IN THE

Supreme Court of the United States

October Term, 1971
No. 71-110

DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

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Opinion Below.

The opinion of the Court of Appeals is reported at 443 F. 2d 837 (9th Cir. 1971).

Jurisdiction.

The Court of Appeals rendered its opinion and judgment on June 8, 1971. A timely petition for rehearing was filed, and rehearing was denied on June 23, 1971. The Petition for Certiorari was filed on July 22, 1971, and certiorari was granted December 13, 1971. This Court has jurisdiction under 28 U.S.C. §1254(1).

Constitutional Provisions and Statutes Relied Upon.

The following provisions, being lengthy, are set out in an appendix to this brief.

U.S. Constitution, Amendment 4;
U.S. Constitution, Amendment 5, due process clause;
18 U.S.C. §1826(a);
18 U.S.C. §§2510-20;
18 U.S.C. §3331(a);
Federal Rule of Criminal Procedure 41(e).

Questions Presented.

1. Whether a grand jury witness, summoned to testify under compulsion, is entitled to notice of wiretapping having been conducted against him and a hearing on his claim that the questions put to him will be based on illegally-overheard conversations which he has standing to suppress, and whether such hearing must as a matter of due process of law be afforded before he is committed to jail for civil contempt for refusing to answer the grand jury's questions.

2. Whether, if the Constitution does not afford the right mentioned in Question One, the right is provided by:

(a) 18 U.S.C. §2515, which prohibits the use before a grand jury of illegally-obtained wiretap and other electronic surveillance evidence; and/or

(b) 18 U.S.C. §§2518(9) and (10), which provide for notice and hearing in certain situations for a victim of electronic surveillance.

3. Whether, if there is a right of the kind mentioned in Questions One and Two, a full adversary hearing should be held to enforce it.

Statement of the Case.

Sidney Parnas, a 63-year old accountant, works for Caesar's Palace, a legal, licensed Las Vegas casino. His principal duties are in connection with a travel service and information office at 1435 Broadway, New York, New York, which assists New Yorkers in making reservations for travel to and accommodations in Las Vegas.

Until recently, Mr. Parnas lived undisturbed by local or federal law enforcement agents. In November and December 1970, however, his voice was apparently overheard on a wiretap installed on the home telephone of Jerome Zarowitz, who, undisputedly, was the principal target of the government's massive electronic surveillance, and is a Palm Springs resident who was formerly an executive of Caesar's Palace. Following these intrusions, which were authorized by Hon. A. Andrew Hauk, U.S.D.J., under the provisions of the Omnibus Crime Control Act of 1968, 18 U.S.C. §§2516-19, the Federal Bureau of Investigation obtained a warrant to search Parnas.

Then, early in 1971, Mr. Parnas received a subpoena to testify before a federal grand jury sitting in Los Angeles on February 10, 1971. This grand jury, which had returned indictments involving interstate gambling, was apparently, investigating "hidden interests" in Las Vegas casinos, "skimming" of funds from casinos, and related matters. Adrian Marshall, counsel for Mr. Parnas, asked attorneys for the United States whether they intended to use material obtained by wiretap in questioning Mr. Parnas before the grand jury. These attorneys replied that they had precisely that intention. Mr. Parnas appeared before the grand jury and read a statement declining to answer questions until his rights to disclosure of wiretap material and to make motions to prevent further intrusion on his right of privacy were respected.

Parnas remained insistent that his rights were being infringed, and the government remained obdurate that he must answer. He was taken before United States District Court Judge Crary to resolve the question. Believing the question to be too serious for immediate resolution, Judge Crary adjourned the appearance for one week to permit briefs to be filed. On February 17, 1971, Judge Crary denied relief and ordered Parnas to answer or be committed for civil contempt.

The facts regarding Mr. Gelbard are quite similar. A telephone tap under 18 U.S.C. §§2516-2518 was conducted of an unknown person, probably an alleged bookmaker. At the time of this tap and the authorization for the interception it is probably that Gelbard's name was unknown to the government and became known only because his conversations were also intercepted in the course of his conversing over the telephone with the person who was the object of the tap. Gelbard's attorney, Burton Marks, refused to permit Gelbard to be sworn before the grand jury.

Summary of Argument.

Petitioners first point is quite simple: They argue that a grand jury witness may properly refuse to answer questions which are the product of unlawful electronic surveillance. They submit that a grand jury witness with a fourth amendment claim has the same right to enforce his claim through testimonial silence as any witness with a self-incrimination privilege, husband-wife privilege, or similar claim. Petitioners concede that the mere making of a claim does not establish it: They say only that when the claim is made, the witness should be given a chance to establish it as a defense to a summary civil contempt proceeding, and if it is established, relieved from the obligation to testify in answer to questions which are the tainted fruit of illegality. This argument rests upon the notion that the formidable powers of testimonial compulsion and of summary civil contempt must be hedged about with safeguards to ensure they are not used to commit or compound invasion of privacy. The principle that there must be judicial review of every claim of testimonial privilege will be seen to have been violated in the case of petitioners.

Alternatively, petitioners argue that irrespective of any constitutional protection of the privacy and liberty, 18 U.S.C. §§2515, 2518(9) and (10) forbid the government to use the tainted fruits of illegal tapping before the grand jury, and require that petitioners be given notice of the use of tapping conducted against them and a hearing at which they could show that the government intended to use illegal material.

In the final portions of this brief, petitioners show that the hearing they seek will not endanger legitimate governmental interests, and discuss the context in which this case is being heard.

ARGUMENT.

I.

THE DUE PROCESS CLAUSE AND ARTICLE THREE OF THE FEDERAL CONSTITUTION, AND 18 U.S.C. SECTION 1826, REQUIRE THAT PARNAS AND GELBARD BE GIVEN A HEARING BEFORE BEING JAILED FOR REFUSAL TO ANSWER QUESTIONS WHICH ARE BASED UPON, AND WILL ELICIT ANSWERS COMPOUNDING, UNCONSTITUTIONAL AND UNLAWFUL INVASIONS OF THEIR PRIVACY.

A. Introduction.

Petitioners argue in this section that irrespective of any provisions of the "wiretap law", 18 U.S.C. §§2510-20, they are entitled to a hearing on their fourth amendment and statutory claim before being taken off to jail for refusals to answer which were expressly based on their fourth amendment and statutory rights.[1] This contention rests upon both statutory and constitutional premises.

B. The Statutory and "Inherent Power" Bases of Civil Contempt and of Testimonial Compulsion Before Grand Juries.

Parnas and Gelbard were ordered committed under 18 U.S.C. §1826, a part of the Organized Crime Control Act of 1970, P.L. 91-452. This section provides in part:

> "Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or

[1]Since there has been no hearing of the kind sought, the court must assume there has been illegal tapping. *Alderman v. United States*, 394 U.S. 165 (1969).

> provide other information . . . the court, upon such refusal, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony . . ."

