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# COMMENTS

## INTERCEPTED COMMUNICATIONS: "JUST CAUSE" FOR REFUSING TO ANSWER THE QUESTIONS OF THE GRAND JURY

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### I. INTRODUCTION

A witness (W) is called before a federal grand jury. Asserting his privilege against self-incrimination,[1] W refuses to answer questions. The government then moves to grant W immunity. W is granted immunity and is ordered to testify, but still refuses to answer, asserting that the questions asked are based on the results of illegal electronic surveillance.[2] The government seeks to have W held in contempt.[3] At the contempt hearing W argues that the illegal surveillance provides him with "just cause" for refusing to answer. This hypothetical, but not uncommon, factual situation raises three questions which have been the subject of much litigation in recent years: (1) Does the illegal surveillance provide W with "just cause" for refusing to answer the questions of the grand jury? (2) If question (1) is answered


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1. U.S. CONST. amend. V.

2. See 18 U.S.C. §§ 2510-20 (1970) for the statutory provisions governing the interception of oral communications.

3. 28 U.S.C. § 1826(a) (1970):

> 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 . . . 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.

affirmatively, how can W effectively assert the defense of the illegal electronic surveillance? (3) Once W has made a prima facie showing of illegal surveillance, what is the government's required response?

Only the answer to question (1) has been definitively resolved. The Supreme Court of the United States, in *Gelbard v. United States,*[4] held that a showing that the interrogation of a witness is based on the illegal interception of his communications constitutes "just cause" for his refusing to testify and precludes finding him in contempt within the meaning of 28 U.S.C. section 1826(a).[5] The law regarding the two remaining questions, however, is fraught with confusion. The thrust of this article is an analysis of these two issues of law. It is hoped that the alternatives presented will be of valuable assistance to theoreticians and practitioners alike. Prior to an examination of these issues, however, it is necessary to evaluate the *Gelbard* decision and its statutory basis, both of which have set the tenor for recent litigation.

It should be noted that in the context of this article the witness is not moving to suppress the evidence before the grand jury. He is merely attempting to raise illegal electronic surveillance as a defense to a contempt charge arising out of his refusal to testify. In the recent case of *Calandra v. United States,*[6] the Supreme Court, in holding the exclusionary rule not applicable to grand jury proceedings, made clear that a witness does not have standing to allege a fourth amendment violation of his right to be free of unreasonable searches and seizures. The *Calandra* majority expressly indicated that its decision did not modify or reverse the *Gelbard* holding.[7] This position was reiterated recently by the Court of Appeals for the First Circuit, when it stated that even though a witness has no standing to move to suppress, this "does not, the Court held in *Gelbard,* mean that the witness, faced with contempt proceedings, cannot invoke the provisions of section 2515."[8]

## II. GELBARD V. UNITED STATES

### A. *The Decision*

The *Gelbard* case was a consolidation of three court of appeals decisions.[9] Each case involved a witness' refusal to obey an order to testify before a federal grand jury on the ground that the questions were based upon information derived from allegedly illegal electronic surveillance. The Supreme Court assumed, for purposes of the appeal,

4. 408 U.S. 41 (1972) [hereinafter referred to as *Gelbard*].

5. See note 3 *supra.*

6. 94 S. Ct. 613 (1974) [hereinafter referred to as *Calandra*].

7. *Id.* at 623 n.11.

8. *In re* Marcus, 491 F.2d 901, 903 (1st Cir.), *vacated and remanded on other grounds,* 94 S. Ct. 3064 (1974).

9. *In re* Walsh, 450 F.2d 231 (3d Cir. 1971); United States v. Gelbard, 443 F.2d 837 (9th Cir. 1971); and *In re* Egan, 450 F.2d 199 (3d Cir. 1971).

that the taps were illegal and, thus, disclosure of their "fruits" was prohibited by 18 U.S.C. section 2515.[10] The Court's holding that a grand jury witness may invoke the prohibition of section 2515 when the government seeks to have him adjudicated in contempt was based on the express wording of the statute and on what the court deemed to be the legislative intent of the Act. In addition, the Court relied upon 18 U.S.C. section 3504(a)(1),[11] which

> is explicit confirmation that Congress intended that grand jury witnesses, in reliance upon the prohibition of § 2515, might refuse to answer questions based upon the illegal interception of their communications.[12]

The government contended that section 3504 did not confer standing on a grand jury witness to challenge the legality of a wiretap, as it merely provided a procedure to be followed where a witness had standing independent of that section. Accordingly, the government argued that 18 U.S.C. section 2518(10)(a)[13] confers standing to move to suppress evidence only in enumerated circumstances and noted that grand jury proceedings were not included in the enumeration. The Court, in response, correctly distinguished the situation in which one seeks to suppress evidence before a grand jury from that in which the witness who has refused to testify is faced with incarceration for contempt. The rule that a defendant cannot challenge his indictment on the grounds that the evidence received by the grand jury would not be admissible in court,[14] "has nothing whatever to do with the situation of a grand jury witness who has refused to testify and who attempts to defend a subsequent charge of contempt."[15]

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10. 18 U.S.C. § 2515 (1970) provides that:
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 . . . proceeding in or before any . . . grand jury . . . if the disclosure of that information would be in violation of this chapter.

11. 18 U.S.C. § 3504(a) (1970) provides that:
In any . . . proceeding in or before any . . . grand jury of the United States—
(i) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act . . . .

12. 408 U.S. at 52.

13. 18 U.S.C. § 2518(10) (a) (1970) provides that:
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.

14. *See, e.g.*, Lawn v. United States, 355 U.S. 339 (1958) (grand jury considered evidence obtained in violation of defendant's privilege against self-incrimination); Costello v. United States, 350 U.S. 359 (1956) (an indictment is not defective because the grand jury considered hearsay evidence).

15. 408 U.S. at 60.

Several facets of the *Gelbard* decision are of particular importance. In the first instance, the Court failed to discuss a constitutional foundation—the fourth amendment—upon which to base its holding.[16] The decision was based primarily on construction of Title III of the Omnibus Crime Control & Safe Streets Act of 1968 section 802.[17] The Court quoted the Senate Report[18] to the effect that it is essential that the victim of illegal surveillance not be left without a remedy. *"The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings."*[19]

> Section 2515 is thus central to the legislative scheme. Its importance as a protection for "the victim of an unlawful invasion of privacy" could not be more clear. The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception.[20]

Secondly, despite its extensive analysis of the reasons for permitting a grand jury witness to raise an illegal wiretap as a defense in contempt proceedings, the Court only dealt tangentially with the issue of the specificity of the witness' illegal wiretap allegations. In its discussion of section 3504, the Court stated:

> In the application of § 3504 to "any . . . proceeding in or before . . . any grand jury," "a party aggrieved" can only be a witness, for there is no other "party" to a grand jury proceeding. Morever, a "claim . . . that evidence is inadmissible" can only be a claim that the witness' potential testimony is inadmissible.[21]

This language emphasizes the Court's view that section 2515 is a defense to a contempt charge. Other than the statutory quotation dealing with the word "claim" and the literal meaning of that word, there is virtually no enunciation by the Court on the issue of the specificity of the witness' allegations.

Finally, the Court did not deal directly with the question of the necessary specificity of the *government's* response. The Court stated:

> Upon such a claim by a grand jury witness, the Government, as "the opponent of the claim," is required under § 3504(a)(1) to "affirm or deny the occurrence of the alleged" illegal interception.[22]

Here again, the main thrust of this assertion was to support the

16. *Id.* at 62 (Douglas, J., concurring).
17. 82 Stat. 211, *as amended,* 18 U.S.C. § 2515 (1970).
18. S. REP. No. 1097, 90th Cong., 2d Sess. 69 (1968).
19. 408 U.S. at 50, *quoting* S. REP. No. 1097, 90th Cong., 2d Sess. 69 (1968) (emphasis in original).
20. 408 U.S. at 50-51 (1972) (footnote omitted).
21. *Id.* at 54.
22. *Id.* at 54-55.

Court's holding that a witness may invoke the prohibition of section 2515 as a defense to a contempt charge. The majority opinion did not consider the questions of (1) whether the government need only deny the existence of an illegal tap, (2) whether the government must submit affidavits of a diligent inquiry to determine that there was no illegal tap, or (3) whether a plenary hearing must be held on the legality of any interception.

Justice White, in his concurring opinion, rejected any possible contention that a witness is entitled to a "full blown" suppression hearing. "[W]here the Government officially denies the fact of electronic surveillance of the witness, the matter is at an end and the witness must answer."[23] Mr. Justice White's opinion, however, dealt only with those situations where the government denies the existence of any wiretap or admits a wiretap and produces a court order authorizing the tap. In such situations, according to Justice White, the witness is not entitled to a suppression hearing to test the legality of the order.

> Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. . . . and, in any event, the deterrent value of excluding the evidence will be marginal at best.[24]

Justice White's opinion, though raising several of the questions that have been the focal point of extensive litigation and of section IV of this article, did not deal with situations where there was no court order, where the authorizing order was not in conformity with the statute, or where the order authorizing the wiretap was not based on probable cause.

In summary, *Gelbard* merely held that a grand jury witness who has refused to obey a court order to testify may assert the prohibition of section 2515 as a defense when the government seeks to have him held in contempt.

### B. *The Statutory Basis*

The central issues raised when an immunized grand jury witness refuses to obey a court order to testify revolve around three statutes: 18 U.S.C. section 2515,[25] 18 U.S.C. section 2518(10)(a)[26] and 18 U.S.C. section 3504(a)(1).[27] There are two primary purposes of Title III of the Omnibus Crime Control Act: (1) to protect individual privacy and (2) to delineate when wiretaps may be employed and when the fruits of the surveillance may be used in evidence.[28]

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23. *Id.* at 71 (White, J., concurring).
24. *Id.* at 70 (White, J., concurring).
25. See note 10 *supra*.
26. See note 13 *supra*.
27. See note 11 *supra*.
28. S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968).

Section 2515 is the exclusionary provision of the law, and, as the Supreme Court made clear in *Gelbard,* is central to the entire statutory scheme.

> The provision thus forms an integral part of the system 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.[29]

Although section 2515 is a general exclusionary rule, its evidentiary sanctions must be read in conjunction with section 2518(10)(a).[30]

According to the Senate Report, section 2518(10)(a) provides the remedy for the right created by section 2515.[31] Section 2518(10)(a), however, omits grand jury proceedings from those hearings in which a motion to suppress may be entertained.

> 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. . . . It is the intent of the provision only that when a motion to suppress is granted in *another context,* its scope may include use in a future grand jury proceeding.[32]

Although section 2518(10)(a) forecloses the right of a grand jury witness to make a motion to suppress at the grand jury proceedings, as the Supreme Court stated in *Gelbard,*

> [I]t does not follow from the asserted omission of grand jury proceedings from the suppression provision that grand jury witnesses cannot invoke § 2515 as a defense in a contempt proceeding under 28 U.S.C. § 1826.[33]

Therefore, at the hearing on contempt which is required under rule 42(b) of the Federal Rules of Criminal Procedure,[34] the alleged con-

29. *Id.* at 96.

30. *Id.*

31. *Id.* at 106.

32. *Id.* (emphasis added).

33. 408 U.S. at 59 (footnote omitted).

34. The question of whether rule 42(b) of the Federal Rules of Criminal Procedure is applicable to contempt proceedings under 28 U.S.C. section 1826 (1970) is not entirely clear. Most of the doubt has arisen from two Supreme Court cases. In the first, Harris v. United States, 382 U.S. 162 (1965), the Court held that where an individual is sentenced to jail for a stated period of time for refusing to obey a court order to testify, his contempt is criminal contempt. The next year in Shilitani v. United States, 384 U.S. 364 (1966), the Court held that where the contempt may be cured by testifying, the contempt is civil in nature. These cases, however, dealt with whether or not a contemnor was entitled to a jury trial and not whether rule 42(b) was applicable. Thus, the distinction between civil and criminal contempt is based on the *purpose* of the incarceration. If the incarceration is punitive, the contempt is criminal. If the incarceration is coercive and the witness may cure his contempt by testifying, the contempt is civil. Unfortunately, the Court in *Shillitani* did not refer to *Harris.* Faced with this problem, the Ninth Circuit, in United States v. Alter, 482 F.2d 1016 (9th Cir. 1973), held that a contempt proceeding where the witness is given the opportunity to cure his contempt is sufficiently civil in character to foreclose the alleged contemnor's right to a jury trial, but sufficiently criminal in character to require a hearing under rule 42(b). The Second Circuit in the case of In re Persico, 491 F.2d 1156

temnor may invoke the prohibition of section 2515. This appears to be a proper reading of the legislative intent. As the Senate Report indicates, where a motion to suppress is granted in "another context," the motion is applicable to any future grand jury proceedings.[35] In the hypothetical factual situation with which this article commenced, the hearing on the alleged contempt, it is submitted, serves as the other context, envisioned by Congress. Section 2518(10)(a), in effect, indicates the basis of the defense which a witness charged with contempt may raise when information is obtained by illegal wiretaps.[36]

Once it is clear that the grand jury witness has standing to raise an illegal wiretap as a defense to a charge of contempt, the questions then become: (1) how does the witness assert the defense; and (2) how does the government meet the defense. Section 3504(a)(1) of Title 18 of the United States Code is designed to provide guidance in this area. Although the full import of section 3504 is still open to question, it is clear that

> [u]nder this provision, upon a charge by the defendant with standing to challenge the alleged unlawful conduct, the Government would be required to affirm or deny that an unlawful act involving electronic surveillance had in fact occurred.[37]

The vital language of this House Report quotation is "upon a charge by the defendant . . . the Government would be required to affirm or deny . . . ." The crucial issues that are thereby raised involve the requisite specificity both of the alleged contemnor's allegations and of the government's response.

## III. STANDING AND SPECIFICITY OF THE WITNESS' ALLEGATIONS

### A. *Who Has Standing to Raise the Defense of an Illegal Electronic Surveillance?*

The legislative history of Title III indicates that it was not the intent of Congress to alter traditional standing requirements.[38] Title III to a large extent codifies the fourth amendment exclusionary rule in

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(2d Cir.), *cert. denied,* 94 S. Ct. 1554 (1974), rejected this approach and held that where the contempt is civil, rule 42(b) is not applicable. However, regardless of whether the hearing is held pursuant to rule 42(b) or not, it is quite clear that the defense of an illegal wiretap is available to the witness in contempt proceedings initiated under 28 U.S.C. § 1826(a) (1970).

35. See note 32 *supra* and accompanying text.

36. *See In re* Marcus, 491 F.2d 901 (1st Cir.), *vacated and remanded on other grounds,* 94 S. Ct. 3064 (1974).

37. H. R. REP. No. 91-1549, 91st Cong., 2d Sess. 51 (1970).

38. *See In re* Womack, 466 F.2d 555, 558 (7th Cir. 1972):

> We can only conclude that neither Congress in the Omnibus Crime Control and Safe Streets Act or in the Organized Crime Control Act nor the Supreme Court in *Gelbard* intended to overrule or change the constitutional rule of *Alderman* that only the person whose privacy is invaded by an illegal electronic surveillance has standing to object.

its application to intercepted communications, and, in fact, 18 U.S.C. section 2518(10)(a)(i) has been held to preserve all constitutional claims.[39] Standing to suppress the product of a fourth amendment violation

> can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.[40]

This standing criterion particularly applies to wiretap situations, as a person is

> entitled to the suppression of government evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner [witness] himself or conversations occurring on his premises, whether or not he was present or participated in those conversations.[41]

Despite this language, prior to *Gelbard,* the courts of appeals were in conflict as to whether a grand jury witness had standing to assert the existence of an illegal tap when the government sought to have him adjudicated in contempt.[42] *Gelbard* resolved the issue in favor of the alleged contemnor.

Since a witness has standing to assert this defense at a contempt proceeding, the issue has arisen as to whether the witness' standing privilege is limited to wiretaps of his conversations alone and those occurring on his premises. Several courts of appeals have gone beyond *Gelbard* and held that a grand jury witness has standing, under certain conditions, to assert the illegal surveillance of his attorney as a defense to contempt.[43] In accordance with *Alderman,* however, it has been held that a witness may not "press a claim that her questioning was the result of leads obtained by illegal taps on someone else."[44]

Perhaps more importantly, as the court held in *Cali v. United States,*[45] "whatever rights a witness may have in a defense to a contempt proceeding, he may not anticipate such a proceeding by bringing a motion to suppress evidence before the grand jury." The holding of the First Circuit in *Cali,* was reinforced by the Supreme

39. *In re* Marcus, 491 F.2d 901, 903 (1st Cir.), *vacated and remanded on other grounds,* 94 S. Ct. 3064 (1974).

40. Alderman v. United States, 394 U.S. 165, 171-72 (1968) [hereinafter referred to as *Alderman*].

41. *Id.* at 176.

42. *Compare* Reed v. United States, 448 F.2d 1276 (9th Cir. 1971), *cert. denied,* 408 U.S. 922 (1972) and *In re* Russo, 448 F.2d 369 (9th Cir. 1971) *with In re* Evans, 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied,* 408 U.S. 930 (1972).

