUISITION OF STORED COMMUNICATIONS

- § 5:50 Generally
- § 5:51 Provider assistance in acquisition of communications and related records
- § 5:52 Notice
- § 5:53 —When notice is required
- § 5:54 —When delayed notice is permissible
- § 5:55 —Preclusion of notice by service provider
- § 5:56 Preservation of evidence and backup preservation—§ 2703(f) letters
- § 5:57 —Backup copies

TABLE OF CONTENTS

§ 5:58 Reimbursement of costs

Volume 2

CHAPTER 6. PROCEEDINGS TO DETERMINE COMPLIANCE WITH ELECTRONIC SURVEILLANCE STATUTES

I. OVERVIEW

§ 6:1 Generally

II. CHALLENGES AT THE GRAND JURY STAGE

- § 6:2 Generally
- § 6:3 Demand for disclosure under § 3504
- § 6:4 —Time for § 3504 demand
- § 6:5 —Standing
- § 6:6 —Contents and sufficiency of the claim
- § 6:7 —Government’s response
- § 6:8 — —Sources which must be checked
- § 6:9 — —Form of government’s response
- § 6:10 — —Content of government’s response
- § 6:11 —Resolution of disputes under § 3504
- § 6:12 — —FISA surveillance
- § 6:13 Contempt proceedings: *Gelbard v. U.S.*

III. MOTIONS TO SUPPRESS

- § 6:14 Generally
- § 6:15 Delivery of the application and order
- § 6:16 Standing: Definition of “aggrieved person”
- § 6:17 —Effect of *Alderman v. U.S.*
- § 6:18 —Possessory interest in the premises
- § 6:19 —Persons against whom surveillance is directed
- § 6:20 —Vicarious standing
- § 6:21 —Establishing standing
- § 6:22 When suppression motions can be filed
- § 6:23 —Motion by defendant
- § 6:24 —Motion by nondefendant or nonparty
- § 6:25 — —Motion prior to arrest or indictment
- § 6:26 — —Intervention by persons who are neither parties nor witnesses
- § 6:27 — —Independent civil action to prevent disclosure
- § 6:28 —Pretrial motions by the prosecutor to determine admissibility of surveillance evidence
- § 6:29 Contents of and hearings on motions to suppress
- § 6:30 —Evidence

- § 6:31 — — Misrepresentations/omissions in facially sufficient applications—Generally
- § 6:32 — — Misrepresentations in facially sufficient applications—
When hearing required
- § 6:33 — — — Affirmative misrepresentations
- § 6:34 — — — Omissions
- § 6:35 — — — Materiality
- § 6:36 — Burden of proof
- § 6:37 — — Scope of review of factual allegations
- § 6:38 — Appeals
- § 6:39 — Postconviction review
- § 6:40 Basis for suppression

IV. CONSEQUENCES OF FAILURE TO COMPLY WITH TITLE III

- § 6:41 Generally
- § 6:42 Circumstances in which surveillance evidence remains
admissible
- § 6:43 — Limitation of § 2515 to “core concerns”/substantial violations
of the regulatory scheme: *Giordano* and *Chavez*
- § 6:44 — Good-faith exception to the Exclusionary Rule
- § 6:45 — Inapplicability of § 2515 to electronic and other non-wire or
non-oral communications
- § 6:46 — Violation of regulations not included in Title III
- § 6:47 — Admission in a proceeding not covered by § 2515
- § 6:48 — Violation of state law
- § 6:49 Partial inadmissibility of surveillance evidence
- § 6:50 Inadmissibility of all surveillance evidence
- § 6:51 Dismissal of the indictment

