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SEARCH AND SEIZURE

The Wiretap Cases:

United States v. United States District Court, 407 U.S. 297 (1972) Gelbard v. United States, 408 U.S. 41 (1972)

In *United States v. United States District Court*[1] and *Gelbard v. United States*,[2] the Supreme Court construed Sections 2511(3), 2515, and 2518(10)(a) of Title III of the Omnibus Crime Control and Safe Streets Act.[3] Taken together, the cases indicate a Supreme Court policy favoring complete disclosure of information obtained by illegal eavesdropping as the only effective protection against illegal surveillance. The cases extend a policy of disclosure set out in *Alderman v. United States*[4] where the Supreme Court put the government to the choice of dismissing its case or of disclosing to the defendant all information obtained through illegal eavesdropping. In *Alderman*, the Court held that the defendant is entitled to examine all government records pertaining to his own conversations, so that he can determine to what extent the eavesdropping contributed to the government's case.[5] He is then entitled to a hearing and an opportunity to argue for suppression of the evidence tainted by the illegal surveillance.[6]

In *United States v. United States District Court* the Court denied the power of the President, acting through the Attorney General, to authorize electronic surveillance in domestic security matters without prior judicial approval.[7] Without a warrant, such surveillance is illegal, and the government must face the choice offered by *Alderman* of either dismissing the case against the defendant, or turning over to the defendant the records of his intercepted conversations.[8]

The *District Court* case arose from a criminal proceeding in which three defendants were indicted by a federal grand jury for conspiracy to destroy government property. One of the three, Plamondon, was also charged with destruction of government property. In a pre-trial motion, the defendants sought the disclosure of their conversations allegedly intercepted by illegal eavesdropping. The government responded by filing Attorney General John Mitchell's affidavit to the effect that he had authorized the wiretaps for domestic security purposes.[9] The government also filed a

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[1] 407 U.S. 297 (1972).

[2] 408 U.S. 41 (1972).

[3] 18 U.S.C. §§2510–2520 (1968). The Omnibus Crime Control and Safe Streets Act authorizes the use of electronic surveillance for the specified classes of crimes as set out in §2516. All such surveillance is subject to prior court order. The standards and procedures for the warrant application are set out in §2518. It is required that the application be in writing and under oath and that it state fully the facts and circumstances relied upon by the affirming officer in support of the application. It must also state the period of time during which the surveillance will be maintained. In addition, the affirming officer must indicate whether other investigative procedures have been tried and failed or why they reasonably appear unlikely to succeed if tried or to be too dangerous.

Title III is a comprehensive congressional attempt to meet the Constitutional requirements for electronic surveillance set forth by the Supreme Court in Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967).

[4] 394 U.S. 165 (1968).

[5] *Id.* at 181. In *Alderman*, the Court rejected the alternative of an *in camera* examination by the trial court to identify those records which might have contributed to the government's case in favor of allowing the defendant to interpret and evaluate the records.

> [W]innowing [the irrelevant] material from those items which might have made a substantial contribution to the case against the petitioner is a task which should not be entrusted wholly to the court. . . . An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event . . . may have special significance to one who knows the more intimate facts of the accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but . . . the task is too complex . . . to rely wholly on the *in camera* judgment of the trial court.

Id. at 182.

[6] *Id.* at 183.

[7] The Supreme Court left open the question of the constitutionality of warrantless domestic security wiretaps in Katz v. United States, 389 U.S. 347 (1967):

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

Id. at 358 n.23.

Only the question of domestic security surveillance is involved in *United States v. United States District Court.* The Attorney General's affidavit makes no mention of any foreign activities or agents; it deals only with activities of a domestic organization. The Court clearly holds that they do not reach the question of the President's power to deal with foreign adversaries or their agents. 407 U.S. at 309 n.8.

[8] 407 U.S. at 324.