43. *See* United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

44. United States v. Doe, 451 F.2d 466, 468 (1st Cir. 1971).

45. 464 F.2d 475, 478-79 (1st Cir. 1972) [hereinafter referred to as *Cali*].

Court decision in *United States v. Calandra.*[46] Although *Calandra* did not deal with electronic surveillance, as did *Cali,* its holding was that a grand jury witness may not move to suppress evidence which is the basis of the questions asked by the grand jury. For future cases the Court undoubtedly would follow this decision when, at a grand jury proceeding, a witness seeks to suppress evidence on the basis of a wiretap. The four Justices dissenting in *Gelbard* formed the basis of the *Calandra* majority. They were joined by Justice White whose concurring opinion in *Gelbard*[47] indicates that he would certainly hold that a grand jury witness has no standing in a grand jury proceeding to move to suppress evidence derived from an illegal wiretap.

The Court in *Calandra* based its holding primarily on the belief that, since the purpose of the grand jury is to inquire, it should not be bound by the technical procedural and evidentiary rules which govern criminal trials. The Court weighed the necessity of unimpeded grand jury investigations against the threat to the individual and found that, in the context of a grand jury proceeding, the rationale for excluding illegally obtained evidence did not apply. The arguments for the exclusionary rule "are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."[48] Since the grand jury does not adjudicate guilt or innocence and the witness is free to press his claim at trial if he is indicted, the need for unimpeded investigation is paramount.

> Any holding that would saddle the grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.[49]

It is, thus, clear that a grand jury witness may not move to suppress evidence before the grand jury under either the fourth amendment or 18 U.S.C. section 2518(10)(a). However, it is equally clear that a grand jury witness may assert the illegal electronic surveillance of himself or his counsel, but not an outsider, as a defense when the government seeks to have him adjudicated in contempt for failure to obey a court order to testify.

### B. *The Required Specificity of the Witness' Allegations*

The language of 18 U.S.C. section 3504(a)(1) leaves no doubt that a claim of electronic surveillance by the witness, with the requisite specificity, shifts the burden to the government to affirm or deny the existence of an illegal tap.[50] The present "majority" view appears to be that the mere allegation in good faith by the witness will trigger the

46. 94 S. Ct. 613 (1974).
47. See notes 23 and 24 *supra* and accompanying text.
48. United States v. Calandra, 94 S. Ct. 613, 620 (1974).
49. *Id.* at 621, *quoting* United States v. Dionsio, 410 U.S. 1, 17 (1973).
50. Gelbard v. United States, 408 U.S. 41, 56 (1972).

applicability of section 3504(a)(1) where the alleged tap has been of the witness himself.

The leading case in this area is *In re Evans,*[51] a pre-*Gelbard* case. In *Evans,* the court stated,

> Since 3504(a)(1) is triggered, in our view, by the mere assertion that unlawful wiretapping has been used against a party, the government must make the next move if it still wishes to interrogate these appellants.[52]

The rationale for this holding is apparent: since an effective electronic surveillance necessitates concealment, the victim ordinarily will remain virtually unaware of the details concerning the illegal taps. If a witness, therefore, were required to specify in great detail the facts giving rise to his belief that he had been the subject of surveillance, an intolerable burden would be imposed on him. Conversely, the requirement that the government affirm or deny the existence of an illegal tap imposes only a minimal, additional burden on the government, as the government is, or should be, possessed of all pertinent records. In any event, if the government were required only to affirm or deny the existence of the surveillance when the witness has asserted in great detail the specific facts, a significant invasion of the witness' privacy may occur through the revelation of these facts. The *Evans* view, that section 3504(a)(1) is triggered merely by the witness' claim of an illegal surveillance, is predicated largely on that court's perception of the Congressional intent

> to combine a limited and carefully articulated grant of power to intercept communications with an elaborate set of safeguards to deter abuse and to expunge its effects in the event that it should occur.[53]

To require a great amount of specificity in the witness' statement would have the counter-productive effect of enabling the government to violate the wiretap law without fear of suppression of the evidence, because in very few situations could a witness meet the threshold specificity requirements.

The *Evans* view has been followed recently by the Second[54] and Ninth[55] Circuits. The holding that the mere good faith assertion of an illegal or allegedly illegal wiretap triggers section 3504(a)(1), "adopts the ordinary meaning of the language of the statute predicating the government's obligation to affirm or deny upon a simple 'claim' of inadmissibility."[56] The affidavit in *United States v. Vielguth* merely

51. 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied,* 408 U.S. 930 (1972) [hereinafter referred to as *Evans*].

52. *Id.* at 1247.

53. *Id.* at 1243.

54. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

55. United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974).

56. *Id.* at 1258.

stated that the witness believed that the questions were based on information which could have been obtained only by illegal electronic surveillance. The affidavit then proceeded to identify the telephone numbers, the premises, and the periods of time involved in the alleged surveillance. The court found that the affidavit was "sufficient to require the government to affirm or deny the occurrence of the alleged surveillance."[57]

This rule comports with both the realities of the situation and the ordinary meaning of the statutory language. It is especially vital that section 3504(a)(1) be invoked upon a mere good faith assertion of illegal surveillance in light of the ever increasing sophistication of surveillance devices. The argument, that to require the government to "affirm or deny" upon a mere good faith assertion by the witness would impose an intolerable burden on the government, loses its persuasive power when a realistic approach to the government's response is established.[58] Moreover, in all probability, section 3504(a)(1) has lessened the burden on the government.

> Subsection (a)(1) [of section 3504] was added at the suggestion of the Department of Justice at the time the Department followed the practice of searching Government files for information about wiretaps and eavesdropping. The Department advised the Senate Judiciary Committee that while it had been "conclud[ing] such examinations as a matter of policy even in cases when no motion ha[d] been filed . . . defendants should be assured such an examination by a specific requirement of law rather than hav[ing] to rely upon the continued validity of current policy." The Senate report on § 3504 explained that since [subsection (a)(1)] requires a pending claim as a predicate to disclosure, it sets aside the wasteful practice of the Department of Justice in searching files without a motion from a defendant.[59]

In situations where the conversations overheard involve the witness' attorney, and not the witness himself, a different standard of specificity of the witness' allegations may be employed by the courts. As discussed previously,[60] a grand jury witness may raise the defense of illegal surveillance of his attorney when the government seeks to have him adjudicated in contempt. Standing is conferred when the surveillance of the attorney intercepts conversations, "relevant to his representation of the particular client in the matter at hand . . . ."[61] Because the defense is available only when the conversation overheard is relevant to the attorney's representation of the alleged contemnor, it

57. *Id.* at 1261.
58. See section IV *infra*.
59. Gelbard v. United States, 408 U.S. 41, 56 (1972).
60. See note 43 *supra* and accompanying text.
61. United States v. Veilguth, 502 F.2d. 1257, 1260 (9th Cir. 1974).

is arguable that a greater degree of specificity and detail is required to trigger section 3504(a)(1) surveillance of counsel cases.

Indeed, in *United States v. Alter,*[62] the court held that a mere assertion of unlawful surveillance of one's counsel was insufficient to require the government to affirm or deny the allegation. The court determined that to establish a prima facie case of electronic surveillance of counsel the affidavit(s) or other evidence in support of the claim must reveal the following:

> (1) the specific facts which reasonably lead the affiant to believe that named counsel for the named witness has been subjected to electronic surveillance;
> (2) the dates of such suspected surveillance;
> (3) the outside dates of representation of the witness by the lawyer during the period of surveillance;
> (4) the identity of the person(s) by name or description, together with their respective telephone numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance took place; and
> (5) facts showing some connection between possible electronic surveillance and the grand jury witness who asserts the claim or the grand jury proceeding in which the witness is involved.[63]

In explaining its position in *Alter,* the Ninth Circuit in *United States v. Vielguth*[64] stated:

> The possibility that surveillance of conversations of the witness' attorney with third persons may impinge upon the witness' Sixth Amendment rights is of an entirely different order than the possibility that such surveillance of the witness' *own* conversations may have violated the witness' statutory and constitutional rights of privacy. The witness' Sixth Amendment rights can be implicated only if the attorney's conversations are relevant to his representation of the particular client in the matter at hand, in which case the witness has standing to require an affirmance or denial. The additional showing required by *Alter* is directed at establishing the possibility that electronic surveillance of an attorney's conversations with third persons might fall into this category. These additional requirements may be justified not only because there is a much greater possibility that the claim of electronic surveillance of relevant third-party conversations will prove to be ill-founded, but also because disclosure of such third-party conversations would invade the privacy of additional persons.[65]

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62. 482 F.2d 1016 (9th Cir. 1973) [hereinafter referred to as *Alter*].
63. *Id.* at 1026.
64. 502 F.2d 1257 (9th Cir. 1974).
65. *Id.* at 1260 (emphasis in original) (footnote omitted).

