

also includes an understanding of the frequency with which we have had to rely on electronic surveillance as a tool, and of the implications of limitations on its use in the future. Indeed, we are necessarily familiar with the frequency with which we have sought to conduct communications interceptions, in part through our compliance with the requirements of Federal law regarding reports to the Administrative Office of the Courts. *See* 18 U.S.C. 2519. Therefore, we believe it was reasonable that our survey focus on determining the frequency with which all law enforcement agencies nationwide have relied upon electronic surveillance in their investigations.

As already stated, the data acquired through our survey cannot be used to determine the frequency of overlapping communications interceptions. Such data did not include any information regarding the hours, minutes and times of day that particular communications interceptions occurred. Rather, the survey data reflects the days over which surveillances were ongoing.

The FBI now offers this further explanation to justify why our reliance on data reflecting numbers of ongoing surveillances was reasonable. First and foremost, an analysis thereof was within the FBI's expertise in assessing the level of investigative resources needed to combat crime. Conversely, a survey and analysis focused on the number of overlapping communications interceptions would not be within our traditional expertise. Such an exercise would be more akin to the "traffic engineering" studies traditionally engaged in by the telecommunications industry. For example, it would require us to make determinations about the extent to which individuals will make or receive phone calls at the same time. As discussed above, if that assessment were relevant to the system design chosen by a carrier, then the carrier is in the most appropriate position to make it.

Second, the capacity requirements set forth in the final notice, in addition to satisfying the requirement for notice to carriers, will serve as guidance to law enforcement agencies in understanding potential technical limitations on the use of electronic surveillance. Agencies can readily comprehend, and if necessary, plan for, being able to conduct only a certain limited number of surveillances at a given time. On the other hand, stating the capacity requirements in terms of a number of overlapping communications interceptions would have little or no meaning to law enforcement agencies.

We further note that initiating a new study to determine the frequency of overlapping communications interceptions would consume a large amount of time and resources, would be problematic, and, for all of the reasons discussed herein, would ultimately not be beneficial to our goal of ensuring that law enforcement's needs are met. Such a study would require us to gather and analyze numerous evidence files in an attempt to determine the exact times at which communications were intercepted and whether or not they overlapped. Because most surveillances are conducted by agencies other than the FBI, most of these files would need to be obtained from third parties, such as other law enforcement agencies or the courts. Given the number of surveillances determined from our survey, this could involve hundreds of files. Moreover, it is also doubtful that such data could even be used to derive a "typical" frequency of overlap among interceptions on which we could reliably base the capacity requirements. First, not every communication that might be intercepted through an ongoing surveillance actually is intercepted, such that it is recorded and entered into evidence files. In particular, some communications made over the facilities subject to the surveillance are not recorded because they are not pertinent to the investigation. *See* 18 U.S.C. 2518(5) (this is often referred to as the "minimization" requirement under Title III). An incomplete picture of the potential for overlap might therefore be presented through a review of evidence files. Second, the probability for overlap when conducting surveillances in different types of cases could vary greatly. In our experience, some surveillances, such as those in bookmaking or drug dealing cases, may involve many communications interceptions over a relatively short period of time. In other cases, such as kidnapping, only a few communications may be actually intercepted.

Finally, as described above, we believe that estimating the number of overlapping intercepted communications would not be ultimately beneficial to effectively estimating law enforcement's capacity requirements. In particular, as we discuss above, we believe that capacity requirements are most appropriately based on a number of surveillances being conducted on the same day, not on a number of overlapping interceptions.

B. Breakdown of Capacity Requirements by Type of Surveillance

The second issue we address in this publication is the breakdown of capacity requirements by type of surveillance. The statute, as discussed above, directs us to provide "notice of the actual number of communications interceptions, pen registers, and trap and trace devices." 47 U.S.C. 1003(a)(1) (emphasis added). The FBI decided, therefore, in the final notice to provide an "actual" and a "maximum" number representing a total number of surveillances, for each county and market service area. The Court questioned our explanation of the basis for this decision, noting that the FBI's numbers "drew no distinction between different types of interceptions (e.g., communications content versus mere pen registers)." *USTA*, 276 F.3d at 626. According to the Court, different types of surveillance may "impose different demands" on the carrier's ability to meet the capacity requirements. *Id.* at 627. The Court further noted, as we stated in the final notice, that more delivery channels may be needed in order to facilitate a communications interception as opposed to the operation of a pen register and/or a trap and trace device. *Id.* The Court therefore remanded this issue to us for a more adequate explanation.

The FBI has considered this issue and continues to find that it is appropriate, given the statutory requirements, to state the capacity requirements for each geographic region as a single actual and single maximum number. Moreover, our approach was consistent with the methodology we used to determine the capacity requirements, which, as described above, focused on the highest number of surveillances of any type that were ongoing on a single day or days during the survey period.

Nevertheless, we find that we can further address the court's concerns and at the same time benefit law enforcement agencies and telecommunications carriers, by providing additional guidance on the application of the capacity requirements. We set forth our analysis of the issue and our finding that the method described below achieves this goal by limiting the number of simultaneous communications interceptions that are required to be accommodated in the counties and market service areas with the highest capacity requirements. By so limiting the number of communications interceptions, we are now giving the carriers providing service in these regions guidance that allows them to