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In the

Supreme Court of the United States

DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 71-110

Washington, D. C.
March 27, 1972

Pages 1 thru 45

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Monday, March 27, 1972

The above-entitled matter came on for argument at 1:08 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MICHAEL E. TIGAR, ESQ., 2424 Pine Street, San Francisco, California 94115, for the Petitioners.

DANIEL M. FRIEDMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 71-110, Gelbard and Parnas against the United States.

Mr. Tigar, you may proceed when you're ready.

ORAL ARGUMENT OF MICHAEL E. TIGAR, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. TIGAR: Mr. Chief Justice Burger, and may it please the Court:

I seek in this argument to show on constitutional statutory premises that the opinion below is an unwarranted assault upon the settled principles of personal liberty and would permit the government to violate the law without paying a price for doing so. The issue, if the Court please, is whether a grand jury witness under compulsion to testify may prevent the use of wiretap material obtained in violation of his or her rights against him or her in the grand jury proceeding.

The facts are these. David Gelbard and Sidney Parnas were subpoenaed to appear before a federal grand jury in Los Angeles in February, 1971. They became aware that they had been overheard on a court-ordered wiretap conducted under the provisions of the 1968 Omnibus Crime Bill. The government conceded that it intended to use the transcripts of petitioners' overheard conversations to refresh

petitioners' recollection and to formulate questions to them before the grand jury. Thus, the government admits that it intended to disclose or cause disclosure of overheard conversations of these petitioners.

The petitioners claim that the taps were illegal and refused to answer questions until they were afforded a hearing at which the legality issue could be determined and, under what the government terms in its brief in the Egan case, the constitutional rule of Silverthorne, the government foreclosed from disclosing this material in questioning petitioners. The District Court denied a hearing and ordered petitioners summarily committed for civil contempt. The Court of Appeals affirmed and this Court granted certiorari.

Our argument embraces three points, if the Court please. First, if disclosure is permitted before the grand jury in questioning these petitioners, they will suffer a harm of which the law can take notice. Second, there is a remedy, constitutional, inherent power, and statutory, for this harm. And, third, I'd like to deal with the implications of the government's position here.

The government says in its brief that the harm that one suffers from being the victim of a wiretap is ended when the tap is disconnected.

Q Is what? Is ended?

MR. TIGAR: Is ended when the tap is disconnected.

That is, Mr. Justice Stewart, there is no further harm from disclosing this material, even assuming it was illegally overheard. This is not the rule this Court has established. It is not the rule, for example, of Silverthorne v. United States, of Go-Bart Importing Company v. United States and, although the case rests on statutory premises, Nardone v. United States, Rea v. United States, and other cases decided by this Court. It is not the rule as established in such an elementary treatise as Prosser on Torts, which identifies public disclosure of private facts as a crucial element of the tort law right of privacy.

Q Mr. Tigar--

MR. TIGAR: Yes, Mr. Chief Justice.

Q --in your case as distinguished from those that are do follow, was the wiretap authorized by warrant?

MR. TIGAR: Yes, Mr. Chief Justice, it was. In both cases we have court-ordered wiretaps in which a determination of probable cause was made against other persons than the petitioners. The petitioners wandered into the ambit of these courtordered wiretaps.

I was just coming to that, Mr. Chief Justice, because the third kind of harm we're talking about here is this statutory harm under the very act under which the warrants were issued. That is to say, Section 2511 of Title 18 makes it a federal crime to disseminate information

unlawfully obtained by wiretapping and electronic surveillance. Thus, the petitioners would be victims of such a federal crime before the grand jury. And, indeed, looking at 2510 or 2520 of Title 18, one can see that the quid pro quo which Congress exacted for granting this broad power to tap and bug was a set of very detailed limitations upon the manner in which this material is to be used.

If then there is harm here to the petitioners, what is the remedy. The government, if the Court please, concedes at page 23 of its brief in the Egan case, which it adopts as its brief in our case, that if there was a pre-subpoena adjudication that these taps were illegal, the Court in adjudicating them illegally under what it aptly terms the constitutional rule of Silverthorne would and could prohibit the government from using this illegally obtained material against these petitioners in this very grand jury proceeding. That is, petitioners could hire a lawyer, file a civil suit under the authority of Go-Bart Importing Company or Rea against United States or the Bivvens case decided in this Court a short time ago, and invoke a consistent course of federal decision going back 60 years to Wise v. Henkle in 220 U. S. They would claim that the inherent power of a federal court could be used, reaching out, the federal equity power, to enjoin the government from making use of this material.