At this juncture, it is necessary to examine the *Alter* requirements in light of their objectives as announced by the same court in *Vielguth*. The *Alter* requirements pose an unwarranted burden on the witness asserting the defense of illegal surveillance of counsel in light of the objectives stated above. As a preliminary observation, it should be noted that if a witness has standing to raise the illegal surveillance of counsel as "just cause" for refusing to testify, it is essential to permit him to require the government to "affirm or deny" after he has made a reasonable showing of a surveillance.

One of the goals of the *Alter* requirements of specificity is to increase the probabilities that the alleged surveillance of counsel concerned matters relevant to counsel's representation of the witness.[66] However, requirement (1), that the witness aver the specific facts giving rise to his belief that counsel has been subjected to surveillance does not further this goal. In fact, its sole result is to decrease the possibility that a witness charged with contempt will be able to require the government to affirm or deny the surveillance of counsel. A second goal of the *Alter* specificity requirements is to decrease the invasion of privacy of third parties. The fourth of the *Alter* requirements,[67] however, requires the witness to specify all those with whom his attorney has spoken during the alleged surveillance period. Through the revelation of names of parties and their telephone numbers, this requirement cannot reasonably co-exist with the court's expressed intention to avoid a significant infringement of the privacy of third persons.

The decision of the Fifth Circuit in *Beverly v. United States*[68] adopts a more realistic view while still satisfying the primary goal that, before the illegal surveillance of counsel may be a defense to contempt, it must be shown that the surveillance was relevant to counsel's representation of the witness. *Beverly* requires that the affidavit of the witness show: (1) the name of counsel; (2) the dates of representation and suspected surveillance; (3) the name of the witness represented; and (4) the telephone numbers.[69] The showing is similar to that required in *Evans* and *Vielguth*. However, the court has added the requirement that the dates of representation be shown in the affidavit. The logic of this additional requirement is obvious; if counsel were subject to electronic surveillance during his representation of the witness, at some point in this period conversations relevant to the witness were overheard. The showing required by *Beverly,* therefore, assures relevance, while at the same time avoids a substantial invasion of any third-party's privacy,[70] and also affords the witness the ability to

66. *Id.*

67. See note 63 *supra* and accompanying text.

68. 468 F.2d 732 (5th Cir. 1972) [hereinafter referred to as *Beverly*].

69. *Id.* at 752.

70. *Compare* note 69 *supra* and accompanying text *with* note 63 *supra* and accompanying text. The *Beverly* requirements are far less stringent than those espoused in *Alter*. *Beverly*, for instance, does not require: (1) the revelation of the names of the persons who communicated with

trigger section 3504(a)(1) upon a reasonable showing of illegal surveillance. *Beverly* also adopts the realistic view, that in determining the sufficiency of the witness' allegations, the district courts will play a paramount role:

> The district court will have wide latitude in determining the sufficiency and objectivity of factual allegations brought forth on a basis for claims of unlawful attorney surveillance. There is room for balance between due regard for the witness' constitutional rights as protected by the statute, on the one hand, and the rights of the United States to proceed with reasonable promptness with a grand jury investigation on the other.[71]

Assuming that the witness makes the requisite showing to require the government to "affirm or deny" the existence of the alleged illegal tap, the degree of specificity of the witness' allegation may have an important bearing on the court's determination of the sufficiency of the government's response.

In the *Evans* case, the court concluded that:

> Thus if the government now denies the existence of any wiretapping against appellants, they will presumably lose their statutory privilege to remain silent. Whether under such circumstances a witness should be permitted to traverse the government's statement, or whether a witness should be able to shift the burden of going forward back to the government by making some showing to contradict the government's assertion, are questions with great potential impact . . . .[72]

Although the *Evans* court specifically dealt with only a possible challenge by the witness to the government's denial, by implication it alluded to the question of whether specific allegations in great detail by a witness might require a more substantial response by the government. The question was raised by the Ninth Circuit in *United States v. Fitch,*[73] where the court, in dealing with the alleged surveillance of counsel, held that the government's response by affidavit was sufficient, but indicated that a more concrete and specific allegation of wiretapping might require a more elaborate response. This issue will be examined more extensively below; however, it should be mentioned, that a balancing test requiring a greater response by the government, where the witness makes specific and extensive factual allegations as to a government wiretap, certainly appeals to a sense of justice and equity and is in line with the policy of Title III of the Omnibus Crime Control and Safe Streets Act, as expressed in the Legislative History.

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the attorney, or (2) a statement of the specific facts which led the witness to believe that his counsel was subjected to surveillance.

71. 468 F.2d at 752.

72. *In re* Evans, 452 F.2d 1239, 1247 (D.C. Cir. 1971).

73. 472 F.2d 548 (9th Cir. 1973).

## IV. THE GOVERNMENT'S REQUIRED RESPONSE

### A. *The Simplest Case—The Government Neither Admits Nor Denies*

The Supreme Court decision in *Gelbard* leaves no doubt that when the government seeks to hold a grand jury witness in contempt, he has standing to challenge the propriety of the grand jury interrogation on the ground that such interrogation is based upon the prior illegal interception of the witness' communications.[74] The Supreme Court stressed that such a witness may invoke the procedure prescribed in 18 U.S.C. section 3504(a)(1) by claiming that his testimony is inadmissible because it is the primary product of an unlawful act, namely an illegal interception, or because it was obtained by the exploitation of such an unlawful act. As provided in section 3504(a)(1), where a witness invokes such a procedure, it becomes the duty of the opponent of the claim (the government) to affirm or deny the occurrence of the alleged unlawful act.[75]

In *Bacon v. United States,*[76] the witness substantially followed this procedure during grand jury proceedings by filing a motion alleging that there had been illegal interceptions and requesting a hearing to ascertain the facts. Instead of responding by affirming or denying the occurrence of this alleged unlawful act,[77] the government opposed the witness' motion. The court stated:

> Had the Government made the required response, and had such response indicated that there had been prior electronic surveillance of [the witness'] communications, then she would have been entitled to a hearing of the kind prescribed in Alderman v. United States . . . altered to conform to the provisions of section 3504(a)(2) and (3), as noted in Gelbard v. United States . . . .
>
> Since the Government did not follow the procedure prescribed in section 3504(a)(1) [the witness] was entitled to refuse to give further grand jury testimony.[78]

The form of the government's required response was at issue in *Korman v. United States.*[79] In that case the defendant-witnesses alleged that the refusal of the Solicitor General to answer their inquiries with respect to the utilization of electronic surveillance in gathering information for the grand jury justified the witness' belief that they had, in fact, been so subjected.[80] The United States Department of

74. 408 U.S. at 41.
75. See note 11 *supra.*
76. 466 F.2d 1196 (9th Cir. 1972).
77. This is required by 18 U.S.C. § 3504(a)(1) (1973).
78. Bacon v. United States, 466 F.2d 1196, 1197 (9th Cir. 1972).
79. 486 F.2d 926 (7th Cir. 1973).
80. In the Motion for Production of Reports of Electronic Surveillance the petitioners asserted on the authority of Gelbard v. United States, 408 U.S. 41, 92 S. Ct. 2357, 33

Justice filed a letter from Henry E. Petersen, Assistance Attorney General, to Sheldon Davidson of the Chicago Strike Force denying that conversations of the witnesses had been overheard by the Department of Justice by means of electronic surveillance. The letter concluded with a statement that the witnesses had never been subjected to electronic surveillance by the United States Secret Service, the United States Postal Service, the Bureau of Alcohol, Tobacco and Firearms, or the Bureau of Narcotics and Dangerous Drugs.

The Seventh Circuit stated that in the past "[c]ertain indiscretions have been revealed concerning illegal electronic surveillance which seem to militate for a more formal and binding denial . . . ."[81] The court then held that an official government denial of electronic surveillance must *at the very least* be submitted in the form of an *affidavit* by a responsible government official.[82]

However, even in those instances where the government has filed an affidavit in response to an allegation of illegal electronic surveillance, the affidavit may be inadequate and thereby fail to satisfy the minimum requirements of 18 U.S.C. section 3504(a)(1). Such an affidavit is "no response."

The court so held in *United States v. Alter*.[83] There, a grand jury witness submitted affidavits in support of his claim that he and his lawyer had been subjected to illegal surveillance. In answer to the witness' affidavits, the government filed a form affidavit signed by Special Attorney Dierker.[84] The grand jury witness challenged the

L.Ed.2d 179 (1972) that as grand jury witnesses, they were entitled to invoke the statutory prohibition against use before the grand jury of evidence gleaned from interception of any wire or oral communications.

*Id.* at 928 n.3.