[9] Attorney General Mitchell's affidavit acknowledged overhearing of the defendant Plamondon's conversations. It stated that the Attorney General approved the wiretaps "to gather intelligence deemed necessary to protect the nation from attempts of domestic organiza-

sealed exhibit of the surveillance logs for *in camera* inspection by the trial court. On the basis of the affidavit and the sealed exhibit, the government claimed that the surveillances were lawful, even though conducted without prior judicial approval, as a reasonable exercise of the President's constitutional power to protect the national security.[10] The government claimed that the power to order surveillance without judicial approval was inferred from the constitutional power and affirmed by Congress in §2511(3) of Title III.[11] That section provides that nothing in Title III limits the President's constitutional power to protect against the overthrow of the government or against "any other clear and present danger to the structure or existence of the Government." The district court, however, held that the surveillance violated the fourth amendment, and on the basis of *Alderman* ordered the government to make full disclosure to Plamondon of the records of his intercepted conversations.[12] The Court of Appeals for the Sixth Circuit affirmed.[13]

Justice Powell, writing for the Supreme Court,[14] rejected the government's contention that §2511(3) constituted a congressional recognition of the President's power to conduct domestic surveillance without prior judicial approval. The Court held that the plain meaning of the language of the provision, as well as the legislative history, refuted the government's interpretation of §2511(3).[15] The opinion termed the language "essentially neutral" with respect to the Presidential use of electronic surveillance.[16] In the Court's view, Congress indicated by §2511(3) only that the Act should not be interpreted to limit or disturb presidential powers as they exist under the Constitution, and §2511(3) is not a grant of new power to authorize a wiretap without prior judicial approval even in cases involving domestic security.[17]

Having rejected the contention that §2511(3) is a statutory grant of power to the President to approve warrantless surveillance in domestic security cases, the Court then considered whether this power could be derived from any of the President's constitutional powers. Taking note that the President is empowered under article II to "preserve and protect" the United States,[18] the Court agreed that the President, in the discharge of his duties, may find it necessary to approve electronic surveillance.[19] The fourth amendment does not deny the government the use of such surveillance; however, it does prescribe a procedure to be followed when these techniques are used. Rejecting the government's argument that fourth

tions to attack and subvert the existing structure of the government." *Id.* at 300 n.2.

In oral argument before the Supreme Court, the government did not contend that this affidavit was sufficient under the warrant requirements of 18 U.S.C. §2518 (1968). Since a §2518 warrant was never applied for by the government, the Court did not have to reach the question whether the facts presented were adequate to support issuance of a warrant.

[10] 407 U.S. at 301.

[11] The relevant language of 18 U.S.C. §2511(3) (1968) provides:

> Nor shall anything in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

[12] United States v. Sinclair, 321 F. Supp. 1074 (E.D. Mich. 1971).

[13] United States v. United States District Court, 444 F.2d 651 (6th Cir. 1971).

[14] Justices Douglas, Brennan, Marshall, Stewart, and Blackmun joined in the majority opinion. Justice Douglas filed a concurring opinion. Chief Justice Burger concurred in the result. Justice White filed an opinion concurring in the judgment.

[15] The legislative history relied upon by the Court involves primarily a colloquy between Senators Hart, Holland, and McClellan on the Senate floor. It is quoted at length in the opinion, 407 U.S. at 306–7, but it is summarized in Senator Hart's statement:

> [N]othing in Section 2511(3) even attempts to define the limits of the President's national security power under present law.... [Section 2511(3)] merely says that if the President has such a power, then its exercise is in no way affected by Title III.

Id. at 307.

[16] *Id.* at 303. *See also* Comment, *The "National Security Wiretap": Presidential Prerogative or Judicial Responsibility*, 45 S. CAL. L. REV. 888 (1972).

[17] 407 U.S. at 303.

[18] U.S. CONST. art. II, §1 indicates that the primary duty of the President is to "preserve, protect, and defend the Constitution of the United States." In *District Court*, the government conceded that there is no express grant in the Constitution of power to make searches and seizures without regard to the fourth amendment. However, before the court of appeals, the government stressed the "inherent power" of the President to safeguard the security of the nation, and, impliedly, a power to authorize warrantless wiretaps in cases where the domestic security of the nation is threatened. The court of appeals rejected that claim citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which, while not involving electronic surveillance, stands for the proposition that the President has no "inherent power" to protect the domestic peace of the nation. Furthermore, the history of the fourth amendment indicates that the amendment was adopted specifically to avoid abusive searches and seizures made under the guise of inherent domestic power.

[19] Presidents and Attorneys General have employed electronic surveillance techniques more or less continuously since 1946. *See* United States v. United States District Court, 444 F.2d at 669. The question of the constitutionality of such use was before the Supreme Court for the first time in *District Court*.

amendment protections ought to be suspended in domestic surveillance situations, the Court held that such protections are even more necessary in such a situation, where the targets of the surveillance are those suspected of unorthodoxy in their political beliefs.[20] The very difficulty of defining the "domestic security interest" indicates a strong danger of abusive government actions seeking to protect that interest. On balance, the government's duty to safeguard domestic security is outweighed by the dangers to individual privacy posed by unreasonable surveillance.