V. TAINT AND HARMLESS ERROR

- § 6:52 Generally
- § 6:53 Hearings to determine taint
- § 6:54 — Time of hearings
- § 6:55 — Evidence
- § 6:56 — Defendant’s initial burden of proof
- § 6:57 — Prosecution’s ultimate burden
- § 6:58 Special problems of taint and electronic surveillance
- § 6:59 — Development of an investigatory focus
- § 6:60 — Tainting of probable cause for subsequent surveillance
orders
- § 6:61 — — Tainting of warrantless surveillance
- § 6:62 — — Tainting of probable cause for conventional searches
- § 6:63 — Effect of taint on the determination of the identity of a
witness
- § 6:64 — — Statements by defendants detected by unlawful
surveillance
- § 6:65 — — Perjurious answers to questions tainted by illegal
surveillance

TABLE OF CONTENTS

- § 6:66 —Admissibility of evidence obtained while preventing criminal activity uncovered by unlawful surveillance
- § 6:67 Harmless error

CHAPTER 7. RETRIEVAL, DISCOVERY, AND USE OF INFORMATION AND EVIDENCE FROM ELECTRONIC SURVEILLANCE

I. PROBLEMS OF INDEXING AND RETRIEVAL

- § 7:1 Generally

II. DISCOVERY IN CRIMINAL PROCEEDINGS

- § 7:2 Generally
- § 7:3 Demands for discovery based on the Constitution
- § 7:4 Discovery under Title III
- § 7:5 —Disclosure with service of the inventory
- § 7:6 —Disclosure prior to suppression hearing
- § 7:7 —Discovery by grand jury witness
- § 7:8 Discovery under Rules of Criminal Procedure
- § 7:9 Discovery under Fed. R. Crim. P. 7(f): Bill of particulars
- § 7:10 Discovery under Fed. R. Crim. P. 16(a)(1)(B)(i)
- § 7:11 Discovery under Fed. R. Crim. P. 16(a)(1)(E)
- § 7:12 Discovery under Fed. R. Crim. P. 16(a)(1)(F)
- § 7:13 Discovery under Fed. R. Evid. 404(b)
- § 7:14 Subpoenas under Rule 17
- § 7:15 Discovery under 18 U.S.C.A. § 3500 (Jencks Act)
- § 7:16 Discovery under Fed. R. Crim. P. 41(g)
- § 7:17 Disclosure after illegality has been determined: *Alderman v. U.S.*
- § 7:18 Limits on discoverable material
- § 7:19 —Classified Information Procedures Act
- § 7:20 Protective orders
- § 7:21 Disclosure required of defendant
- § 7:22 Consequences of failure to comply with discovery requirements

III. DISCOVERY IN CIVIL PROCEEDINGS

- § 7:23 Generally
- § 7:24 Suits based upon illegal surveillance
- § 7:25 —Objection that discovery not allowed under the Freedom of Information Act
- § 7:26 —Objection based on executive privilege
- § 7:27 — —Plaintiff's initial burden of showing need
- § 7:28 — —Government's burden of showing necessity for nondisclosure, despite plaintiff's need
- § 7:29 — —Criteria to be followed when partial disclosure is ordered
- § 7:30 —Objection that requested information is classified

- § 7:31 General civil proceedings not involving recovery for illegal surveillance

IV. DISCLOSURE, USE, AND ADMISSION OF SURVEILLANCE RECORDS UNDER TITLE III

- § 7:32 Generally
- § 7:33 Disclosure to other law enforcement officers
- § 7:34 —Disclosure by federal officers to state officers in states which prohibit surveillance
- § 7:35 Use by law enforcement officers
- § 7:36 —Use by state officers of evidence obtained from federal officers in states which prohibit surveillance
- § 7:37 —Use by state officers in a prohibitory jurisdiction of evidence obtained from another state's surveillance
- § 7:38 —Use by federal officers of evidence obtained from state surveillance
- § 7:39 Admission of surveillance records under Title III
- § 7:40 —Admissibility in federal proceedings of evidence which would be inadmissible in another federal court
- § 7:41 —Admissibility in federal proceedings of evidence which would be inadmissible in a state court
- § 7:42 — —Evidence obtained by federal officers
- § 7:43 — —Evidence obtained by state officers
- § 7:44 — —Evidence obtained by private persons
- § 7:45 —Admissibility in state proceedings of evidence obtained by federal or state officers in states which prohibit or impose additional restrictions on surveillance
- § 7:46 —Admissibility in state proceedings of evidence obtained in violation of another state's statute
- § 7:47 —Admissibility in state proceedings of evidence obtained by another state's officers or residents
- § 7:48 Media access to surveillance materials
- § 7:49 Divulgence by electronic communication services
- § 7:50 Effect of disclosure or use beyond § 2517

