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PERSPECTIVE

The rise of white collar wiretaps

By Michael Mugmon and Timothy Perry

Before the tenure of departing Attorney General Eric Holder, the use of wiretaps was generally relegated, as if by gentlemen's agreement, to narcotics and organized crime cases. But these days, U.S. attorney's offices increasingly use wiretaps in the white collar arena. While the technique is most commonly associated with the U.S. attorney's office for the Southern District of New York — which used wiretaps to help convict hedge fund billionaire Raj Rajaratnam of insider trading in 2011 — white collar wiretaps have since become more widespread, including in California. And they're vulnerable to challenges from the defense bar.

Signs of Vulnerability

Wiretaps require not just probable cause to believe a crime is afoot, but also proof of "necessity" — that is, a "full and complete statement [that] other investigative procedures have been tried and failed ... reasonably appear to be unlikely to succeed ... or [are] too dangerous." 18 U.S.C. Section 2581(c). A special agent must swear out an affidavit demonstrating that both probable cause and necessity have been met.

Simple to articulate, the standard is far harder to meet. And while Manhattan prosecutors have garnered well-deserved praise for their historic successes, some practitioners believe the original Rajaratnam wiretap affidavit fell short of the legal standard, marked by errors that nearly resulted in the suppression of all recordings.

What went wrong? According to critics, the Rajaratnam wiretap's affiant failed to tell the authorizing judge about a simultaneous Securities and Exchange Commission investigation into Rajaratnam's trading — an investigation that had turned up 4 million pages of documents and subpoenaed records.

Surely, the argument goes, these 4 million pages were relevant to whether a wiretap was "necessary." Should the FBI not have reviewed these documents before leaping to the most intrusive tool in its investigative toolbox? In defense of the wiretap, prosecutors argued the SEC's civil investigation was implicit in the affidavit, and not relevant to a criminal inquiry. But echoing the critiques of practitioners, Rajaratnam's trial judge called the omission "glaring." The judge also found it essentially harmless, and the 2nd U.S. Circuit Court of Appeals affirmed.

California Scheming

While most media accounts have focused on the wiretap-related successes in New York, the technique has quietly become commonplace in California.

In February 2013, the U.S. attorney's office for the Central District of California brought charges against Sherman Mazur and a dozen others in a pump-and-dump scheme, alleged to have cost investors $30 million. Wiretapped telephone calls and text messages were central to the case — something prosecutors confirmed when they dismissed charges, just one year later, conceding deficiencies in their wiretap applications.

In September 2013, federal authorities in Los Angeles and San Diego leveraged wiretaps to indict nearly 30 defendants in a tax and identity theft scheme. In July 2012, the U.S. attorney's Office in San Diego brought charges against a dozen defendants in a conspiracy to evade import restrictions on foreign goods. Earlier this year, it brought campaign finance charges, citing evidence derived in part from wiretaps.

But the technique is no more invincible here than in New York, as illustrated by the U.S. attorney's office's ill-fated case against Mazur. Admitting there were "omissions and misstatements in the wiretap affidavits," prosecutors acknowledged the same problem that beset the Rajaratnam case. As reported in this paper, defense attorneys at the time said those omissions concerned the government's failure to explain why it could not have used confidential informants to make its case — in other words, a failure to show necessity. It was the same error the Rajaratnam investigators made, although this time, it was serious enough that prosecutors opted to fall on their swords.

Taking the Fight to the Government

Given these vulnerabilities, what is the mode of attack against this new breed of wiretap?

• Recognize they are not invulnerable. These past six years, prosecutors have sometimes seemed so busy throwing haymakers, they forget to protect their chin. Wiretaps are hard; the feds are fallible, especially when confronted with the complexities of a white collar case.

• Remember that the government's obligation to disclose helpful information — "Brady material" — applies to suppression hearings. In choosing to use a wiretap, the government opens a Pandora's box of potentially discoverable material, effectively pulling back the curtain on investigators' inner decision-making processes, and making it all fair game for litigation. Did the affiant fail to disclose a confidential informant to the authorizing judge? Did a member of an Immigration and Customs Enforcement surveillance team write a log entry that contradicts a statement in the FBI agent's affidavit? In the hurly burly of white collar probes, these mistakes are easy to make.

• Know your statute. Strict rules govern the FBI's live monitoring of telephone calls, and systematic errors can justify suppression. At the end of the wiretap, the government has 24 hours to physically seal the original "tapes" in the presence of a district judge. A technicality, but the remedy if they fail? Automatic suppression.

• When the government indicts, it has a vast informational advantage. Do not let them keep it. Put pressure on the government to disclose their worst facts before the suppression hearing — and before codefendants lose heart and turn witness.

• Finally, take the fight to the government. Wiretaps are powerful tools, but they only thrive in the dark. Once laid bare in the bright light of adversarial proceedings, they look just as imperfect as any other government tactic — and in some ways, even more vulnerable.

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