The section goes on to provide that the confinement may last until the court proceeding is over or until the grand jury's term is up, but not for more than eighteen months. Section 1826(b) deals with bail and with judicial review of the commitment order.

Turning to 18 U.S.C. §3331(a), we discover that a grand jury convened under that Section may sit for eighteen months, and with extensions granted by the court, for a term of three years. Section 3333(e) permits a grand jury to sit even longer. And of course there is nothing to prevent one grand jury being dissolved and another promptly begun to deal with the same subject, since a district judge must summon a special grand jury if the Attorney General "certifies in writing" that it is necessary. §3333(a).[2]

Thus, although §1826 limits confinement to eighteen months for any one refusal, the government is aware of its power to summon a witness before successive grand juries dealing with the same subject matter and prolong the term of confinement. We do not concede the legality of such tactics, but only note that within counsel's experience they have been used.

The Congress has therefore enacted a closely-connected group of statutes which provide that eighteen

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[2]The grand jury before which Parnas was summoned was apparently not convened under this new authority, having been called before the effective date of the 1970 Crime Control Act. Thus, it could not sit for more than eighteen months. There would be nothing to prevent a new grand jury being convened promptly once the eighteen months were up, however.

months and more in jail may be summarily accorded a recalcitrant witness. This Court must decide, in this case, how that fearsome power of summary confinement is to be exercised. In doing so, we respectfully point out that even the federal conspiracy laws provide only a five-year maximum sentence, 18 U.S.C. §371, with time off for good behavior and labor, and an opportunity for parole after one-third of the sentence. Further, a punitive confinement in excess of six months requires a jury trial, though the offense be called "contempt." *Bloom v. Illinois*, 391 U.S. 194 (1968). So here is a weapon, committed largely to the Attorney General's discretion, which reason tells us and experience demonstrates is susceptible of the most sweeping use in the service of any motive that can be cloaked in the name "investigation of organized crime." It is this power that brings accountants and revolutionaries, nuns and gamblers, organizers and poets, together to the bar of this Court.

Turning back to §1826, the legislative history states the basis of the section, which

> "becomes applicable to any proceeding before or ancillary to any court or grand jury in which a witness unjustifiably refuses to testify or to produce other information. . . .
>
> The court is authorized summarily to confine the witness at a suitable place until the witness is willing to give such testimony or provide such information. The procedure is designed to codify present practice. . . . The confinement is civil, not criminal; its purpose is to secure the testimony through a sanction, not to punish the witness by imprisonment. As amended by the committee con-

finement is, therefore, limited to . . . the term (including extensions) of the grand jury."

1970 U.S. Code Cong. and Ad. News 4022.

The statutory provision for civil contempt thus changes existing practice only in specifying a maximum term for confinement. There is nothing novel in the use of civil contempt powers to compel testimony, among the many uses of this device to force obedience to judicial command:

> "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."

Shillitani v. United States, 386 U.S. 364, 370 (1966). And see *R. Goldfarb, Contempt* 49-67 (1963), for a discussion of the origin of "civil contempt" (or "quasi-contempt", as it was known at common law) as an attribute of judicial power.

Sec. 1826 echoes other, similar provisions dealing with judicial compulsion of testimony and documents:

> "The Act gives the (Securities and Exchange) Commission authority to require the production of books and records in the course of its investigations and in the absence of a basis for saying that its demand exceeds lawful limits, it is entitled to the aid of the court in obtaining them. . . ."
>
> *Penfield Co. of California v. SEC,* 330 U.S. 585, 590-91 (1947).

The Crime Control Act therefore contains no novelties of substance, save a clear intention to use this power of summary "civil" confinement to the uttermost extent permitted in logic and law.

We must, therefore, ask what limits the doctrine has.

C. Limits on Summary Civil Contempt: Why Parnas and Gelbard Were Treated Illegally and Unconstitutionally.

The most important limit suggested by the statute and by decisions of this Court is that the order disobeyed must be lawful. The cases and statutes cited above express this requirement in different ways:

> 18 U.S.C. §1826: "refuses without just cause shown."
>
> Legislative history: "witness unjustifiably refuses to testify."
>
> *Shillitani, supra*: "compliance with their lawful orders."
>
> *Penfield, supra*: "in the absence of a basis for saying that its demand exceeds lawful limits."

Here is the simple heart of the matter: Parnas and Gelbard are not seeking in this proceeding to halt an entire grand jury investigation, and this case could ultimately be decided favorably to them without ordering any evidence suppressed. (Compare our argument under Point II, *infra.*) They merely want the court below to recognize a basis for their refusing to testify about certain subjects, and to free them from a condemnation to jail for that refusal.

There is nothing new in a witness refusing to testify before an investigatory body on the basis of a constitutional, statutory or decisional law privilege or immunity. Grand jury investigations are regularly halted while the court rules upon some such claim: privilege against self-incrimination, husband-wife privilege, lawyer-client privilege, first amendment objections to the breadth of inquiry,[3] and so on. For example, if a wit-

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[3]See *Caldwell v. United States,* 434 F. 2d 1081 (9th Cir. 1970), *cert. granted,* No. 70-57, 39 U.S.L.W. 3388 (3/8/71).

ness responds to a grand jury question by invoking the privilege against self-incrimination, one of two things happens. Either the claim is accepted and the question dropped, or the witness is taken before a district judge to have the claim of privilege ruled upon. The judge tells the witness whether the claim is sustained or whether the witness must, upon pain of summary confinement, answer the question. Parnas and Gelbard refused to answer questions, but based upon the fourth amendment and a federal statute. They were taken before a judge, but he decided not to pay any attention to their fourth amendment claims. Instead, they were ordered off to jail without any judicial decision on the validity of their claim that the question asked, and the answer sought, invaded rights just as precious as those enshrined in the fifth amendment.

Parnas and Gelbard should have the right, we submit, to litigate their claim that the questions posed to them are based upon evidence obtained in flagrant disregard of the fourth amendment and 18 U.S.C. §§ 2510-20, and their corollary claim that answers to these questions would compound the invasion of their privacy.

Chief Justice Warren expressed our view in *Watkins v. United States*, 354 U.S. 178, 187-88 (1957), speaking not only of Congressional investigations but of all governmental inquisitions in which testimony is compelled:

> "It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of Congress and its committees, and to testify fully with re-

spect to matters within the province of proper investigation.

This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress just as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subject to unreasonable search and seizure. . . ." (Emphasis added.)

Before developing this theme, we believe it important to underscore the constitutional limitations upon the power of summary commitment, to give point to petitioners' demand for judicial review.

1. The Constitution Requires Judicial Review of the Basis of Confinement.

Justice Harlan did not speak without basis in seeing "serious constitutional problems" in depriving a person of liberty before he or she had the opportunity to present his or her claims to "any competent forum."

> *Oestereich v. Selective Service System,* 393 U.S. 233, 241, 243 (1968);
>
> *Breen v. Selective Service Board,* 396 U.S. 460, 468-69 (1970).