81. Korman v. United States, 486 F.2d 926, 931 (7th Cir. 1973).

82. Various circuits have considered the adequacy of an affidavit of denial in similar cases and have deemed the affidavit sufficient as an official denial. *E.g.*, United States v. Fitch, 472 F.2d 548 (9th Cir. 1973); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972); *In re* Grumbles, 453 F.2d 119 (3d Cir. 1971); United States v. Doe, 451 F.2d 466 (1st Cir. 1971).

83. 482 F.2d 1016 (9th Cir. 1973).

84. The affidavit stated:

ROBERT A. DIERKER being first duly sworn states:

1. That I am an attorney with the United States Department of Justice, Internal Security Division, temporarily assigned to assist the United States Attorney for the Northern District of California, and I am authorized to represent the Government in grand jury investigations and judicial proceedings ancillary thereto;

2. That I caused an official inquiry to be made with the appropriate Federal Government agencies to determine if there has been any electronic surveillance of the conversations of MARK LAWRENCE ALTER. The federal agencies to whom this inquiry was directed are:

a. Federal Bureau of Investigation
b. Bureau of Narcotics and Dangerous Drugs
c. United States Secret Service
d. Internal Revenue Service
e. Bureau of Customs
f. Bureau of Alcohol, Tobacco and Firearms
g. United States Postal Service;

3. That based upon the results of the said inquiry I state that there has been no electronic surveillance occurring on premises known to have been owned, leased, or licensed by the said MARK LAWRENCE ALTER;

4. I further state that based upon the said inquiry there has been no electronic

legal sufficiency of the affidavit on three grounds: (1) the critical statements were conclusions based on multiple hearsay, (2) the agencies checked were too limited, and (3) the affidavit did not reveal the period covered by the investigation.

The court held that the witness' affidavits were sufficiently concrete and specific to make a prima facie showing that on the occasions described someone was interfering with his telephone calls and that the FBI was involved. "The burden was then on the Government squarely to affirm or to deny those charges . . . . The Dierker affidavit did neither."[85]

The court's decision was grounded on the fact that the Dierker affidavit spoke in conclusory terms; no information whatever was supplied about the identity of the person or persons with whom Dierker communicated, the substance of his inquiries, or the substance of the replies. The affidavit stated no facts from which the court could conclude that the six agencies listed were the only governmental agencies that could have been involved in electronic surveillance. Nor did the affidavit reveal the dates of the claimed surveillance to which the inquiries were addressed.[86] To reply sufficiently, the government must file a responsive, factual, unambiguous and unequivocal affidavit.[87]

In summary, it is clear that the government must respond by affirming or denying a witness' allegations that he has been subjected to illegal electronic surveillance. The failure of the government to do so will preclude a finding of contempt pursuant to 28 U.S.C. section 1826(a).

### B. *The Government Admits*

Once the government has admitted the existence of illegal wiretaps, what must it subsequently do in order to require testimony of a grand jury witness who has been granted immunity?

*In re Egan*[88] was the first decision to attempt to resolve this issue. In that case Sister Joques Egan, a member of the Order of the Sacred Heart, was called before a federal grand jury in connection with the investigation into an alleged plot to kidnap a high public official and

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surveillance of any kind of any conversations of the said MARK LAWRENCE ALTER at any locations;

5. That I know the identity of all the sources of information upon which the questioning of the said MARK LAWRENCE ALTER is based and no questions asked are the result of electronic surveillance of the said MARK LAWRENCE ALTER.

/s/ROBERT A. DIERKER
Special Attorney
United States Department of Justice

*Id.* at 1027 n.17.

85. *Id.* at 1027 (citations omitted).

86. The Third and Fifth Circuits have criticized similar affidavits. *In re* Horn, 458 F.2d 468 (3d Cir. 1972); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

87. *See* Alderman v. United States, 394 U.S. 165, 180-85 (1969).

88. 450 F.2d 199 (3d Cir. 1971), *aff'd sub nom.* Gelbard v. United States, 408 U.S. 41 (1972) [hereinafter referred to as *Egan*].

other offenses. Immediately following her refusal to testify on fifth amendment grounds, the government served her counsel with an application for immunity.[89] Appearing before the grand jury once again, Sister Egan refused to testify on several grounds, one of which was that the information which caused the government to subpoena her and which prompted the questions propounded to her flowed from illegal wiretapping and electronic surveillance. At no time did the government deny the employment of wiretaps, nor did it claim that any electronic surveillance that may have been utilized was authorized by court order. The Third Circuit, therefore, assumed Sister Egan's allegations to be true.

The *Egan* court opined that in pursuing investigations the government attempts to conduct surveillance within statutory and constitutional limits; only in a slight number of cases does a violation of the rules governing wiretapping occur. Thus, when the allegation of illegal surveillance is made, in most cases the government will simply represent to the court that no electronic surveillance has been employed by the government. In a lesser number of cases, the government will produce in court the warrant by which it proceeded, and a brief inquiry will demonstrate that the warrant was properly obtained and that the surveillance did not exceed the authority of the warrant. Only in a minimal number of cases will the court find that the government conducted surveillance in violation of the statute, and in these cases the hearings will not be overly complicated or lengthy. In such instances the primary matter of inquiry would be: "[W]hether the Government can demonstrate an independent basis, aside from the illegal surveillance, upon which to justify the questions propounded before the grand jury."[90]

The *Egan* court made clear that, despite any disruption of the proceedings, the mere possibility that some grand jury witnesses may seek *Alderman* hearings[91]—to determine whether the alleged surveillance occurred and was illegal—is not sufficient to cause a curtailment of an important right such as provided by the fourth amendment. As the Supreme Court stated in *Wong Sun v. United States,*[92] the question is:

> [W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

89. Pursuant to the Organized Crime Control Act of 1970, 18 U.S.C. § 6003 (1970). The court granted the application for immunity under section 6003 and Sister Egan was directed to be available for examination. However, contrary to the court's instruction, and in direct reversal of the government's announced intention, Sister Egan was not called before the grand jury. Instead, the government served her counsel with an application for a grant of "transactional immunity" under 18 U.S.C. section 2514, the Omnibus Crime Control and Safe Streets Act of 1968.

90. *In re* Egan, 450 F.2d 199, 216 (3d Cir. 1971).

91. See note 40 *supra* and accompanying text.

92. 371 U.S. 471, 488 (1963).

As Justice Day stated in *Weeks v. United States*:[93]

> The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects against all unreasonable searches and seizures under the guise of law. . . .
>
> . . . .
>
> If letters and private documents can thus be seized . . . the protection of the fourth amendment declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

The *Egan* court concluded by stating that the very existence of a government of laws will be imperiled if it fails to observe the law scrupulously.

> For the Government teaches the whole people by its example, and if the Government becomes a law breaker, it breeds contempt for law. To declare that the Government may commit crimes in order to secure the conviction of a criminal may well bring unfortunate retribution.[94]

In *In re Testa,*[95] a grand jury witness contended that he could not be held in civil contempt for his failure to respond to questions which were based, in part, upon illegal wiretaps maintained by the government. The government admitted that it had employed a number of illegal wiretaps. Quoting *Egan,* the court held that once the government admitted the existence of illegal wiretaps, it must establish by a preponderance of the evidence "an independent basis, aside from the illegal surveillance, upon which to justify the questions propounded before the grand jury."[96]

In order to establish an "independent basis," the government introduced into evidence more recent legal surveillance reports of the Federal Bureau of Investigation and claimed that these documents were the basis of the questions.[97] The government attorney in charge

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93. 232 U.S. 383, 391-93 (1914).

94. *In re* Egan, 450 F.2d 199, 217 (3d Cir. 1971).

95. 486 F.2d 1013 (3d Cir. 1973).

96. *Id.* at 1016.

97. Most of these surveillances took place in 1972 and 1973—the time period in which the events in question involving the witness occurred—and were physical sightings of the witness' meeting with various individuals.

of the grand jury investigation also testified that he had not read the logs of the illegal wiretaps; therefore, the logs had no effect on the questions asked the witness. The court held that such evidence was sufficient to find that the government had met its burden and had established an "independent basis, apart from the illegal surveillance," for the questions asked.[98] In so holding, the court rejected the witness' contention that the "independent basis" was tainted by the illegal wiretaps. It reasoned that the likelihood that the questions were tainted by the illegal taps was small; any taint which might have existed was in all likelihood sufficiently attenuated; therefore, the possibility that the FBI agents used the illegal material did not persuasively refute the government's evidence.[99]

Under certain circumstances, however, even if the government fails to establish an "independent basis," a witness may be precluded from raising the defense that the questions asked were based upon improperly authorized electronic surveillance.[100]

The witness in *In re Marcus*[101] was held in civil contempt for refusal to answer questions propounded to him before a grand jury following a grant of immunity pursuant to 18 U.S.C. section 2514. He defended on the ground that an improperly authorized electronic surveillance formed the basis of the questions asked. The alleged impropriety was lack of initial authorization by the Attorney General, or a specially designated Assistant Attorney General,[102] the so-called Will

98. While the court found that the district court's evidentiary determination was correct and affirmed on that basis, it also noted that 18 U.S.C. section 3504, enacted as part of the Organized Crime Control Act of 1970, had application to the factual situation presented. The statute provides:

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
>
> . . . .
>
> (3) no claim shall be considered that evidence of such an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

In this case the illegal surveillance ended in July, 1965, and the interrogation of the witness related to 1972 and 1973 events. This being the case, the statute operated to preclude the claim of inadmissibility.