Of course, as this Court has heard this morning in argument in the Tatum case, the government might claim in such a civil suit that the case wasn't ripe for an injunction to issue. That is, that the petitioners could not before they received the subpoena demonstrate the kind of immediate harm that the federal equity power is customarily used to protect against. But petitioners' case, if the Court please, could not be more right. And that is why it is incredible to us that the government won't go the last six inches with us, since they have agreed on just about everything else, and say that when the petitioners are standing in the jailhouse door, that surely they have a right to prevent the use against them of this material.

The petitioners are not like the defendant in the case of Blue against United States, in the position of a gratuitous intervener in the grand jury, who merely suspects that he orshe is being talked about in the secrecy of the grand jury room and wants to stop the grand jury process. No, they are standing in the jailhouse door because the material the government admits is going to be used against them in the grand jury room.

So, this case is no different from asking a District Court to sustain any other claim of privilege, any other claim of privacy protecting privilege, if the Court please, at the behest of any other grand jury witness in any other

grand jury in any federal court in the land.

In this connection, we ask the Court to note, as I mentioned before, petitioners are after all, if this tap is illegal, being made the victim of a federal crime in the grand jury room. And so the government asks this Court to break the promise which this Court made in the Alderman case in two ways. First, by negating what Alderman termed the constitutional rule that forbids using the fruits of unlawful tapping against persons who, like the petitioners, are agreed. And, second, they want to undermine Alderman by urging this Court to permit the government to commit the federal crime detailed in Section 2511 and, in this Court's words, to let those who flout the rules go unscathed and to cavalierly disregard the rights of persons under the act.

So, this Court can decide this case based on elementary principles of equity jurisprudence with some attention to the mandate of the Fourth Amendment in protecting the right of privacy and some attention to the inherent power in the words of Wise v. Henkle of the District Court to protect against abuse of its process by its officers. The Constitution surely requires no less.

But there is, as two Courts of Appeals, one of them en banc, have held a statutory ground decision which is available to the Court in this case. The 1968 act,

Sections 2510 through 2520 of Title 18, provide for notice of hearing for suppression at the instance of those who, like petitioners, are about to be harmed by surveillance against them. Section 2515 of the act forbids the use of material unlawfully obtained in any court or grand jury proceeding. Section 2518 of the act in subdivision nine requires that before material obtained under the act is to be used against a person, there must be ten days notice given to that person.

By the way, this is one answer to the government's contention that our position here is to going to sabotage grand juries. The government knew it was going to use the fruits of this tapping against Mr. Gelbard and Mr. Parnas. If they had sent ten days before that grand jury appearance a letter saying we intend to use it, Mr. Gelbard and Parnas could come into the District Court, ask the District Judge to look at the order authorizing the tap, gotten a threshold determination of legality or illegality.

Q Mr. Tigar, I think I've heard you say several times something to the effect that the government was going to use this against them. Are Gelbard and Parnas the subject of grand jury inquiry? Are their activities now being investigated by the grand jury?

MR. TIGAR: Their conversations are overheard, Mr. Chief Justice.

Q What's the purpose of the grand jury

investigation that's going on?

MR. TIGAR: The grand jury investigation, Mr. Chief Justice, has thus far resulted in several indictments. Those are mostly in the field of interstate gambling. One of the people that has been indicted, Mr. Jerome Zarowitz, was formerly executive vice president of a hotel called Caesar's Palace in Las Vegas. Mr. Parnas is an accountant who works in New York for Caesar's Palace. So, so far as we can determine, there is some connection between what the grand jury indicted about and what they want to ask Mr. Parnas about.

With respect to Mr. Gelbard, the questions asked that are reproduced in the appendix focus on the allegation, to put it bluntly, that he was the bag man carrying the proceeds of illegal interstate gaming between Los Angeles and Las Vegas.

Q This sounds as though what Parnas and Gelbard fear is that they may be exposed to some criminal prosecution. Is that what you're telling us?

MR. TIGAR: Mr. Chief Justice, with respect to Mr. Parnas, the government informs us in a footnote to its brief that it intends to seek immunity grant for him if he should return to the grand jury. And the government represented below and does here that it has no intention at this time of prosecuting Mr. Gelbard and Mr. Parnas. So, I

think that--

Q If he has any such fear, doesn't the Fifth Amendment give him rather sweeping protection?

MR. TIGAR: If he were afraid of a criminal prosecution, yes, Mr. Chief Justice, he could invoke his privilege against self-incrimination.

Here he is protecting another right.