In the selective service field, this Court has confronted the problem of judicial review again and again. The draft cases are relevant, for the government seeks to console Parnas and Gelbard as they are marched off to jail with words like those in *Estep v. United States,* 327 U.S. 114, 119 (1946):

> "Congess enlisted the aid of the federal courts only for enforcement purposes."

That is, Parnas and Gelbard can have some judicial review, sometime, of their constitutional claim, but first must suffer a denial of liberty for some indefinite period. *Estep* contains a clear answer to this claim. Citing *Ng Fung Ho v. White,* 259 U.S. 276 (1922), the Court said that any attempt to deprive a person of liberty without judicial review of his claims that his rights have been violated would raise grave constitutional doubts. 327 U.S. at 120.[4] And any statute which was silent as to judicial review while prescribing loss of liberty should be construed, if possible, to permit review.

This is no new principle. For every official wrong there should be a remedy. *Marbury v. Madison,* 5 U.S. 137, 163, 166 (1803). The Congress cannot give jurisdiction to a federal court over a case or controversy and then prescribe that the government shall always win. *United States v. Klein,* 13 Wall. 128 (U.S. 1872). If nothing else does so, the habeas corpus provisions of the Constitution give "adequate security that every one who without legal justification is placed in confinement shall be able to get free." Dicey, *Law of The Constitution* 213 (9th ed.). See also J. Story, *Commentaries on the Constitution,* §§1338-42; *In re Merryman,* 17 Fed. Cas. 144, 150 (Fed. Cas. No. 9487) (Taney, J. 1861).

Professors Hart and Wechsler, citing *Estep, supra,* and *Ng Fung Ho, supra,* conclude it to be a fundamental principle of the constitutional compact that:

> "Jurisdiction always is jurisdiction only to decide constitutionally."

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[4]Where Congress invokes the aid of the federal courts to punish contemnors, the courts will insist upon compliance with constitutional standards. *Watkins, supra,* at 206-08. Even where

(This footnote is continued on next page)

And following the habeas corpus analogy, they say

> "That principle still forbids a federal court with jurisdiction in habeas corpus from ever accepting as an adequate return to the writ the mere statement that what has been done is authorized by Act of Congress."

H. Hart and H. Wechsler, *The Federal Courts & the Federal System* 334, 340 (1953). See also Tigar, *Judicial Review, the "Political Question" Doctrine, and Foreign Relations,* 17 U.C.L.A. L. Rev. 1135 (1970).

The notion that judicial review of claimed violations of right must precede deprival of liberty is underscored in a number of other cases decided by this Court.[5] The majority opinions in *Oestereich, supra,* and *Breen, supra,* stretch a statute limiting judicial review to avoid constitutional difficulty. 50 U.S.C. App. §460(b)(3). The majority opinion in *Gutknecht v. United States,* 396 U.S. 295 (1970), suggests a concern that summary procedures for ending liberty have a hard time squaring with the Constitution. *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970), clearly holds:

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' (Citation omitted.) The hearing must be 'at a meaningful time and in a meaningful manner.' "

And where constitutional rights are at stake, limitation of judicial review is doubly to be condemned. *Cf. Blount v. Rizzi,* 400 U.S. 410 (1971), and particularly the citation with approval, in footnote 5, of

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the Congress acts itself to punish contempt, the alleged contemnor will have judicial review by habeas corpus.

Kilbourn v. Thompson, 103 U.S. 168 (1881).

[5]The right of review is raised in such venerable cases as *Boske v. Comingore,* 177 U.S. 459 (1900). See also *Fay v. Noia,* 372 U.S. 391 (1963).

Manual Enterprises v. Day, 370 U.S. 478, 518-19 (1962) (concurring opinion of Brennan, *J.*), See also *Freedman v. Maryland*, 380 U.S. 51 (1965). As Learned Hand said:

> "Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens."
>
> *United States v. Coplon*, 185 F. 2d 629, 638 (2d Cir. 1950).

In sum, whether it be called due process of law, the command of Article Three of the Constitution, or a logical extension of the habeas corpus concept dating from the reign of Charles II, there is an affirmative, primary federal judicial obligation to review all claims of privilege, and especially constitutional claims, invoked by a witness under the compulsion of a federal court to answer questions.[6]

2. How Should Parnas' and Gelbard's Claims Be Raised and Adjudicated? Why Does Their Position Not Endanger the Grand Jury's Lawful Functions?

The government made much in the Court below, and may do so here, of the argument that petitioners' claim would halt grand juries in their work. In its brief below, the government even relied upon the statement in *Cobbledick v. United States*, 309 U.S. 323, 327 (1940), that "The duration of (the grand jury's) life, frequently short, is limited by statute . . ." This argument has no

[6]The right of judicial review is basic to all modern legal systems. See, *e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 5, clause 4 (in Council of Europe, *Report to the International Conference on Human Rights* [1968]).

application to cases involving special grand juries convened under the 1970 Crime Control Act, since the Act makes the grand jury's life three years, and the legislative history recognizes that these "organized crime" grand juries will typically sit for a long time. See 1970 U.S. Code Cong. & Ad. News 4014 ("typically lengthy organized crimes case"). Virtually all the cases raising the issues now before the Court involve lengthy grand jury proceedings, and some involve the "organized crime" provisions of the wiretap law as well. 18 U.S.C. §§2510-20. The grand jury's work will not be frustrated by changing the order in which a long list of witnesses testify in order to give a hearing to those who make a fourth amendment claim.[7]

But petitioners do not rely only upon their own, or this Court's power to predict the length of time grand juries will sit. A hearing on a fourth amendment violation is not a lengthy affair in any case, any more than a hearing on a fifth amendment privilege, a lawyer-client privilege, or an executive privilege is necessarily lengthy. The question to be decided is a legal one: Has some constitutional or other privilege been invaded, or would it be by compelling an answer to the grand jury's questions? Inquiry into the basis of the claim, going far enough to ensure that the privilege is properly invoked and not so far as to destroy it by

[7]In trials and hearings of all sorts, a party (including the government) is often required to change the order of proof to permit leisurely disposition of a witness's claim of privilege or an opponent's claim of surprise. To experienced trial lawyers, the government's claim concerning the impracticality of petitioners' position makes no sense. At any rate, due process always takes a little longer than summary process, or drumhead process, or pistol-at-the-head process; in the end, it is a question of the kind of society you want. The framers of the Constitution chose a society in which justice and fairness should be primary, and enshrined their choices in the Bill of Rights.

revealing the privileged material to the public, has been outlined in many cases. See, for a particularly incisive statement, *United States v. Reynolds,* 345 U.S. 1, 7-10 (1953).

This Court has heard in other cases the claim that judicial review threatens governmental functions and should therefore be disallowed. The survival of the nation itself has been put forward as the basis of such claims, yet they have been rejected. *Estep v. United States,* 327 U.S. 114 (1946), accommodated the need for judicial review with the concerns for national security and about "litigious interruption" of the military service selection program. *Oestereich, supra,* and *Breen, supra,* are to the same effect. In *Gutknecht v. United States, supra,* the Court rejected the claim that unless local draft boards could be agencies of punishment, the Selective Service System could not function.