However, constitutional questions may be involved in the application of this section. *See* Gelbard v. United States, 408 U.S. 41 (1972); *In re* Evans, 452 F.2d 1239, 1248 n.32 (D.C. Cir. 1971).

99. In so reasoning the court relied upon the statement of the Supreme Court in *Nardone v. United States:*

> Sophisticated argument may *prove* a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.

308 U.S. 338, 341 (1939) (emphasis added).

In *In re Testa,* only the *possibility* of a causal connection between the illegal taps and the questions had been demonstrated. Moreover, all of the questions asked related to specific events which occurred in 1972 and 1973, the period of time in which most of the legal surveillance of the witness relied on by the government took place. The illegal taps, by contrast, ended in 1965.

100. *In re* Marcus, 491 F.2d 901 (1st Cir. 1974), *vacated and remanded on other grounds,* 94 S. Ct. 3064 (1974).

101. *Id.* [hereinafter referred to as *Marcus*].

102. 18 U.S.C. § 2516(1) (1970).

Wilson defect.[103] The government conceded that this case involved a Will Wilson defect, but took the position that the witness was precluded, in connection with grand jury proceedings, from relying upon it. On the basis of the government concession, the court seemingly found that the interception order was not in fact properly authorized by the Attorney General or an Assistant Attorney General,[104] but ruled that this was irrelevant.

Under 18 U.S.C. section 2518(10)(a), there are three grounds stated for suppressing testimony:

> (i) the communication was unlawfully intercepted;
> (ii) the order or 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.

The *Marcus* court construed subsection (i) as "covering, broadly, all common law or constitutional objections . . . but, since statutory violations are embraced in the other sections, not statutory ones."[105] The court then held that the Will Wilson defect "is a purely statutory violation and therefore is not within subsection (i)."[106] As to subsection (ii), section 2518(4)(d) requires that the order state the identity of the person authorizing the application for the surveillance; this procedure had been followed to the court's satisfaction.[107] The *Marcus* court, thus concluded that there was no facial defect in the surveillance order.

It is apparent that if the government admits the existence of an illegal wiretap it may, nevertheless, proceed with the interrogation of the grand jury witness provided that it can demonstrate either: (1) an independent basis, aside from the illegal surveillance, which purges the taint of the illegal action; or (2) that the illegality does not fall within the confines of 18 U.S.C. section 2518(10)(a), *i.e.*, the communication was lawfully intercepted, the authorizing order was sufficient on its face, and the interception was made in conformity with the authorization.

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103. At the time that the decision in *Marcus* was announced, aspects of the Will Wilson defects were pending before the Supreme Court. *See* United States v. Giordano, 94 S. Ct. 1820 (1974); United States v. Chavez, 94 S. Ct. 1849 (1974).

104. As provided in 18 U.S.C. § 2516(1) (1970).

105. 491 F.2d at 903.

106. *Id.* at 904.

107. The order stated as follows:

> Special Agents of the Federal Bureau of Investigation . . . are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Wilson, who has been specially designated by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to [carry out the surveillance].

*Id.*

### C. *The Government Denies*

#### 1. THE GOVERNMENT MERELY DENIES IN A LETTER

In *In re Korman,*[108] the government submitted to the court a letter signed by the chief of the Organized Crime and Racketeering Section of the Justice Department, on behalf of the Assistant Attorney General. That letter firmly and unequivocally denied that the witnesses who had been called before a grand jury had been electronically monitored.

Although not alleged by the witnesses themselves, the question of whether or not a court's acquiescing in such a response met the test of fundamental fairness was raised by the *Korman* court.[109] By acting on its own initiative, the court pointed out that past decisions had not dealt with this issue expressly and had not thereby indicated that they would permit this form of response as a sufficient form of official denial to meet the classic test of fundamental fairness. For example, in *Gelbard v. United States,*[110] Mr. Justice White in his concurring opinion stated:

> Of course, where the Government officially denies the fact of electronic surveillance of the witness, the matter is at an end and the witness must answer.[111]

However, this is not a statement relative to the *sufficiency* of the government's response needed to characterize it as a "denial."

In *In re Womack,*[112] the government also filed a letter from the Assistant Attorney General which made certain representations concerning the lack of electronic surveillance. The Seventh Circuit held that:

> [T]he representations in this case by the Department of Justice that the privacy of neither relator was subject to interference put "the matter . . . at an end and the witness[es] must answer."[113]

Yet it is evident that there was area for consideration of whether or not the Supreme Court has, in fact, accepted the type of letter involved in *Korman* as a sufficient, official denial of wiretapping:

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108. 351 F. Supp. 325 (N.D. Ill. 1972), *aff'd,* 486 F.2d 926 (7th Cir. 1973) [hereinafter referred to as *Korman*].

109. The court questioned whether a letter submitted in this form and manner might offend "the traditional concept of the right of confrontation by the accused of his accuser. That right includes the right of cross-examination or the right in some fashion to go behind the ordinary letter." *Id.* at 328.

110. 408 U.S. 41 (1972).

111. *Id.* at 71.

112. 466 F.2d 555 (7th Cir. 1972).

113. *Id.* at 558. *See also* Fraser v. United States, 452 F.2d 616 (7th Cir. 1971); United States v. Doe, 451 F.2d 466 (1st Cir. 1971).

> Incisive characterization compels me to query whether or not such a letter in the form and manner in which it is submitted would in the opinion of the higher courts, were they clearly to address themselves to it, offend the traditional concept of the right of confrontation by the accused of his accuser. That right includes the right of cross-examination or the right to in some fashion go behind an ordinary letter. The right of confrontation seems yet in want of attention with relation to the sufficiency of the Government's check upon itself.[114]

Whether the letter of denial by the Department of Justice was sufficient to put a witness' allegations of electronic surveillance to an end and to foreclose the necessity of additional affirmative action by the government was resolved by the Seventh Circuit in the *Korman* appeal.[115] Paraphrasing the language of the lower court, the Seventh Circuit admitted that its past decisions had deemed such letters of denial sufficient as a disclaimer of governmental intervention by electronic means.

> Yet, subsequent to these decisions, certain indiscretions have been revealed concerning illegal electronic surveillance which seem to militate for a more formal and binding denial . . . .[116]

The court, therefore, held that an official governmental denial of electronic surveillance must, at the very least, be submitted in the form of an affidavit by a responsible government official.

### 2. THE GOVERNMENT SUBMITS AFFIDAVITS

In addition to the Seventh Circuit, various courts have considered the adequacy of an affidavit of denial in similar cases. That an affidavit is the proper form of official denial has also found support in the First Circuit,[117] the Third Circuit,[118] the Fifth Circuit,[119] and the Ninth Circuit.[120]

In *In re Grumbles,*[121] the government gave the following assurance:

> [W]e are prepared to assure your Honor . . . that neither of these witnesses has [*sic*] the subject of any electronic surveillance within the knowledge of the United States government, nor have any premises over which they have any proprietary interest been the subject of any electronic surveillance, and they have not been overheard in any way at any time in

114. *In re* Korman, 351 F. Supp. 325, 328 (N.D. Ill. 1972), *aff'd,* 486 F.2d 926 (7th Cir. 1973).

115. Korman v. United States, 486 F.2d 926 (7th Cir. 1973).

116. *Id.* at 931.

117. United States v. Doe, 451 F.2d 466 (1st Cir. 1971).

118. *In re* Grumbles, 453 F.2d 119 (3d Cir. 1971).

119. Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

120. United States v. Fitch, 472 F.2d 548 (9th Cir. 1973).

121. 453 F.2d 119 (3d Cir. 1971) [hereinafter referred to as *Grumbles*].