V. ADMISSION OF RECORDINGS AND TRANSCRIPTS INTO EVIDENCE

- § 7:51 Generally
- § 7:52 Determining the admissibility of audio recordings: Introduction
- § 7:53 Determining the admissibility of recordings: Introduction— Direct testimony when recording inadmissible
- § 7:54 Basic elements: Authenticity and accuracy
- § 7:55 —Standards of admissibility
- § 7:56 — —Authentication of recordings
- § 7:57 — —Absence of alterations
- § 7:58 Video and similar recordings
- § 7:59 Data from computers and other electronic devices

TABLE OF CONTENTS

- § 7:60 Identity of speakers
- § 7:61 —Constitutional issues
- § 7:62 — —Fourth Amendment
- § 7:63 — —Fifth Amendment
- § 7:64 — —Sixth Amendment
- § 7:65 —Identification by person overhearing conversation or other evidence
- § 7:66 —Voice spectrograms
- § 7:67 —Voice exemplars and other types of identification evidence
- § 7:68 —Identity of persons shown on video recordings
- § 7:69 Effect of inaudibility
- § 7:70 —Conversations in code
- § 7:71 Foreign language conversations
- § 7:72 Effect of incompleteness
- § 7:73 Inclusion of irrelevant material
- § 7:74 Copies and transcripts
- § 7:75 —Copies
- § 7:76 —Transcripts
- § 7:77 — —Use or admission to assist the court or jury
- § 7:78 — —Admission in lieu of recording

VI. ISSUES RELATING TO THE USE OF SURVEILLANCE EVIDENCE

- § 7:79 Generally
- § 7:80 Use of recordings which have been illegally obtained
- § 7:81 Use during deliberations
- § 7:82 Use by reviewing court

CHAPTER 8. CRIMINAL PENALTIES AND CIVIL REMEDIES FOR ILLEGAL ELECTRONIC SURVEILLANCE

I. STATUTORY STRUCTURE FOR THE IMPOSITION OF SANCTIONS

- § 8:1 Generally
- § 8:2 Statutory issues under §§ 2511, 2520
- § 8:3 —Element of intent
- § 8:4 —Element of interception
- § 8:5 — —Transmission versus storage
- § 8:6 —Oral communication: The element of an expectation of privacy

II. CRIMINAL PROSECUTIONS

- § 8:7 Criminal prosecution under Title III
- § 8:8 —Constitutional issues
- § 8:9 —General prohibition of interception: § 2511(1)(a)

- § 8:10 — —Regulation of intrastate activity
- § 8:11 —Prohibition of interception of oral communications in specific circumstances: § 2511(1)(b)
- § 8:12 —Prohibition of disclosure and use of unlawfully intercepted communications: § 2511(1)(c)
- § 8:13 —Prohibition of manufacture, etc., of devices: § 2512
- § 8:14 — —Confiscation of illegal devices: § 2513
- § 8:15 Defenses to criminal charges under Title III
- § 8:16 —Discriminatory enforcement
- § 8:17 —Consent
- § 8:18 — —Interspousal and intrafamilial surveillance
- § 8:19 —Good faith reliance on court order or provisions of Title III
- § 8:20 Procedural aspects of prosecutions for violations of Title III
- § 8:21 —Indictment
- § 8:22 —Evidence
- § 8:23 Criminal prosecution under § 2701
- § 8:24 Criminal prosecution under 47 U.S.C.A. § 605