Parnas and Gelbard, in striking analogy to *Breen* and *Oestereich,* are not seeking to invade the grand jury's evidence, and make the district court a "super grand jury", any more than in *Oestereich* and *Breen* the Court was to be a "super draft board." They like *Breen* and *Oestereich,* raise a legal claim-violation of statute and constitution—susceptible of being framed in narrow compass and decided by reference to settled legal standards. (Indeed, if the argument under Point II, *infra,* is sustained, there would be ten days before their grand jury appearance is even scheduled within which they could obtain the desired judicial review, and therefore no interruption at all of the grand jury's work.)

D. The Problem of Standing Raised by the Ninth Circuit.

In *Carter v. United States*, 417 F. 2d 384, 388 (9th Cir. 1969), cert. denied, 399 U.S. 935 (1970), relied on below, the Ninth Circuit said of a claim similar to Parnas' and Gelbard's:

> "As witnesses, they have no standing to question the source of the government's information. It will be time enough to do that if any of them should ever become a defendant."

The concept of "standing" raised in *Carter* is difficult to understand, but should be dealt with, for it may have led the Court below into error.

The varying and sometimes recondite uses of the term "standing" by lawyers, text-writers and courts create considerable difficulty. The term may be used to refer to several quite distinct limitations upon the power of federal courts to decide cases. See generally *Flast v. Cohen*, 392 U.S. 83 (1968). First, standing may refer to the procedural capacity of a litigant to sue or be sued. Ehrenzweig, *Conflict of Laws*, §§ 11-24 (1959).

Second, "standing" is sometimes used to denote a limit upon the article three judicial power, and to refer generally to the requirement that litigants have a genuine and not a sham contrariety of interests, both qualitatively and quantitatively. Cases in which the requisite "qualitative" adversity was lacking include *Muskrat v. United States*, 219 U.S. 346 (1911), and *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The question is double-edged in these cases: will the Court decline, on the basis of judicially-fashioned rules of restraint to take the case? (See *Muskrat*); and, on the other hand, may Congress bestow standing upon a class of litigants without falling afoul of the proscription on advisory opinions—stated affirmatively as the case or controversy requirement (see *Sanders Bros. Radio Station*). The "quantitative" dimension of standing was considered in *Flast v. Cohen*, 392 U.S. 83 (1968), in which the Court limited *Frothingham v. Mellon*, 262 U.S. 447 (1923). *Frothingham* had rejected a taxpayers' suit directed at a federal statute upon the ground that the interest of a taxpayer in the outcome of the litigation was but a comminute share of the interest of the community at large, and not sufficiently direct and immediate. See also *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

A third use of the term "standing" has been in reference to questions essentially of ripeness. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), is such a case. There the FCC had adopted a rule stating that licenses for television broadcasting would not be granted if the applicant had a direct or indirect interest in more than five other stations. Storer, which had reached the limit under the rule, sued for a declaration that the rule was invalid. This Court concluded that Storer had "standing" to sue, resting its decision upon a perception of the statutory judicial review standard and a finding of present harm to Storer, 351 U.S. at 197-99. The Court recognized that "standing", in the sense it had used the term, carried along with it the notion of ripeness. Taking the question before the court out of "standing" language, one could cast it as, "Should Storer have gone through the license-application process before coming to court?" This requirement may also be termed one of "finality." See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154-56 (1951) (Frankfurter, *J.* concurring).

A fourth "standing" issue is that of "legal wrong," a term which appeared in Section 10 of the old Administrative Procedure Act and which now appears in the judicial review provisions of recodified Title 5, 5 U.S.C. § 702 (Supp. IV 1969). See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198-99 (1956); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939). The "standing" issue in "legal wrong" cases really goes to the merits of the claim being asserted, for "standing" is denied or upheld based upon whether the harm complained of is legally cognizable.

Fifth: Closely related to the fourth meaning but distinct from it, is the issue of "standing" raised when B seeks to complain of a violation of rights which are said to "belong" to A. Mr. Justice Frankfurter termed this the problem of "directness." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 153-54 (1951). This fifth notion of standing has been an issue in search and seizure cases, most recently *Alderman v. United States*, 394 U.S. 165 (1969). In these cases, the Court has held that in a case, United States v. A, A cannot complain of the admission into evidence of items unlawfully seized from B. See also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149-55 (1951) (Frankfurter, *J.* concurring); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *NAACP v. Button*, 371 U.S. 415 (1963). Other "vicarious assertion" cases are collected and analyzed in Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962).

Parnas and Gelbard do not rest upon a "standing to suppress evidence" argument (the fifth type of standing mentioned above) any different from that applied by the Court in *Alderman, supra.* Each claims to be a "party aggrieved" by an unlawful search directed at him.

Each clearly has a stake in the outcome of this proceeding, both through the invasion of his privacy and through the sanction which will be imposed upon him if he is unsuccessful in this Court, so the second type of standing mentioned above is present. The first and fourth types of standing are not in issue here.

The only sense in which "standing" could limit petitioners' right is the third mentioned above. The Ninth Circuit may have considered that a person whose privacy is invaded in front of a grand jury has no remedy unless and until an indictment is returned against him. Then, the unlawfully obtained evidence can be challenged and the government forced either to prove its case by lawful evidence or to dismiss the prosecution. This theory of "standing" would be that applied in *Storer, supra.* This theory, which might be applied to a prospective defendant who was not called before the grand jury and subjected to a compulsion to testify, is inapplicable to the present case.

In the discussion under Point II, we analyze in detail *United States v. Blue,* 384 U.S. 251 (1966), reserving our discussion to that point in the brief because of the reliance on *Blue* in the legislative history of the wiretap law. However, it bears saying here that this case has nothing to do with the situation in *Blue.* Parnas and Gelbard do not seek dismissal of an indictment against them on the ground that illegally-obtained evidence was adduced before the grand jury. They are not in the position of a criminal defendant who brings a suit in equity to challenge an illegal search and is told that an adequate remedy at law exists by a motion in a criminal case, which would be another way of saying that his claim should be raised in the proceeding where the harm complained of has its most direct and immediate effect—on his freedom.