The basic issue presented in *District Court* is whether the government's search was reasonable.[21] "Reasonableness" derives its content and meaning through reference to the warrant requirement clause of the fourth amendment.[22] Inherent in the concept of a warrant is its issuance by a neutral and detached magistrate.[23] The Court in *District Court* held that fourth amendment freedoms cannot be properly guaranteed if domestic security surveillance may be conducted solely at the discretion of the executive branch.[24] Executive officers are charged with the duties of enforcing, investigating, and prosecuting offenders. Therefore, they cannot perform the function of neutral and detached magistrates as envisioned by the fourth amendment.[25]

The Supreme Court has recognized exceptions to the warrant requirement.[26] The government, in *District Court*, argued that the special circumstances applicable to domestic security surveillance necessitated recognition of a further exception.[27] The special circumstances cited by the government included the complex and subtle nature of the probable cause determination in a domestic security situation,[28] the possibility of dangerous security leaks as a result of disclosure of information to a magistrate to secure a warrant,[29] and the fact that these searches functioned to gather intelligence rather than evidence of a specific

[20] While the Court did not rely upon first amendment arguments to support its decision, the opinion did indicate that first and fourth amendment values often converge in domestic security situations. The Court concluded:

> The price of lawful dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversations. For private dissent, no less than open public discourse is essential to our free society.

407 U.S. at 314.

[21] The Supreme Court has consistently held that electronic surveillance and recordation by wiretap is a search and seizure governed by the fourth amendment. Giordano v. United States, 394 U.S. 310 (1969); Alderman v. United States, 394 U.S. 165 (1969); Katz v. United States, 389 U.S. 347 (1967); Silverman v. United States, 365 U.S. 505 (1961).

[22] Coolidge v. New Hampshire, 403 U.S. 443, 473–484 (1971).

[23] *Id.* at 473–84.

[24] 407 U.S. at 316–17.

[25] Katz v. United States, 389 U.S. 347, 359–60 (1967) (Douglas, J., concurring).

[26] *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970); Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Warden v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, 384 U.S. 757 (1966).

However, none of these cases was a wiretap case. All involved emergency situations which were held to prevent obtaining a search warrant, or to excuse the absence of one. In all instances there was submission of the evidence for subsequent judicial review. The primary consideration in all cases was the need of law enforcement officials to protect themselves or to prevent evidence from being destroyed.

[27] 407 U.S. at 318. *See also id.* at 335 (White, J., concurring in the judgment).

Mr. Justice White would find an exception to the general requirement of prior judicial approval in the circumstances specified in §2511(3). He disagreed with the construction given to that section by the majority, and felt that §2511(3) should be read to mean that the general ban against surveillance found in §2511(1) would not apply if a court determined that in a specific circumstance the President could constitutionally intercept communications without a warrant. *Id.* at 336 n.2.

In the circumstances of this case, the Attorney General's affidavit fails to bring the search within the exception of §2511(3). Justice White indicates:

> [The affidavit] utterly fails to assume responsibility for the judgment that Congress demanded: that the surveillance was necessary to prevent overthrow by force or by other unlawful means or that there was a clear and present danger to the structure or existence of the government. The affidavit speaks only of the attempts . . . it articulates no conclusion that the attempts involved any clear and present danger . . . .

Id. at 341.

Justice White's construction of §2511(3) avoids the constitutional issue and resolves the facts to a two-part determination:

> Clearly, for the Government to prevail it was necessary to demonstrate first that the interception involved was not subject to the statutory requirement of judicial approval for the wiretapping because the surveillance was within the scope of §2511(3); and, secondly, if the Act did not forbid the warrantless wiretap, that the surveillance was consistent with the Fourth Amendment.

Id. at 339.

[28] Justice Powell responded "if the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance." *Id.* at 320.