III. CIVIL LITIGATION

- § 8:25 Civil litigation under § 2520 of Title III—Generally
- § 8:26 —Procedural issues—Parties
- § 8:27 — —Pleadings and motions
- § 8:28 —Substantive issues—Interception
- § 8:29 — —Disclosure
- § 8:30 — —Use
- § 8:31 — —Claims arising under § 2512
- § 8:32 —Defenses provided
- § 8:33 — —Reliance on a court order
- § 8:34 — —Legislative or statutory authorization
- § 8:35 — — —Consent
- § 8:36 — — — —Special considerations involving online businesses
- § 8:37 — — — —Special considerations involving voice-activated virtual assistant software
- § 8:38 — —Interspousal and intrafamilial surveillance
- § 8:39 — —The “ordinary course” of business exceptions
- § 8:40 — — —User’s ordinary course of business
- § 8:41 — — —Provider’s ordinary course of business
- § 8:42 — —Law enforcement officers’ performance of duties
- § 8:43 —Other defenses to a § 2520 claim
- § 8:44 — —Statute of limitations
- § 8:45 — —Privileges and immunities
- § 8:46 — —Miscellaneous
- § 8:47 —Preemption
- § 8:48 —Admissibility of illegally obtained recordings
- § 8:49 —Damages
- § 8:50 —Injunctive relief
- § 8:51 Civil litigation under § 2707 of SCA—Generally
- § 8:52 —Standing

TABLE OF CONTENTS

- § 8:53 —Statute of limitations
- § 8:54 —Protected communications
- § 8:55 —Unlawful access
- § 8:56 —Lawful access
- § 8:57 —Unauthorized disclosure by service provider
- § 8:58 —Defenses and immunities
- § 8:59 —Remedies
- § 8:60 Civil litigation under § 2712
- § 8:61 Constitutional claims
- § 8:62 Claims under 28 U.S.C. § 1983
- § 8:63 Tort actions—Federal Tort Claims Act

CHAPTER 9. FOREIGN INTELLIGENCE SURVEILLANCE

I. INTRODUCTION

- § 9:1 Generally

II. WARRANTLESS NATIONAL SECURITY SURVEILLANCE: U.S. V. U.S. DISTRICT COURT

- § 9:2 Generally

III. PURPOSE AND COVERAGE OF FISA

- § 9:3 Generally
- § 9:4 Exclusivity
- § 9:5 Scope of FISA—Overview
- § 9:6 —Electronic surveillance
- § 9:7 —Foreign intelligence information
- § 9:8 —“Foreign power” requirement
- § 9:9 —Agent of a foreign power
- § 9:10 —Purpose of FISA surveillance
- § 9:11 Levels of judicial oversight under FISA

IV. FOREIGN INTELLIGENCE SURVEILLANCE WITHOUT A COURT ORDER

- § 9:12 Matters outside of FISA—Consent surveillance
- § 9:13 —Extraterritorial surveillance
- § 9:14 Executive authority to authorize FISA surveillance without a court order
- § 9:15 —Section 1802(a) surveillance
- § 9:16 —Emergency surveillance
- § 9:17 —Continuation of surveillance of non-United States person previously believed to be located outside of the United States
- § 9:18 —Incidental surveillance
- § 9:19 —Authorization during time of war

V. APPLICATIONS AND ORDERS FOR COURT-ORDERED ELECTRONIC SURVEILLANCE OF TARGETS NOT REASONABLY BELIEVED TO BE OUTSIDE OF THE UNITED STATES