The true rule is this: Any person aggrieved by an unlawful federal search (*i.e.*, any person with "standing" in the *Alderman* sense) has standing (in the sense of a real contrariety of interests with the federal authorities) to bring an appropriate proceeding for return of property and suppression of evidence. Federal courts may, however, decline to hear such a suit on the grounds that the claimant lacks standing, in the sense of not having waited until the evidence was sought to be used against him: This is "standing" in the sense of ripeness, and may also be placed under a heading like "adequate remedy at law."[8]

The cases which deal with this question are legion, but every one of them recognizes that the federal courts have the *power* to hear a claim by a party aggrieved, and only a *limited discretion* to refuse a hearing on grounds of ripeness—the third kind of "standing" mentioned above. See, for example, *Smith v. Katzenbach*, 351 F. 2d 810, 814 (D.C. Cir. 1965) (Opinion by Leventhal, *J.*; Burger, *J.*, on the panel); *Foley v. United States*, 64 F. 2d 1, 3 (5th Cir. 1933); *Austin v. United States*, 297 F. 2d 356 (4th Cir. 1961), *mandate recalled and app. dism. on other grounds*, 353 F. 2d 513 (4th Cir. 1962); *Parrish v. United States*,

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[8]One of petitioners' counsel has, in another context, attempted to collect and analyze the case-law and texts dealing with federal courts' power and discretion to decline jurisdiction. See Tigar, *Judicial Power, the "Political Question Doctrine", and Foreign Relations*, 17 U.C.L.A. L. Rev. 1135, 1136-67 (1970).

256 F. Supp. 793 (E. D. Va. 1966), *app. dism.*, 376 F. 2d 601 (4th Cir. 1967); *Plato v. Katzenbach*, 253 F. Supp. 1021 (N.D. N.Y. 1966); *Silbert v. United States*, 282 F. Supp. 635 (D. Md. 1968); *United States v. Arrington*, 159 F. Supp. 843 (D.D.C. 1958); *Lord v. Kelley*, 223 F. Supp. 684 (D. Mass. 1963), *app. dism.*, 334 F. 2d 742 (1st Cir. 1964). See also *Lankford v. Gelston*, 364 F. 2d 197 (4th Cir. 1966) (suit against state officers; injunction granted against illegal searches); *In re Fried*, 161 F. 2d 453 (2nd Cir. 1947), *cert. dism. on suggestion of Solicitor General*, 332 U.S. 807 (1947) (illegal confession extracted by third degree methods; pre-indictment intervention); *Morrow v. District of Columbia*, 417 F. 2d 728 (D.C. Cir. 1969) (ancillary jurisdiction of federal court in criminal matter). Compare *Rea v. United States*, 350 U.S. 214 (1956) (federal court has power, at the instance of the victim of an unlawful search, to enjoin a federal officer from testifying about the fruits of the search).

The law is, therefore, that Parnas and Gelbard could have brought independent suits in equity, or proceedings under some other provision of law, to get back the fruits of illegal wiretapping and prevent the use of such material. These suits would have been within the power of federal courts to entertain, provided Parnas and Gelbard alleged a violation of "their" fourth amendment rights. And had they been victorious, the fruits of illegality would simply not be available to the government to frame grand jury questions, or for any other purpose. This case would not have arisen. A federal court might, however, as a matter not of power but of prudence, decide that Parnas and Gelbard should wait until they could demonstrate a more immediate harm before coming to court—await, that is, more ripeness or finality—and hold that they lacked "standing."

But now the harm is more than merely threatened and these cases could not be more ripe. Parnas and Gelbard could not have more "standing" than they do. They are "standing" in the jailhouse door, and will remain, unless they submit to questioning based upon exploitation of illegally-obtained material, and unless they make answers which will compound that initial illegality.

Not only is there no prudential limitation upon the federal judicial power to give them a hearing, but there is, as we show above, the clearest federal judicial duty to do so.

E. Concluding Remarks Under Point I.

For the reasons stated above, Parnas and Gelbard have a right to the relief they seek. They want their fourth amendment claim heard and decided before they face jail, just as a witness relying upon the fifth amendment wants the legitimacy of his claim determined before facing jail for refusal to answer.[9] This right is independent of the provisions of the statutes which govern wiretaps, and arises directly from the Constitution. Therefore, the Court must, we respectfully suggest, hold either (a) that the wiretap statutes, 18 U.S.C. §§2510-20, discussed under Point II have no relation to this case, and Parnas and Gelbard must have a hearing; or (b) that the wiretap statutes must be construed to avoid serious constitutional doubts and Parnas and Gelbard given a hearing under those statutes; or (c)

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[9]And as a draft registrant wants review, before facing jail, of the legality of local board action.

that the wiretap statutes are unconstitutional in denying a hearing to petitioners. We turn, having said this, to an analysis of the statutes, and show that they support the position taken above.

II.

PETITIONERS HAVE A RIGHT UNDER 18 U.S.C. SECTIONS 2515 AND 2518 TO A HEARING BEFORE THEY CAN BE MADE TO ANSWER QUESTIONS WHICH MAY BE DERIVED FROM ILLEGAL WIRETAPPING OR ENDURE IMPRISONMENT FOR THEIR FAILURE TO DO SO.

A. Summary and Analysis of the Wiretap Law.[10]

The 1968 Crime Control and Safe Streets Act, P.L. 90-351, authorized judicially-controlled wiretapping and other electronic surveillance in the investigation of certain crimes which are enumerated in the Act, which is codified as 18 U.S.C. §§2510-20. The Act lays out the methods for getting and using such evidence: An application for surveillance orders may be made to a federal judge[11] as provided in 18 U.S.C. §2518(1). The judge may require the application to be supplemented. 18 U.S.C. §2518(2). If he finds the statutory standards met, the judge may issue an eavesdropping order. §2518(3). The order must name the person whose communications are to be intercepted, must describe the communications facilities to be used, must identify the agency conducting the interception and the person authorizing the application, and must state the period of time for which the interception is authorized. §2518(4). 18 U.S.C. §2518(5) limits orders un-

[10]The text of the Act is in an Appendix to this brief.

[11]The statute authorizes state judicial wiretap orders, but these provisions are irrelevant to this case.

der the statute to thirty days. Sec. 2518(6) permits the issuing judge to have reports submitted to him or her concerning the interception. Sec. 2518(7) authorizes "emergency" interceptions without prior judicial approval. Sec. 2518(8) deals with custody of recordings: It provides that the issuing judge must give notice of the interception to the person against whom the order was issued and *may* give such notice to all those overheard by the device. Secs. 2518(9) and (10) provide for the rights of those overheard in the course of electronic surveillance under the statute.

So much for the details. The spirit of the Act is expressed in 18 U.S.C. §2515, quoted below, which prohibits the use of electronic surveillance evidence "if the disclosure of that information would be in violation of this chapter." This prohibition extends to all sorts of judicial and quasi-judicial proceedings. Other sections of the Act enact strict prohibitions on the manufacture, use and transportation of wiretapping and "bugging" devices.

In its discussion of the statute, the Senate Committee stated an intention to comply with the direction of this Court in *Berger v. New York,* 388 U.S. 41 (1967) and *Katz v. United States,* 389 U.S. 347 (1967).