> electronic surveillances, either legal or illegal, within the knowledge of the United States government.[122]

The government volunteered to make this statement under oath, but the district court considered this procedure unnecessary without an objection by counsel for the witnesses. However, at the suggestion of the Third Circuit, an affidavit was filed with the district court, paragraph seven of which stated:

> I reassert on the basis of information and belief that a review of the records of the Department of Justice reveals that Donald Bruce Grumbles and Patricia Catherine Grumbles were never the subjects of direct electronic surveillance nor were any of their conversations monitored by any electronic device to the knowledge of any Federal agency, nor has there been electronic surveillance on premises which were known to have been owned, leased, or licensed by them.[123]

The court held that the government had made a sufficient showing that the questioning of the witnesses was not the product of an electronic surveillance proscribed by the Constitution and 18 U.S.C. section 2515. As indicated above, the government had assured the district court that neither of the witnesses nor any of the premises in which they had any proprietary interest had been the subject of any electronic surveillance, legal or illegal; this assurance had been restated in affidavit form. The witnesses had failed to present any evidence demonstrating that these representations made by the government were false.

The issue raised by a witness in *In re Horn*[124] was whether a witness who refused to testify on the basis that the questioning represented the product of unlawful wiretapping or electronic surveillance was entitled to an evidentiary hearing. The court, citing *Grumbles,* held that when a witness files a petition to suppress pursuant to 18 U.S.C. section 2518(10)(a),[125] the government, though obligated to affirm or deny the occurrence of the unlawful act,[126] may do so by affidavit. If the affidavit is sufficient on its face and nothing is offered to indicate that the affidavit is false or defective, the trial court has the power to deny the witness' petition.

Although the decision in *Grumbles* certainly did not foreclose holding an evidentiary hearing where appropriate, that case held that since the witnesses had not presented "any evidence demonstrating that these representations by the Government [were] false,"[127] a hearing was not warranted.

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122. *Id.* at 120.

123. *Id.* at 120 n.4.

124. 458 F.2d 468 (3d Cir. 1972).

125. Under 18 U.S.C. § 2518(10)(a) (1970), there are three grounds stated for suppressing testimony. These are quoted in note 13 *supra. See also* section IV, B *infra.*

126. 18 U.S.C. § 3504(a)(1) (1973).

127. 453 F.2d at 122.

It would be desirable for the government's affidavits to contain more complete statements setting forth whether there had been *any* wiretapping or electronic surveillance including that which the government had considered to be legal. Furthermore, the caseload of questions involving electronic surveillance would be greatly reduced if the government were to indicate with some specificity which "appropriate agencies" were in fact contacted to determine whether surveillance had been employed.[128]

### 3. IS THE WITNESS ENTITLED TO A HEARING EVEN IF THE GOVERNMENT DENIES BY AFFIDAVIT?

Does a witness, while defending a civil contempt action brought against him for refusing to answer a grand jury question derived from electronic surveillance, have a right to litigate the legality of that surveillance?

Chapter 119 of Title 18 of the United States Code, entitled "Wire Interception and Interception of Oral Communications" (18 U.S.C. sections 2510-20), represents an assiduous congressional effort to balance the individual's right to privacy against the government's legitimate interest in gathering information necessary for the prosecution of crimes.[129] Integral to the statutory scheme are elaborate precautions prescribed to insure that electronic surveillance is not used unnecessarily and that when it must be used its duration is narrowly circumscribed. To maximize compliance with the provisions of chapter 119 by investigative authorities who desire to employ wiretaps and other electronic devices, the chapter contains its own "exclusionary rule" which provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.[130]

The apparently ample breadth of this proscription has been confirmed by *Gelbard*.[131] However, the *Gelbard* court left undecided the issue of whether a witness may refuse to answer questions if the

128. *In re* Horn, 458 F.2d 468 (3d Cir. 1972).

129. The striking of this balance is achieved primarily through the statutory provisions requiring the Government to obtain a court order authorizing the electronic interception. *See* 18 U.S.C. §§ 2511(1)(a), 2516(1) [(1970)]. As might be expected, the statute also contains some express exceptions to this general mandate. See, e.g., 18 U.S.C. §§ 2511(3), 2518(7) [(1970)].

*In re* Persico, 491 F.2d 1156, 1159 n.2 (2d Cir.), *cert. denied*, 94 S. Ct. 1554 (1974).

130. 18 U.S.C. § 2515 (1970).

131. 408 U.S. 41 (1972).

interception of conversations were pursuant to court order. This issue emerged in *In re Persico*.[132] In that case it was urged that the mere existence of a court order should not preclude the witness from fully litigating in the contempt proceeding the lawfulness of the surveillance.

In rejecting a witness' right to an evidentiary hearing, the *Persico* court relied heavily upon the concurring opinion of Justice White in *Gelbard*.

> In that opinion he intimated . . . that when, during grand jury proceedings, the Government *does* produce a court order the traditional notion that the functioning of the grand jury system should not be impeded or interrupted could prevail at that time over the witness's interest in exploring in depth the validity of the surveillance.
>
> "Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and in any event, the deterrent value of excluding the evidence will be marginal at best."[133]

Congressional concern over disruption of the operation of the grand jury system is also found in the legislative history of chapter 119. Senate Report No. 1097[134] appears to controvert a witness' contention that, in defending a contempt proceeding resulting from his refusal to answer a question before the grand jury, he is entitled to a suppression hearing.

> Paragraph (10)(a) provides that any aggrieved persons, as defined in section 2510(11), discussed above, in any trial hearing or other proceeding in or before any court department, officer, agency, regulating body or other authority of the United States, a State, or a political subdivision of a State may make a motion to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom.
>
> This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the

132. 491 F.2d Cir.), *cert. denied*, 94 S. Ct. 1554 (1974) [hereinafter referred to as *Persico*].

133. *Id.* at 1160, *quoting* Gelbard v. United States, 408 U.S. 41, 70 (1972) (White, J., concurring).

134. S. REP. NO. 1097, 90th Cong., 2d Sess. (1968).

> 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, [United States v. Blue] 86 S. Ct. 1416, 384 U.S. 251 [16 L.Ed.2d 510] (1965).) There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted *in another context,* its scope may include use in a *future* grand jury proceeding.[135]

Though Congress prescribed that illegal wiretap evidence must be excluded from all grand jury proceedings, hearings to suppress evidence were not to be permitted during such proceedings.

> These seemingly inconsistent policy determinations can be reconciled only by interpreting the statute as requiring exclusion only when it is clear that a suppression hearing is unnecessary, as when the Government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent, such as, for example, when no prior court order was obtained, or when the unlawfulness of the Government's surveillance has been established in a prior judicial proceeding.[136]

In these situations both statutory policies—the exclusion of illegally acquired evidence and the maintenance of unimpeded grand jury proceedings—are served. "But where illegality is claimed and, if established, can be established only by way of a plenary suppression hearing, one important aim of the legislation would be frustrated."[137]

However, despite the preceding analysis, the *Persico* court held that, in contempt proceedings initiated when a witness who has been granted "derivitive use" immunity refuses to answer questions propounded by a grand jury because he claims he is entitled to a hearing to ascertain whether the questions posed are the product of unlawful electronic surveillance, the witness is *not* entitled to a plenary suppression hearing to test the legality of that surveillance. The court further held that the witness' refusal to answer would be permissible only if there is an absence of a necessary court order, a concession from the government that the surveillance was not in conformity with statutory requirements or a *prior* judicial adjudication that the surveillance was unlawful. In *Persico* there were three court orders. Inasmuch as the judge conducted an in camera inspection to ascertain whether the government had complied with the statute and found compliance, the

135. *Id.* at 2195 (emphasis added).
136. *In re* Persico, 491 F.2d 1156, 1161 (2d Cir. 1974).
137. *Id.* at 1161-62.

Second Circuit felt that the witness had received all that he was entitled to receive.

The Ninth Circuit has followed the lead of the Second in denying a witness the opportunity of a hearing. In *In re Weir,*[138] an affidavit prepared by a Department of Justice attorney denied any electronic surveillance. The attorney stated that all national security electronic surveillance authorized by the Attorney General is conducted by the FBI and that his inquiries of the FBI and other agencies which conduct surveillance pursuant to Title III of the Omnibus Crime Control & Safe Streets Act of 1968 revealed that no surveillance occurred. The *Weir* court held that the government's denial of surveillance was adequate. "Proving a negative is, at best, difficult and . . . a practical, as distinguished from a technical, approach is dictated."[139]

Judge Goodwin based his dissenting opinion in *Weir,* however, on the fact that the questions propounded to the witness were based upon statements obtained from Mexican authorities. It was uncontroverted that these statements had been brutally obtained by Mexican soldiers holding the witness' head under water until he gagged and lapsed into unconsciousness, sticking knives into his legs, buttocks and neck, beating him until he was unconscious, and hanging him from a tree limb by a rope around his neck until he lost consciousness.

Judge Goodwin stated that nine months had elapsed between the witness' first appearance before the grand jury and the contempt adjudication. There was ample time for a hearing, which, it had been estimated, would have taken no more than one day. A hearing could easily have been held without disrupting the grand jury proceedings any more than they already had been delayed by other circumstances.