- § 9:20 Generally
- § 9:21 Foreign Intelligence Surveillance Court
- § 9:22 —Availability of amicus curiae to assist
- § 9:23 —Designation of counsel in case involving U.S. persons
- § 9:24 Procedure by which a surveillance application is filed
- § 9:25 —Authorization to file
- § 9:26 —Approval of the application by the attorney general
- § 9:27 —Contents of the application
- § 9:28 — —Identity of the applicant
- § 9:29 — —Identity of the target
- § 9:30 — —Factual basis
- § 9:31 — —Minimization procedures
- § 9:32 — —Description of information sought
- § 9:33 — —Certification and its contents
- § 9:34 — —Methods by which surveillance is to be conducted
- § 9:35 — —Previous applications
- § 9:36 — —Time period
- § 9:37 — —Summary of investigative techniques
- § 9:38 Procedure by which surveillance application is filed—Contents of the application—Summary of information obtained
- § 9:39 — —Accuracy and exculpatory information

VI. JUDICIAL REVIEW AND FINDINGS

- § 9:40 Generally
- § 9:41 Proper authorization
- § 9:42 Probable cause
- § 9:43 Statements and certifications

VII. CONTENTS OF THE ORDER

- § 9:44 Generally
- § 9:45 Specifications
- § 9:46 Directives

VIII. DURATION AND EXTENSIONS

- § 9:47 Generally

IX. MINIMIZATION UNDER FISA

- § 9:48 Generally

X. POST-SURVEILLANCE CHALLENGES

- § 9:49 Generally

TABLE OF CONTENTS

- § 9:50 *Ex parte, in camera* determination
- § 9:51 Scope of review: Certification of purposes and finding of probable cause
- § 9:52 Scope of review: Minimization
- § 9:53 Appeal and preclusion

XI. USE OF FISA INFORMATION AND EVIDENCE

- § 9:54 Generally
- § 9:55 Information concerning United States persons
- § 9:56 Notice
- § 9:57 Retention of FISA evidence

XII. IMMUNITY FOR ASSISTANCE

- § 9:58 Generally

XIII. CONSTITUTIONALITY OF FISA

- § 9:59 Constitutional challenges to FISA
- § 9:60 —Fourth Amendment
- § 9:61 —First Amendment
- § 9:62 —Fifth Amendment
- § 9:63 —Sixth Amendment
- § 9:64 —Equal protection

XIV. ELECTRONIC SURVEILLANCE TARGETING PERSONS REASONABLY BELIEVED TO BE LOCATED OUTSIDE OF THE UNITED STATES

- § 9:65 Generally
- § 9:66 Targeting of non-U.S. persons—Certifications and orders
- § 9:67 —Targeting procedures
- § 9:68 —Minimization procedures
- § 9:69 —Queries
- § 9:70 —Compliance issues
- § 9:71 —Emergency authorization
- § 9:72 —Provider assistance
- § 9:73 Certain acquisitions inside the United States targeting U.S. persons outside of the United States
- § 9:74 Notice, disclosure, and use of information

XV. PEN REGISTERS AND TRAP AND TRACE DEVICES

- § 9:75 Generally
- § 9:76 Collection of electronic communications metadata

XVI. ORDERS FOR COLLECTION OF TANGIBLE THINGS

- § 9:77 Generally

- § 9:78 Collection of telephony metadata—Generally
- § 9:79 —Statutory issues—Bulk collection
- § 9:80 — —Ongoing production of records in connection with international terrorism investigations
- § 9:81 — —Other records
- § 9:82 —Constitutional issues—Bulk collection

APPENDICES

- Appendix A. 18 U.S.C.A. §§ 2510–2522: Interception of Wire, Oral, and Electronic Communications
- Appendix B. 18 U.S.C.A. §§ 2701–2709, 2711–2713: Access to Stored Wire and Electronic Communications and Related Transactional Records
- Appendix C. 18 U.S.C.A. §§ 3121–3127: Pen Registers and Trap and Trace Devices
- Appendix D. 50 U.S.C.A. §§ 1801–1813, 1841–46, 1861, 1871–1874, 1881–1885c: Foreign Intelligence Surveillance

Table of Laws and Rules

Table of Cases

Index