This, is, therefore, a statute designed to go as far in the aid of the police as the Constitution permits, and yet to give protection to individual privacy. Whether the statute is constitutional is not an issue in this case. See generally, Schwartz, *The Legitimation of Electronic Eavesdropping,* 67 Mich. L. Rev. 455 (1969);

Lyon, *Note: Wiretapping and Electronic Surveillance, Title III of the Crime Control Act of 1968*, 23 Rutgers L. Rev. 319 (1969). Petitioners suggest that the statutory language which recognizes the rights of the wire-tapped should be given a generous reading to protect individual liberty, and to avoid constitutional doubt.

But the argument below demonstrates, we submit, that whether the reading be remorselessly literal or smilingly generous, the statute provides petitioners with the following rights:

1. The right to prevent the use before the grand jury of any information obtained in violation of the Act, including information obtained in violation of the fourth amendment. See Point II, B, *infra*.
2. The statutory right to notice, 10 days before their grand jury appearance, that information obtained by electronic surveillance is going to be used in questioning them. Point II, C, 1, *infra*.
3. The statutory right, after receipt of such notice, to a hearing before their grand jury appearance, or in the alternative, after they have duly invoked their statutory and fourth amendment rights before the grand jury and before they are in danger of contempt sentences. Point II, C, 2, *infra*.

Finally, we argue under this section that nothing in *United States v. Blue*, *supra*, or in the legislative history undermines these conclusions. Point II, D *infra*.

B. Section 2515 of the Wiretapping Act Mandates a Hearing Such as Petitioners Seek.

Sec. 2515 states:

> "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, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." (Emphasis added.)

This section, standing by itself, creates a statutory right for anyone overheard illegally to have such evidence suppressed in a grand jury hearing.

As a majority of judges held in the Third Circuit case of *United States v. Egan,* 39 U.S.L.W. 2724 (3rd Cir. 1971) (en banc), this provision requires a hearing for any grand jury witness who has been informed by the government, or even who merely suspects that there is a wiretapping material which it may use in its formulations of questions to be put to the witness. The witness may "stand mute" and rely upon §2515's prohibition on use of illegally-obtained materials.[12] The language of the statute is so uncompromisingly clear that even if there were no statutory remedy prescribed to protect this right, there would be no question but that the witness has some protection against the invasion of his privacy, which the government in this case has been so anxious to invade.

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[12]See Opinion of Judges Rosenn, Sertz and Van Dusen.

As Judge Adams held in Egan,

> "Section 2515 is an unequivocal bar to questioning one before a grand jury if the questions are derived from electronic surveillance conducted in the absence of a properly issued warrant and aimed at the witness if the witness himself (sic) objects to the interrogation. See 18 U.S.C.A. §§2511, 2516, 2518."

Sec. 2515 therefore recognizes, by its terms, a full-fledged right to be free of illegal eavesdropping and wiretapping.[13] It is quite a forward-looking provision, when one examines it closely. It seems to recognize that the real damage to human beings from unlawful electronic surveillance is the invasion of their privacy. See A. Westin, *Privacy and Freedom*, C. 3 (1967), and that prohibition on use and disclosure of the material is the only way to redress an illegal invasion.[14]

Even if the statute did not contain any remedy provision at all, or even if the remedy provision of §2518 is held inapplicable to petitioners, §2515 would provide the basis for complete relief in this case and the complete vindication of petitioners' position. Sec. 2515 creates a federal right, and by doing so imposes a duty on federal officials to honor and enforce that right. Compare *Rea v. United States, supra.* That right is enforceable in any appropriate proceeding, by the invocation of any settled principle of federal remedies law. Parnas and Gelbard could have filed an injunction suit, subject to the general principles of equity jurisdiction.

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[13]Even the §2517 "intra-governmental" disclosure sections permit disclosure only of lawfully-intercepted communications.

[14]*Cf.* the discussion at Point II, D, concerning legislative history.

See *Dellinger v. Mitchell,* 39 U.S.L.W. 2487 (D.C. Cir. 1971). *Cf. Stamler v. Willis,* 371 F. 2d 413 (7th Cir. 1966), (reh. den. en banc 1969). And see the cases collected at Point I, C *supra.* They could have filed a Federal Rule of Criminal Procedure 41(e) motion. See *Smith v. Katzenbach, supra.* Or, as the Third Circuit held in *Egan, supra,* and as appears from a common-sense reading of the statute's unambiguous language, they could file a pleading invoking the illegality of electronic surveillance about to be used against them as a basis for not answering questions before the grand jury and as a defense to a contempt proceeding. This last is just what they did, and they were right in doing so.[15]

C. For the Right Recognized by Sec. 2515, There Is a Statutory Remedy Provided by Secs. 2518(9) and (10)(a).

1. Notice Is Required.

Sec. 2518(9) provides in part:

> "The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than 10 days before the trial, hearing, or other proceeding, has been furnished with a copy of the court order and accompanying application, under which the interception was authorized or approved."

[15]Even the legislative history agrees with this construction, for it says that §2515 must be taken "along with the criminal and civil remedies", a clear reference to the general federal judicial power. 1968 U.S. Code Cong. & Ad. News 2185.

This 10 day notice may be dispensed with if the judge finds that the delay will not be prejudicial. Id. Parnas and Gelbard were told informally that the government had and would use wiretap material to question them but the only sort of "notice" served upon them was a grand jury subpoena.[16]

The government has admitted in the courts below that its questioning of Parnas and Gelbard would result in "disclosure" of intercepted communications. Thus, under §2518(9), they are entitled to ten days' notice of the interception, within which time they could take appropriate action under some applicable federal remedies law. (We argue below, Point II, C, 2, that §2518(10) is such a law, but the discussion above demonstrates that there are many other jurisdictional bases.) The district judge held, however, that a grand jury was not a "trial, hearing or other proceeding", and that §2518(9) does not require disclosure. This holding cannot be defended without doing violence to the language of the statute, to settled principles of statutory construction, and to the English language.

"Proceedings in court" encompasses many ancillary proceedings, and is surely broad enough to include

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[16]Congressional intent to "conform" with existing warrant procedure is manifest in §2518(8)(d), which sets up an inventory mechanism. 1968 U.S. Code Cong. & Ad. News 2194. The judge has the duty to "cause to be served, upon the persons named in the order (authorizing the interception) or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice . . ." The inventory will be served not later than 90 days after the termination of the interception and will include notice of the entry of the order to intercept, the period of interception and whether wire or oral communications were intercepted. Of course, the fact that the judge may "in his discretion" give the subject of the tap the right to scrutinize portions of the intercepted communications belies strict Congressional adherence to compliance with F. R. Crim. P. 41, since a literal compliance would give the right to an inventory.

grand jury proceedings. See 34 Words and Phrases, pp. 190-91 (heading "Proceeding in Court") (Perm. ed.), and 1970 Pocket Part pp. 25-26.