Q Isn't that just what you indicated he was afraid of?

MR. TIGAR: Mr. Chief Justice, he is of course afraid of that, as are all citizens faced with government scrutiny of this kind. But he's also seeking in this case, in this proceeding, to protect another right of his. The Fourth Amendment, Mr. Chief Justice, is not designed solely to protect guilty criminals and those who fear the government is going to prove that they are guilty criminals. And Mr. Parnas and Mr. Gelbard are seeking an application of their Fourth Amendment rights in the context of this proceeding which will vindicate their right of privacy, a right which is available to them whether or not they fear prosecution and whether or not they are granted immunity from prosecution by the government. They are thus in no different a position from any person who invokes a privacy-protecting privilege in front of the grand jury regardless of whether he fears prosecution by the government.

Perhaps I could use an analogy, if I may. Let us assume that the FBI, through stealth, listened in on a conversation between a penitent and a priest engaged in the ritual of the confession and that thereafter the government called the penitent before a grand jury and sought to interrogate him or her about what had been heard in the confessional. In such a case, if the government indicated an intention to use the transcript of the FBI agents' overhearing to refresh the penitent's recollection about she or he had told the priest, a fair reading of the clergyman-penitent privilege, at least as it appears in such statements as that in the proposed federal rules of evidence, would, it seems to me, permit the witness to interpose this privacy protecting privilege. And so here where the intrusion is illegal under the 1968 act and the government admits that it intends to use it, we say that the law of the right of privacy protects, and of course we supplement that by saying that irrespective of any Fifth Amendment problems, the statute forbids this material to be used in the way that the government plans to use it.

Q Do I understand your position to be that any person that gets in that situation can never be called before any grand jury under any time or under any circumstances?

MR. TIGAR: No, Mr. Justice Marshall, that is not our position. The government could call Mr. Parnas and

Mr. Gelbard and interrogate them about any subject under the sun, provided the District Court has held that the tap was legal.

Second, if the District Court--

Q If the tap was illegal--

MR. TIGAR: If it's illegal--

Q --in 1971, would they call them in 1978 before the grand jury?

MR. TIGAR: The Congress has recently legislated with respect to this question and purported to set up a cutoff date with respect to claims of illegality, but passing that statutory provision the government would be obliged in such a case merely to purify its evidence and to show that the questions it wanted to ask were either so far removed from the initial illegality so as, in the words of Wong Sun to dissipate the taint; or, again in the words of Wong Sun, derive from an independent source. And, of course, the rule of Wong Sun in this connection has subsequently been applied, I believe, by its citation in the Alderman situation. So, the government is not foreclosed from ever calling them; it just can't violate people's rights without paying the price, which is that it can't use the fruits of its illegality.

Q I am just trying to find out how much price did you want them to pay.

MR. TIGAR: No more than the illegality is worth,

Mr. Justice Marshall, which is to say they can't exploit the wrong that they have done. That's all the limitation that we want to put on the government in this case.

To all of this the government replies what? That the rule which the prior decisions of this Court and the plain meaning of the act establish would impose too heavy a burden on the administration of criminal justice. There are two answers to this contention. First, that it isn't true; and, second, we invite the Court to think of the alternative.

This was a tap under the provisions of the 1968 act. The 1968 act, if the District Judge orders it, gives persons overheard in these taps the right to be notified of the fact they have been overheard. Thus, it requires the government to keep records. The government says in its brief that in the remand in the Alderman case they spent 20 man days searching through the records to see whether or not the petitioners there had been overheard. I can understand that. This Court knows from bitter experience how difficult it was to ferret out taps that the FBI had conducted and subsequently attempted to hide even from attorneys in the Justice Department. But under the '68 act, all of that is supposed to be over. There are supposed to be records kept and so the notice-giving function that the act makes a crucial part of its protection of the rights of

the individual can be adhered to, complied with.

There is second the gratuitous assertion that these petitioners are not trying to protect their rights, they're trying to shield somebody else, that if they were really concerned about themselves they would invoke the Fifth Amendment like good citizens and not worry about all this privacy argument. They seek, as I mentioned before, to protect their own right of privacy. As Chief Judge Soboloff said in the case of Lankford v. Gelston, upholding the use of the federal equity power to issue an injunction against illegal search, it would be a grotesque irony if our courts protect only against the unlawful search which uncovers contraband by the exclusionary rule while offering no relief against an admittedly unlawful pattern and practice affecting hundreds of innocent home owners.