[29] The Court argued in response that a warrant application is not a public or adversary proceeding. If clerical and secretarial personnel do pose security dangers, those dangers can be minimized "by proper administrative measures, possible to the point of allowing the Government itself to provide the clerical assistance." *Id.* at 321.

crime.[30] The Court rejected the government argument that these circumstances justified a complete exemption from judicial scrutiny. While recognizing the constitutional derivation of the President's domestic security power, the Court nonetheless held that he must exercise that power in a manner compatible with the fourth amendment. The appropriate warrant procedures must be followed.[31]

The Court, however, left an opening for a congressional response by indicating that the standards and procedures for warrant application set out in §2518 of Title III[32] are not necessarily applicable to domestic security surveillance cases. The clear implication is that if Congress so provides, less precise standards for the issuance of warrants than those of §2518 will be constitutional in domestic security situations.[33] But whatever standards Congress may prescribe, *United States v. United States District Court* clearly requires prior judicial approval of all proposed surveillance. In the absence of a warrant, even domestic security surveillance approved by the President is unlawful.

The purpose of the *Alderman* requirement of complete disclosure to a criminal defendant of his illegally seized conversations is to allow him the opportunity to suppress evidence derived from such surveillance. In *Gelbard v. United States*,[34] the second wiretap case decided this Term, this disclosure requirement was extended to the case of a grand jury witness when his conversations are intercepted by an illegal wiretap, and the government seeks testimony based on information derived from the illegal surveillance. At issue was the evidentiary prohibition section of Title III of the Omnibus Crime Control and Safe Streets Act. Section 2515 directs that the contents of any conversation intercepted by an illegal wiretap may not be received in evidence in a trial or other specifically indicated proceedings, including grand jury hearings.[35] Justice Brennan, writing for the majority,[36] held that where a grand jury witness is held in civil contempt for refusing without just cause to comply with the order of the court to testify,[37] the witness may invoke §2515 as a defense, claiming that the interrogation will be based upon the illegal interception of his own conversations.[38] A finding by the trial court that the questions asked would be based upon information illegally intercepted would constitute "just cause" sufficient to preclude a finding of contempt.[39]

The holding in *Gelbard* expressly indicates that where a potential witness invokes a §2515 defense, the government must respond, admitting or deny-

[30] An attempt to justify a warrantless search by distinguishing it from a search for evidence of a specific crime was struck down in Camara v. San Francisco Municipal Court, 387 U.S. 523 (1967). There the Court held that an individual's rights under the fourth amendment exist apart from his being suspected of criminal behavior. *Id.* at 528–30.

The facts in *Camara* involved health code inspections without prior warrant, and the distinction which the government unsuccessfully attempted to draw was one between civil as opposed to criminal actions. But the Court indicated that any distinction overlooks the fundamental function of the warrant procedure which is to interpose a neutral magistrate to decide whether an invasion of privacy is constitutionally permissible. *Id.* at 532–33.

[31] United States v. District Court, 407 U.S. at 320.

[32] *See* note 3 *supra*.

[33] The Court carefully refrained from attempting to detail precise standards for domestic security warrants. However, the opinion suggests that Congress may determine that the application and affidavit allege circumstances other than those indicated in §2518, which may be more appropriate in domestic security cases. Congress could also provide for a specially designated court, e.g. the District Court or the Court of Appeals for the District of Columbia, to which a request for a warrant could be made in sensitive situations. Congress could also provide that the time and reporting requirements need not be as strict as those of §2518.

[34] 408 U.S. 41 (1972).

[35] 18 U.S.C. §2515 (1968) provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States . . . if the disclosure of that information would be in violation of this chapter.

The disclosure violation sections of Title III are §2511 (1) which provides for a penalty of up to five years' imprisonment or a $10,000 fine, or both, for disclosure of the contents of a conversation intercepted contrary to the procedures of Title III, and §2517(3) which provides that the contents of an intercepted conversation may be disclosed if the interception was in accordance with the procedures of that chapter.

[36] Justices Douglas, Stewart, White, and Marshall joined in the opinion. Justices Douglas and White filed concurring opinions.

[37] 28 U.S.C. §1826 (a) (1970) codified the existing practice in federal courts with respect to civil contempt adjudications against grand jury witnesses. *See also* Shillitani v. United States, 394 U.S. 364 (1966).

[38] The Seventh Circuit Court of Appeals has interpreted *Gelbard* as retaining the constitutional rule of *Alderman* that only the person whose privacy is invaded by an illegal electronic surveillance has standing to object. A grand jury witness cannot invoke a §2515 defense on the basis of an illegal interception of someone else's conversations. *In re* Womack, 466 F.2d 555 (7th Cir. 1972).