Further, the statute contains convincing internal evidence that the word "proceeding" includes a grand jury proceeding. Most strikingly, §2517(3), in its 1968 version, referred to "criminal proceeding" and "grand jury proceeding," making it evident that the generic term "proceeding" includes a "grand jury," as well as a "criminal" proceeding. In 1970, the Congress amended the Act to make it simpler, and substituted "any proceeding held under the authority of the United States or of any State or political subdivision thereof." Since no relevant change in meaning is presumably intended by this clerical amendment, the statutory term "proceeding," standing alone, now includes a grand jury proceeding at one point in the Act. Moreover, §2515 includes under the types of "proceeding" to which it applies, a "grand jury," again making clear that this term has the inclusive sense petitioners claim.

The statute should, petitioners suggest, be read in this common-sense way since it is on its face unambiguous. The Court should read the statute, we submit, and reject appeals to ease Congress's mind. See generally *United States v. O'Brien*, 391 U.S. 367 (1968); *United States v. Oregon*, 366 U.S. 643, 648 (1961); *Thorne, Construction of Statute,* in *How to Find the Law,* 353 (1949).

If "proceeding" includes grand jury proceeding, petitioners were deprived of their right to notice. This right would but enforce the due process guarantee of a timely hearing, *Goldberg v. Kelly, supra,* and a hearing at which notice of the issues is given to the affected party. *In re Ruffalo,* 390 U.S. 544 (1968).

2. A Hearing Must Be Held.

18 U.S.C. §2518(10) provides:

"Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order or authorization or approval. Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice."

The statutory requirements of §2518(10) that a hearing be held before the contents of a wiretap can be used must, in the absence of any statutory direction to the contrary, be interpreted to include claims raised by grand jury witnesses. The argument at Point II, C, 1, *supra*, establishes that much.

3. Secs. 2518(9) and (10) Read Together.

If Secs. 2518(9) and (10) be read together, and with §2515, the statute as a whole makes literal sense, and fairly good sense at that. We need not consider whether there should be a wiretapping statute, or whether other sections go too far in conferring authority to tap: These remedy provisions read as an internally-consistent whole. Sec. 2515 prohibits the use of information obtained unlawfully, and creates (remembering the fourth amendment, we should perhaps say "recognizes") a right. Then §2518(9) and (10) provide an orderly means to enforce that right, when it is threatened in the context of certain kinds of proceedings.

These sections therefore enforce the due process command of a timely, adequate hearing. If Parnas and Gelbard were worried only about the fact of interception, they could proceed under §2520 with a damage suit. But they are concerned not only about the invasion of their privacy, but the use to their detriment of the material obtained. They therefore have the remedy provided by §2518.

If these sections are not read so as to provide this remedy, they are, for the reasons stated in Point I, unconstitutional.

D. The Legislative History and United States v. Blue.

The government seems to believe that the statute should be resorted to only if the legislative history is ambiguous, so stoutly did they urge below that the statute must be read to deny petitioners a remedy.

The legislative history relied on by the government is the following. With reference to §2518(10):

> "It provides the remedy for the right created by Section 2515. Because no person is a party as such to a grand jury proceeding, the provision does not *envision* the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable by an individual. (Blue v. United States, 86 S. Ct 1416, 384 U.S. 251 (1965)." (Emphasis added.)
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> 1968 U.S. Code Cong. & Ad. News 2195.

The legislative history does not, however, speak with one voice. The portion quoted is impossible to reconcile with the spirit of the discussion of §2515:

> "It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury . . . or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. The provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (*Nardone v. United*

> *States,* 58 S. Ct. 275, 302 U.S. 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone v. United States,* 60 S. Ct. 266, 308 U.S. 338 (1939). There is, however, no intention to change the attenuation rule. See *Nardone v. United States,* 127 F. 2nd 521 (2d), certiorari denied, 62 S. Ct. 1296, 316 U.S. 698 (1942); *Wong Sun v. United States,* 83 S. Ct. 407, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role beyond present search and seizure law. See *Walder v. United States,* 74 S. Ct. 354, 347 U.S. 62 (1954). But it does apply across the board in both Federal and State proceeding. Compare *Schwartz v. Texas,* 73 S. Ct. 232, 344 U.S. 199 (1952). And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. Compare *Adams v. Maryland,* 74 S. Ct. 442, 347 U.S. 179 (1954); *Mapp v. Ohio,* 81 S. Ct. 1684, 367 U.S. 643 (1961). The provision thus forms an integral part of the systen of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications."
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> 1968 U.S. Code Cong. and Ad. News 2185.

If, indeed, "such a suppression rule is necessary and proper to protect privacy" why should it not protect the privacy of a grand jury witness, particularly those such as petitioners who were not themselves the target of the wiretapping, and against whom there was no finding of "probable cause" such as is required by §2518(3) before a judge may issue an order authorizing interception of wire communications? The only privacy which the government intends to accord to petioners Parnas and Gelbard is that of a prison cell.

This discordant note aside, the government's reliance upon *United States v. Blue, supra,* is utterly mistaken. Perhaps it would be helpful to recall *Blue*. Ben Blue was served with jeopardy assessments, had his assets seized, and tax liens recorded by the Internal Revenue Service. He then received a 90-day letter, and within that time filed petitions in the Tax Court to challenge the alleged deficiencies. While the civil case was pending, and more than a year later, the government obtained a six-count indictment charging evasion, Internal Revenue Code §7201, and wilful false statements, Internal Revenue Code §7206. Blue moved to dismiss the prosecution, claiming that the indictments were barred because the evidence used to obtain them was illegally compelled in violation of the fifth amendment, the government having relied upon information disclosed in the Tax Court proceedings. The district court granted the motion, also noting that Blue would have to incriminate himself in the criminal case in order to prosecute his Tax Court action. This Court held:

1. The district court sustained a plea in bar, giving this Court jurisdiction on direct review. 18 U.S.C. §3731.

2. "Even if we assume that the government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial." 384 U.S. at 255. If tainted evidence is presented to a grand jury, this is not a "basis

> for abating the prosecution pending a new indictment, let along barring it altogether." 384 U.S. at 255 n.3, citing authority.

The Court said, also at p. 255, that barring prosecutions where the grand jury evidence was proven tainted would interfere to "an intolerable degree with the public interest in having the guilty brought to book."

Blue stands, therefore, for the proposition that a prosecution will not be abated or dismissed if illegally-obtained evidence was adduced before the grand jury.[17] Read most favorably to the government, *Blue* might even be authority that illegally-obtained evidence may be introduced before a grand jury, and that the victim of the illegality cannot invade the grand jury's deliberations with a motion to suppress it. Petitioners do not concede this latter reading, but are willing to assume it because it makes no difference to their position here.

Blue involved the fifth amendment's self-incrimination clause. Read as above, *Blue* holds that the defendant cannot have his prosecution dismissed, and cannot while the grand jury is sitting challenge the evidence being taken before it. But suppose the government called *Blue* as a witness, and began to question him about his taxes. Would the government say he could not in-

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[17]Although the government is aware that often when a motion to suppress is sustained, the government's whole case collapses and must be dismissed, particularly if the item suppressed is an unlawful substance or a crucial intercepted conversation; typically, in such cases, the substance or the conversation will have been the main part of the government's grand jury presentation.

voke his privilege against self-incrimination? Of course not. Would the government say that he had to go to jail or else incriminate himself, and rely on the principle that no one may challenge evidence being taken before a grand jury? Of course not.