Thus, we are saying here that the privacy protecting job of the federal district court isn't limited to saying that contraband seized from somebody who is proven guilty by the fact the contraband was seized ought not to be received in evidence, that the privacy-protection function arises any time the citizen is about to be the victim of an invasion of privacy directed against him or her. The government said in Alderman and it said in this Court and through the words of the Solicitor General that it was concerned about people like petitioners, third parties

who wander into taps that have been authorized against somebody else. We invite the government in this case to share that concern that we have about these third parties under these circumstances.

These are not, if the Court please, the times of the Assize of Clarendon in which grand jurors sat under a tree and gossiped about breaches of the King's peace. Grand jury is a formidable force with the power to call on many investigative agencies to pull people off the streets and compel them to testify. It may be used for investigation and as a dress rehearsal for the government's case in chief of trial. It is the sole inquisitorial element in an accusatorial system of jurisprudence. There must be limits on its power. Yes, those limits may slow down the process some. As we say in our brief, due process is always slower than summary process or drumhead process or pistol-at-the-head process or, as in this case, no process at all.

In conclusion, we say only that a great deal has been written and more said about the wave of recent congressional legislation on crime. Many see in these statutes an unyielding hostility to civil liberty. But however these laws may fair here, when measured against the Constitution this Court should surely set its face against any attempt, as in this case, to read out of those statutes the precious few concessions to personal freedom which they

undisputably contain. The government's position here, if the Court please, is sabotage. It is sabotage of the 1968 act, sabotage of 170 years of this Court's decision, and sabotage of the rights of liberty and personal security.

MR. CHIEF JUSTICE BURGER: Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court:

We think the starting point in this case should be the law as it existed prior to the 1968 statute. Our position in this case is that prior to that law it was settled that a witness before a grand jury could not challenge before being required to give testimony before that grand jury either the evidence which led the grand jury to summon him or the evidence which was proposed to be used before the grand jury in examining him. And our position, furthermore, is that Congress cannot be deemed to have changed this well settled principle without some clear expression indicating that it intended to do so in the 1968 act. And when we look at the 1968 act, we think not only does that act not show any congressional decision to change it but, on the contrary, it affirmatively shows an intention to continue that rule and not to permit witnesses before a grand jury to challenge the evidence before the grand jury.

Prior to turning to this discussion, however, I'd like to respond to one question--

Q Challenge the evidence or decline to answer questions?

MR. FRIEDMAN: Well, decline to answer questions, Mr. Justice, on the basis of the evidence before the grand jury.

Q The grand jury is trying to adduce evidence by getting this witness to answer questions. What he was doing, what these two gentlemen were doing, was refusing to answer questions; isn't that right?

MR. FRIEDMAN: They were refusing to--

Q Challenging evidence--they were asked to give evidence.

MR. FRIEDMAN: They refused to answer questions, Mr. Justice, for two reasons. First, they said the only reason the grand jury was led to call them was because of this electronic surveillance and the information it had obtained. And, secondly, they said, as the government recognized, that the evidence obtained from this electronic surveillance would be used to refresh their recollection. That is what they objected to. They said, "We have a right not to testify before the grand jury until we can first determine whether or not the evidence which the grand jury proposed to use in either examining the witnesses or which

led the grand jury to call the witnesses was the product of illegal electronic surveillance. They want to litigate out before testifying the question whether or not there was improper electronic surveillance related to them. And our basic submission to this Court is that they do not have the right to do that, that that is an issue they can raise only if and when the evidence is sought to be used against them--against them--in a criminal proceeding.

Q What evidence? I'm a little confused. You talk about challenging evidence; they were called in order to give evidence, and you say that they can challenge it when the evidence is sought to be used against them. Are you talking now about their own answers?

MR. FRIEDMAN: May I answer it this way, Mr. Justice; any information which the government obtained as a result of a search and seizure that was in violation of the Fourth Amendment can be excluded by them if they are ever proceeded against criminally. They can exclude that. But we say they cannot refuse to answer questions put to them before the grand jury on the claim--on the claim--that this kind of evidence was the reason for their questioning. They can claim personal privilege if they claim that the answers to these questions would tend to incriminate them. They may make that claim. If they claim that the answer to the question would violate any of the traditional privileges, such as

the lawyer-client privilege. They can refuse to answer on that ground. But we say they cannot refuse to answer on the ground that there was prior illegal electronic surveillance which either led the grand jury to call them or on the basis of which they were to be questioned. They cannot refuse to give evidence, in other words, before the grand jury on the basis--on the basis--of the factors that led the grand jury to call them. That's not, we think, an appropriate issue to litigate in the context of a grand jury proceeding.