> The incremental delay which this hearing would have provided to the effective and expeditious discharge of the grand jury's duties would seem a modest price to pay if in the final result we could put an early end to the use of a coerced confession in a federal court.[140]

The most recent pronouncement with regard to a grand jury witness' right to a hearing is that of the First Circuit. The court in *In re Lochiatto*[141] noted that there is often sensitive material contained in government reports and affidavits; there is a high premium placed on secrecy, often to protect the witnesses; there is the practical necessity of not unduly impeding grand jury proceedings. However, the First Circuit concluded that, though an absolute requirement of total disclosure of guarded information could not have been the intent of Congress, policy does not command a bar of *any* disclosure.

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138. 495 F.2d 879 (9th Cir. 1974) [hereinafter referred to as *Weir*].
139. *Id.* at 881.
140. *Id.* at 882 (Goodwin, J., dissenting).
141. 497 F.2d 803 (1st Cir. 1974) [hereinafter referred to as *Lochiatto*].

The *Lochiatto* court stated, "The triple objective, then, is to minimize the delay, secure the government's interest, if any, in secrecy, and protect a defendant's right to assert the defenses Congress established."[142] Though it did not grant a witness the right to a hearing, by balancing the three competing needs, the First Circuit established certain ground rules. When a witness seeks to assert his rights under 18 U.S.C. section 2515 and section 2518(10)(a), he should be given an opportunity to inspect the authorized application of the Attorney General or his designate, the affidavits in support of the court order, the court order itself and any affidavit submitted by the government indicating the length of the surveillance.

The *Lochiatto* decision does not require that the witness be provided with any evidence for the purpose of litigating the truth of statements made by affiants. If the government interposes an objection on secrecy grounds, the district court must determine whether the information can be successfully deleted or summarized and whether access to the excerpted material should be granted. However, if the judge determines that so much of the material is sensitive and that revelation of any of it would prejudice the government, he must review it in camera to determine the constitutional and statutory validity of the application and the court order based on the warrants and the compliance by the government with statutory minimization requirements.

## V. CONCLUSION—A PLENARY HEARING IS CONSTITUTIONALLY REQUIRED

There is no doubt that an alleged contemnor may raise the defense of illegal electronic surveillance when the government seeks to have him adjudicated in contempt.[143] It is equally clear that he may also raise the illegal surveillance of his attorney under appropriate circumstances.[144] In addition, the overwhelming majority view is that to make a sufficient denial of any illegal act, the government must submit at least an appropriate affidavit.[145] However, the question of whether the alleged contemnor is entitled to a hearing is, as yet, unresolved. Those few courts which have broached the subject have stopped short of permitting a plenary suppression hearing.[146] Conceivably, both the fourth and fifth amendments provide a constitutional basis for an alleged contemnor to demand a plenary hearing.[147]

142. *Id.* at 807.
143. See section II *supra*.
144. See section III, A *supra*.
145. See section IV, C *supra*.
146. *Id.*
147. U.S. CONST. amend. IV provides:
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 person or things to be seized.

The exclusionary rule formulated in *Weeks v. United States*[148] and *Mapp v. Ohio*[149] prohibits the introduction of evidence seized from a criminal defendant in violation of his fourth amendment rights. Fruits of such evidence are excluded as well.[150] Because that amendment now affords protection against the uninvited ear, illegally overheard oral statements and their fruits are also subject to suppression.[151] Moreover, there is now a comprehensive statute making unauthorized electronic surveillance a serious crime.[152] The reasons for this extensive protection of fourth amendment rights are equally applicable to grand jury witnesses. The security of persons and property remains a fundamental value which law enforcement officers must respect: "Nor should those who flout the rules escape unscathed."[153]

There is no doubt that when an illegal search has been discovered, the government has the ultimate burden of persuasion to show that its evidence is untainted. But, at the same time, alleged contemnors must go forward with specific evidence demonstrating taint.

> [T]he trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of a poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof has an independent origin.[154]

The shifting of these burdens between the parties demonstrates that adversary proceedings are a major aspect of our system of criminal justice.

> Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which must exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate

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U.S. CONST. amend. V provides: "No person shall . . . be deprived of life, liberty or property without due process of law . . . ."

148. 232 U.S. 383 (1914).

149. 367 U.S. 643 (1961).

150. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920).

151. Katz v. United States, 389 U.S. 347 (1967); Silverman v. United States, 365 U.S. 505 (1961).

152. Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-18 (1970). Not only does the Act impose criminal penalties upon those who violate its provisions governing eavesdropping and wiretapping, but it also authorizes the recovery of civil damages by a person whose wire or oral communication is intercepted, disclosed, or used in violation of the Act. Punitive damages are recoverable, as well as a reasonable attorneys' fee and other costs of litigation reasonably incurred.

153. Alderman v. United States, 394 U.S. 165, 175 (1969).

154. Nardone v. United States, 308 U.S. 338, 341 (1939).

> resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.[155]

There is no magical solution to be found in the use of adversary proceedings. They will not eliminate all error; however, they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the fourth amendment exclusionary rule demands. The government may be compelled by the prospect of disclosure to dismiss some prosecutions in deference to national security or third-party interests. Nevertheless, this is a choice faced by the government with respect to illegally obtained material which is arguably relevant to the evidence offered.[156]

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.[157]

The dictates of the fourth amendment, standing alone, mandate that an alleged contemnor be afforded a plenary hearing. However, a second Constitutional source in support of the contention that a plenary hearing be provided is the due process clause of the fifth amendment.

Failure to afford the alleged contemnor an opportunity to litigate the issue of the illegality of any wiretap has the effect of denying due process of law. It is abundantly clear that the witness is faced with a grievous loss, that of his personal liberty, thus satisfying the threshold standard promulgated for the application of due process by the Supreme Court in *Morrissey v. Brewer:*[158]

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer a grievous loss." The question is not merely the "weight" of the

155. Alderman v. United States, 394 U.S. 165, 184 (1969).
156. *Id.*
157. Johnson v. United States, 333 U.S. 10, 14 (1948).
158. 408 U.S. 471 (1972) [hereinafter referred to as *Morrissey*].

> individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language [of the due process clause].[159]

Once the *Morrissey* test is met, the question then becomes what process is due? "The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner."[160] *Goldberg v. Kelly* recognizes that the hearing must afford the individual an effective "opportunity to confront and cross-examine adverse witnesses . . . ."[161] This view was reiterated by the Supreme Court in *Morrissey,* in a parole revocation proceeding where it was held that due process necessarily includes the "right to confront and cross-examine adverse witnesses."[162] Another essential element is that the ultimate determination be made by an impartial decision maker.

The opportunity to confront adverse witnesses and the presence of an impartial decision maker are equally applicable to a contempt proceeding under section 1826(a). Neither a parole revocation proceeding nor a section 1826(a) contempt proceeding is denominated by statute as applying to purely criminal proceedings. Both, however, involve the loss of an individual's liberty, the "grievous loss" contemplated by the due process clause. The Ninth Circuit, in *Alter,* recognized the hybrid quality of section 1826(a) proceedings. The labels "civil" and "criminal" are not "immutable legal compartments, forever hermetically sealed from each other, embodying mutually exclusive procedural and constitutional rules."[163] The court held that where the alleged contemnor makes a substantial claim of illegal wiretapping, he is entitled to an uninhibited adversary hearing. It rejected as inconsistent with due process a proceeding "confined to the perfunctory reception of affidavits, a round of oral argument and some offers for the record."[164]

The position espoused in *Alter* is entirely consistent with the due process requirements of *Morrissey* and *Goldberg.* The view that the mere denial by the government of illegal electronic surveillance puts an end to the inquiry is totally inconsistent with all principles of due process. *Morrissey* and *Goldberg* require an opportunity to confront adverse witnesses and the presence of an impartial decision maker. In all of man's experience and utilizing all of his wisdom, there remains no way to confront or cross-examine a piece of paper. Of equal importance is the fact that when this piece of paper is presented by the

159. *Id.* at 481.
160. Goldberg v. Kelly, 397 U.S. 254, 267 (1970).
161. *Id.* at 269 [hereinafter referred to as *Goldberg*].
162. Morrissey v. Brewer, 408 U.S. 471, 489 (1972).
163. United States v. Alter, 482 F.2d 1016, 1022 (9th Cir. 1973).
164. *Id.* at 1024.

government, and held ipso facto conclusive as to the factual issues involved, there is no impartial decision maker. The only way that section 8504(a)(1), as it deals with the government's denial of illegal activity, can be construed to be consistent with due process is to afford the alleged contemnor a full hearing as to the legality of the wiretap.