And here is the crucial distinction. Parnas and Gelbard are not bystanders to the grand jury proceeding, who fear that something is going on in the grand jury room which involves their privacy. They *know* that they are to be *questioned* on the basis of a wiretap. They believe that the tap was illegal. They are assured that the questioning is under compulsion, and that unless they make answer or show some good cause, they will go to jail. This is the case which *Blue* does not reach, for the simple reason that it is governed by another body of law altogether: the body of law which governs all objections by a witness to compelling testimony.

The legislative history may be read to limit the right of bystanders to invade grand jury proceedings with their writs, but it may not—consistently with reason, common-sense, the literal language of the statute, and the plain command of the Constitution—be read to limit Parnas' and Gelbard's right to raise a point of law in the hope of escaping jail.[18]

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[18]The statute recognizes the danger of unlawful evidence getting before a grand jury. In §2517(3), it says that a wiretapper may testify only about material overheard in compliance with the Act.

III.

WHAT KIND OF A HEARING SHOULD BE HELD: THE MEANING OF ALDERMAN V. UNITED STATES.

Alderman v. United States, 394 U.S. 165 (1969), is important to the decision of this case. It does, as noted above, fashion a standing rule which applies to electronic searches as to all others. However, if the Court decides to sustain the legal position of Parnas and Gelbard and hold that they are entitled to a hearing, *Alderman* determines what kind of a hearing that should be.

If Parnas and Gelbard have a right to prevent illegal electronic surveillance from being used as the basis of questions put to them before the grand jury, they must have a means to enforce that right We suggest that the first inquiry is: "Has there been an illegal electronic surveillance which petitioners have standing to suppress?" This question must be decided based upon an adversary hearing. *Giordano v. United States,* 394 U.S. 310 (1969), and *Taglianetti v. United States,* 394 U.S. 316 (1969), direct the district court, when a question of legality is raised, to "find the facts." Fact-finding implies an adversary proceeding, in which the circumstances surrounding the surveillance would be revealed. There would not, at this stage, necessarily be disclosure of the logs of the surveillance, except to the extent necessary to determine legality. Disclosure of the logs is a right only after a determination of illegality.

There has been some dispute about the meaning of *Taglianetti* and *Giordano* in the district courts. This Court should make it clear now that fact-finding, even when the facts concern surveillance, must be done in an open hearing just as when a search for tangibles objects is being challenged. Perhaps, as in Jencks Act cases, some compromises with full-blown adversary proceedings might be tolerated. See *Campbell v. United States*, 365 U.S. 85 (1961), 373 U.S. 487 (1963), but petitioners do not see the reason for such a concession.

Then, if there is a determination of illegality, petitioners should have access to the logs of their conversations. After all, they cannot well ensure that illegal material is not used unless they can by reference to the logs establish the likely provenance of illegality. Here the command of *Alderman* is the strongest: "Adversary proceedings" have "superiority as a means for attaining justice"; "ex parte procedures" are inadequate. 394 U.S. at 183-84. All the cautions of *Alderman* apply concerning the danger of a hearing gone beyond the bounds of necessity and good sense, but the central teaching remains: Petitioners must show that the tap was illegal, then the government, having disgorged the logs, must show its proposed line of inquiry to be untainted.

This, petitioners submit, is a common-sense means of affording the right to a hearing, whether the hearing is granted under the statute or as a matter of constitutional right.

IV.

SOME OBSERVATIONS ON THE NEW GRAND JURY.

This case is being fought out as the Justice Department is pouring unprecedented resources into the convening of grand juries. Petitioners believe that a word about its context is necessary. We do not now live in the 12th Century, when a grand jury convened under the Assize of Clarendon would make informal inquiry about crimes committed in the vill or hundred and pass this gossip along to the King. It would be naive and dangerous nonsense to claim that the modern federal grand jury bears any resemblance to an independent, self-governing body of twenty-three citizens using common sense and meager resources to ferret out crime.

Instead, the grand jury is run by a new breed of government lawyer—the "strike force" lawyer—who has all the resources of the Federal Bureau of Investigation at his command. These strike forces contain men and women who travel from city to city working with different grand juries. Some of them are headquartered under the name "Organized Crime", and others under the name "Internal Security." Using the investigative power of the grand jury, they have managed to create a mechanism which the Federal Rules of Criminal Procedure and accepted principles of criminal justice had long denied them: They can use, on behalf of the government, a roving compulsory process to compel almost any witness to testify on almost any subject, offering the alternative of untold months in jail upon summary committal.

Counsel have seen these new lawyers at work. Their power is equalled only by their zeal. We intend no personal attack upon them. We submit, however, that there is a real danger they are abusing their powers. For the new grand jury, there should be a new look at the old law of constitutional rights, statutory rights, and evidentiary privileges. There should be a renewed attention to the procedural protections which go under the name "due process." Just as the fiction of informal and friendly adjudication in juvenile courts gave way to the stern reality of summary justice for young people, see *In re Gault,* 387 U.S. 1 (1967), and just as the "little groups of neighbors" in the local draft board came to be recognized as a harsh and sometimes brutally unfair summary tribunal, see *Gutknecht v. United States,* 396 U.S. 295 (1970), and just as the all-seeing and informal Federal Communications Commission was seen to need some citizen participation in a formal, quasi-judicial due process way, see *Office of Communication of United Church of Christ v. FCC,* 359 F. 2d 994 (D.C. Cir. 1966), so the summary justice of the grand jury and the enforcing district judge must yield to a more sensitive appreciation of the power to commit for contempt.

Conclusion.

For the reasons stated above, the judgment of the Ninth Circuit should be reversed, and the cause remanded to the district court with directions to vacate the order of commitment and afford them notice and hearing as prayed herein.

Respectfully submitted,*

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*Counsel acknowledge with great thanks the research and drafting assistance rendered by Madeleine R. Levy, law clerk.

APPENDIX OF STATUTES AND RULES.

U.S. Constitution, amendment 4:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Constitution, amendment 5:

". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

18 U.S.C. §1826(a):

"(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

"(1) the court proceeding, or

"(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

18 U.S.C. §2510-20:

§ *2510. Definitions*

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

§ *2511. Interception and disclosure of wire or oral communications prohibited*

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept, or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or

an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained 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. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any

trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

§ 2512 (omitted).
§ 2513 (omitted).
§ 2514 (omitted).

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

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, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501-(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property, section 1963 (violations with respect to racketeer influenced and corrupt organizations);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or

law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evi-

dence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in acordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent ju-

risdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision

of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

§ 2520. *Recovery of civil damages authorized*

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

18 U.S.C. § 3331(a):

(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated, Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

Federal Rules of Criminal Procedure, R. 41(e):

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use of evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.