[39] 408 U.S. at 51–52.

ing the use of electronic surveillance.[40] If the government admits the use of surveillance, the district court must establish its legality in terms of compliance with §2518 procedures.[41] If the surveillance is determined to be illegal, then, under *Alderman*, the government must turn over to the witness all surveillance records of his intercepted conversations. The witness then has the opportunity to argue before the district court that the testimony sought before the grand jury is tainted because it is the fruit of the illegal surveillance. Section 2515 prohibits disclosure of the illegal fruit to the grand jury and provides the witness with a just cause defense to a contempt charge.

In both *Gelbard* and its companion case, *United States v. Egan*,[42] the witnesses appeared but declined to answer questions before the grand jury. In *Gelbard*, the government admitted the surveillance and the fact that the questions to be asked before the grand jury were derived from it. However, a federal judge had approved the surveillance.[43] In *Egan*, the government did not respond before the district court to the charge of illegal surveillance.[44] Subsequently, before the Supreme Court, the government denied any overhearing of conversations of these respondents.[45]

The majority opinion in *Gelbard* severely limited the scope of the question before the Court. In both the *Gelbard* and the *Egan* situations, the majority considered it necessary to assume that the government had conducted illegal surveillance, and that the testimony sought would be evidence derived from that surveillance and, if disclosed to the grand jury, would violate §2515. Thus the Court proceeded on the premise that §2515 prohibited the presentation to grand juries of the compelled testimony of these witnesses,[46] and limited the question before the Court to whether the witness himself could invoke the Title III prohibition by raising a §2515 defense to a contempt charge.

Having so limited the question, the majority found abundant support for the availability of a §2515 defense in the legislative history of Title III. They termed the language of §2515 an "unequivocal" expression of congressional policy to strictly limit the use of electronic surveillance. The protection of privacy was interpreted to be the overriding congressional concern.[47] Accordingly, §2515 was found to be of central importance in Title III as a means of enforcing that policy. To allow a grand jury to hear testimony prohibited by §2515 would subvert this legislative scheme and destroy the integrity of the court by making it a partner to the illegal conduct.[48] Denial of the §2515 defense subjects the victim to a second federal invasion of privacy by "adding to the injury of the interception, the insult of compelled disclosure" to the grand jury.[49] However, recognition of §2515 as a defense relieves the court of the "anomalous duty" of finding the witness in contempt for failing to cooperate with the prosecutor in an illegal course of action.[50]

The majority found further support for a §2515 defense to a charge of contempt in 18 U.S.C. §3504 (1970).[51] That section establishes procedures to be followed "upon a claim by a party aggrieved that evidence is inadmissible because" of illegal wiretapping or electronic surveillance. Under §3504(a)(2), if the unlawful surveillance took place before June 19, 1968, the effective date of Title III, a full *Alderman* disclosure is not re-

[40] *See* discussion of 18 U.S.C. §3504 (1970) *infra*, in text accompanying and following note 51.

[41] *See* note 3 *supra*.

[42] 450 F.2d 199 (3d Cir. 1971).

[43] Gelbard v. United States, 443 F.2d 837, 838 (9th Cir 1971). Gelbard and petitioner Parnas were called before a Los Angeles grand jury investigating possible violations of the federal gambling laws.

[44] 450 F.2d at 201–02. Respondents Egan and Walsh were called before a federal grand jury at Harrisburg, Pennsylvania. The investigation involved, among other crimes, the alleged plot to kidnap a government official.

[45] 408 U.S. at 61 n.23.

[46] *Id.* at 47.

[47] *Id.* at 48.

[48] *Id.* at 51.

[49] *Id.* at 51–52. The Court rejected the government contention that the invasion of privacy was over and done with. Disclosure through compelled testimony makes the witness a victim of a second federal crime.

[50] Recognition of §2515 as a defense to the contempt charge "relieves judges of the anomalous duty of finding a person in civil contempt for failing to cooperate with the prosecutor in a course of conduct, which if pursued unchecked, could subject the prosecutor himself to heavy civil and criminal penalities." *In re* Egan, 450 F.2d 199, 220 (3d Cir. 1971).

[51] The relevant language of §3504 (1) provides:

> [U]pon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged act.

Section 3504 (2) provides that for unlawful acts prior to June 19, 1968, disclosure shall not be required unless such information may be "relevant to a pending claim of . . . inadmissibility."

Section 3504(3) provides that no claim of inadmissibility shall be considered if the event in question occurred more than five years after the unlawful act.

"Unlawful act" as used in §3504 means "the use of any electronic, mechanical, or other device in violation of the Constitution or laws of the United States."

quired; only information found to be relevant after an *in camera* inspection of the surveillance records need be disclosed to the party aggrieved. However, for unlawful interceptions taking place after June 19, 1968, a full *Alderman* disclosure of all records of the victim's own conversations is required. Under §3504(a)(3), there is a five-year limitation upon consideration of a claim of inadmissibility based upon an unlawful act that took place before June 19, 1968.

The June date does not appear in §3504(a)(1) which directs that upon any claim of inadmissibility, the opponent of the claim must affirm or deny the alleged surveillance. The majority in *Gelbard* inferred from this omission of the date that the procedures of §3504(a)(1) must be applied to all claims without regard to the date of the surveillance. Section 3504 specifically includes application to a grand jury hearing. The Court interpreted "party aggrieved" to include a grand jury witness, and "evidence" to mean the witness's testimony.[52] The "opponent of the claim," in this case the government, must affirm or deny the use of electronic surveillance. Only after it is determined by the trial court that an illegal surveillance took place, does June 19, 1968, become relevant in determining whether full disclosure or a prior *in camera* examination is required.[53] Some level of disclosure to the victim of the surveillance is required in any event. The *Gelbard* majority took this requirement as implicit recognition of the victim's right to use the disclosed information as the basis of a §2515 defense to a contempt charge.[54] The §2515 defense is the witness's procedural opportunity to press his §3504 claim of inadmissibility.

The opinion turned finally to the government argument that §2518(10)(a)[55] of Title III codifies the procedure to suppress illegally seized evidence, and that that section is applicable only to specified types of proceedings, not including grand jury proceedings. The Court refused to grant special significance to the omission of "grand jury" from the specified list.[56] The Court indicated that grand jury witnesses do not, as a rule, move for "suppression" of their own testimony. Usually a witness refuses to answer and receives a contempt hearing. Thus the majority held that the omission of grand jury proceedings from §2518(10)(a) does not preclude a witness's right to a suppression hearing, but instead implies that his opportunity arises with a §2515 defense in a contempt proceeding.

The majority opinion in *Gelbard* clearly relies on statutory construction of §2515, §3504(a)(1), and §2518(10)(a), and does not reach the broader constitutional issue of a grand jury witness's right to object to testimony which is the fruit of any violation of his fourth amendment rights. Justice Douglas, however, in his concurring opinion,[57] argues that the fourth amendment itself shields a grand jury witness from any question, or any subpoena based on information derived from searches and seizures which invade the witness's fourth amendment rights.[58] Further, Justice Douglas asserts that Title III is unconstitutional because any government use of electronic surveillance violates the fourth amendment.[59] He concludes that the essence of a provision forbidding the acquisition of evidence by illegal surveillance is that the evidence shall never be used.[60] However, in both the majority and dissenting opinions, the Court recognized a government right to employ electronic surveillance if proper procedures are followed because the government has the right to use the most efficient and effective techniques available in proper pursuance of its duties. Thus there is little concurrence on the present Court

[52] 408 U.S. at 54. A party aggrieved in a grand jury proceeding can only be the witness since there are no other "parties" to such a hearing. Similarly, the evidence presented to the grand jury is the testimony of the witnesses.

[53] *Id.* at 58.

[54] *Id.* at 52–53.

[55] 18 U.S.C. §2518(10)(a) (1968) provides:
Any aggrieved person in any trial, hearing or proceeding before any court, department, officer, agency, regulatory body, or other authority of the United States . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom.

[56] 408 U.S. at 59 n.19.

[57] *Id.* at 62.

[58] *Id.*

[59] *Id.*

[60] Justice Douglas found the *Gelbard* result controlled by Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1919). In that case, federal agents unlawfully seized documents belonging to the petitioners and their company. The documents were returned at the order of the court, but in the interim the agents had copied them. After return of the originals, the prosecutor attempted to regain possession of them by issuing a grand jury subpoena *duces tecum*. The Silverthornes refused to comply with the subpoena and were convicted of contempt. The Supreme Court reversed, Justice Holmes holding that the documents unlawfully seized could not be used in court, and could not be used at all.

In *Gelbard*, the government distinguished *Silverthorne* as not dealing with electronic surveillance. The majority opinion in *Gelbard* dealt entirely with statutory construction and did not reach the fourth amendment issues, and so never considered *Silverthorne*.

in Justice Douglas' position that the fourth amendment completely forbids all electronic surveillance.

A strong dissenting opinion by Justice Rehnquist, writing for four members of the Court,[61] found the majority result supportable by the statutory language, but not compelled by it.[62] The two opinions differ primarily in the interpretation given to the legislative history of §2515 and §3504, and the weight given to the historical method of operation of the grand jury.

The normal grand jury procedure, codified by 28 U.S.C. §1826 (1970), deals mostly with questions of privilege against self-incrimination. A witness is entitled to a hearing before a finding of contempt, but it is an expedited hearing consisting primarily of arguments by the attorneys on the agreed-upon facts.[63] A broad right to disclosure of government records to the witness at this stage of the proceedings has never before been indicated. The dissent in *Gelbard* indicated that while Congress could provide for this broad disclosure, it had not done so in §2515. The opinion pointed out the unique scope of inquiry open to the grand jury, and contended that time-consuming challenges by witnesses to the admissibility of the testimony sought are inimical to the grand jury's function which is to sift all evidence that may result in the presentation of criminal charges.[64]

The dissent attached greater significance than did the majority to the inclusion of grand jury proceedings in §2515 and the corresponding omission in §2518(10)(a).[65] The latter section is the codification of the right to disclosure of records of illegal surveillance and of the right to a hearing on suppression of the evidence derived from such surveillance.[66] This is in essence a full *Alderman* hearing, which has never before been accorded to grand jury witnesses. According to the dissent, grand jury witnesses denied the §2518(10)(a) remedy were not, however, completely without a remedy. Section 2515 is the basic prohibition against disclosure. Remedies in addition to that of §2518(10)(a) are criminal and civil sanctions indicated in §2511[67] and §2520,[68] and the latter two remedies are available to grand jury witnesses.

The dissent argued further that §3504(1), requiring an opponent of a claim of inadmissibility to admit or deny the use of electronic surveillance, had no application to the facts of these cases. Only Gelbard made what might be termed a "claim of inadmissibility" within the language of the statute, and in his case, the government admitted the surveillance and indicated that prior approval had been given by a federal judge. In the case of Egan, the government entirely denied conducting surveillance. Even assuming that §3504 applied in these cases, the dissent read the June 19, 1968, limitation as applying to all three sections of §3504. Thus the entire statutory provision would apply only to surveillances which took place before June 19, 1968, and would be inapplicable to both the *Gelbard* and *Egan* cases.[69]

Justice White, in his concurring opinion in *Gelbard*,[70] may have indicated a way to reconcile the majority policy, which calls for disclosure to the victim of the surveillance of all records of his conversations, with the dissent policy favoring uninhibited and broad investigative powers in the grand jury. Justice White concurs in the majority result, "at least where the United States has intercepted communications without a warrant in circumstances where court approval was required."[71] Therefore, where the trial court determines that illegal surveillance did take place, a grand jury witness should have the right to examine all surveillance records of his own conversations with a view toward showing taint in the testimony requested before the grand jury, and, if necessary, showing a §2515 "just cause" defense to a contempt charge. The policy of Title III, supported by the Supreme Court in *United States v. United States District Court*, clearly favors prior judicial approval of all electronic surveillance. If the executive officers of the government adhere to that policy, there will be few cases of warrantless surveillance. In those few instances where warrantless surveillance occurs, a full *Alderman* hearing could reasonably be granted to grand jury witnesses without unduly delaying or disturbing the activities of the grand jury.

However, in Justice White's view, a different result could occur where the government produces

[61] Justices Blackmun and Powell and Chief Justice Burger joined in the dissent.

[62] 408 U.S. at 71.

[63] *See* Shillitani v. United States, 384 U.S. 364 (1966); Rogers v. United States, 340 U.S. 367 (1951); Blau v. United States, 340 U.S. 159 (1950).

[64] Costello v. United States, 350 U.S. 359, 363 (1956).

[65] 408 U.S. at 81.

[66] *See* note 55 *supra*.

[67] *See* note 35 *supra*.

[68] Section 2520 provides for actual and punitive civil damages in a suit brought by the victim of an unlawful surveillance. Good faith reliance upon a court order warranting the surveillance is a complete defense.

[69] 408 U.S. at 86–88.

[70] *Id.* at 69.

[71] *Id.* at 70.