Q What if there is subsequently a criminal trial in which neither one of these petitioners, neither one of these parties, is a defendant, somebody else is a defendant, but they are called as witnesses in the criminal trial, witnesses for the government or as on cross-examination by the government. Can they do it then?

MR. FRIEDMAN: No, Mr. Justice. They can again refuse to answer any question that might tend to incriminate. They cannot refuse--

Q You're not limiting it to a grand jury.

MR. FRIEDMAN: No. But that's the only question in this case. Our basic position is that a witness cannot refuse to answer a question before a grand jury or before a court on the ground that this question is somehow the result of some illegal electronic surveillance.

Q Of that very witness.

MR. FRIEDMAN: Of that very witness. That is correct.

Q You say he can't even assert that at a criminal trial. So, you're not limiting your argument to the grand jury.

MR. FRIEDMAN: No. Our argument goes beyond that, and we think that is what the law has always been, that a mere witness cannot refuse to answer an otherwise proper question on the claim that previously there had been some violation of his rights under the Fourth Amendment. He can refuse to answer any question in terms of permissible privilege, a privilege that the law allowed. But he cannot refuse--

Q Well, that's question begging, what is a permissible privilege.

MR. FRIEDMAN: We think the permissible privilege is a Fifth Amendment privilege against self-incrimination and what I would call the personal privilege, where in contrast to the giving of the testimony which relates to an allegedly illegal search and seizure, where the mere giving of the testimony itself breaches the privilege. That is in the case, for example, of the lawyer-client communication, the privilege is breached at the time the witness is forced to disclose the confidential communication.

In the search and seizure situation, if there has

been illegal electronic surveillance that has happened a long time before, the question is whether that can now be made public. And basically--basically--in case, for example, of a criminal trial, if a witness declines to answer a question, claiming the question results from an illegal search and seizure, what he is really seeking to do is not to prevent the introduction of that evidence against him but to prevent the introduction of that evidence against a third party, and we think at least though it doesn't specifically hold that, at least the rationale of the Alderman decision indicates that that can't be done.

Q By hypothesis it was his Fourth Amendment right that was violated, the witness's, and by asserting the right not to answer he is trying to--through him the sanction is being imposed against violation of his Fourth Amendment rights.

MR. FRIEDMAN: The Fourth Amendment right has already been violated, Mr. Justice.

Q And will be continually, I suppose, if there is no sanction against its operation.

MR. FRIEDMAN: There are sanctions. For example, only last term this Court in the Bivvens case indicated that there was a right of action for damages, and under this 1968 statute there is an express right of action for damages given. There are also criminal penalties for violation of

the law. We don't think that a witness in effect can refuse to give pertinent evidence because he says, "Well, this would compound and continue the violation of the Fourth Amendment." The right to be secure against unreasonable searches and seizures. The search and seizures have taken place by definition long before. That's, we think, going to--

Q That's true in the basic week situation or map situation, the violation has taken place long before the trial.

MR. FRIEDMAN: Yes, but if I may, Mr. Justice, I think that illustrates the reason why we believe the courts have not permitted people like witnesses before a grand jury to raise these issues. In the week situation, in the map situation, all the cases involving the exclusionary rule, the question was whether the evidence taken in violation of the Fourth Amendment rights was to be used against the defendant. And the theory, it seems to us, of these cases is that the right given you by the Fourth Amendment to be secure in your person and property against unreasonable searches and seizures would be an empty thing if despite that the evidence obtained through the search and seizure could be used against you, could be used against you. But in the case where a witness is merely being asked questions, where he is not a defendant in a case, the evidence is not being used against him.

Q The petitioner raises another point, which is that, as I understand, that under no circumstances would he have any business with a grand jury. Under no circumstances would he volunteer any testimony. And under no circumstances would he give any information unless forced to do so.

And, two, that there is no way that the government would have known about it, that he was a witness, except by this tap. And, therefore, because the government got this piece of information which is that he did know something, if the government hadn't had that information, they never would have called him. And he's trying to find some way to get around being a volunteer witness before the grand jury.

MR. FRIEDMAN: He's not a volunteer witness.

Q As I understand your position, is that before the 1968 act there was no way he could question any way that the government got the evidence; is that right?

MR. FRIEDMAN: Insofar as he was a witness before the grand jury, that is correct.

Q Regardless of how unlawful the action of the prosecutor prior to--

MR. FRIEDMAN: With one exception, Mr. Justice, with one exception, and that is the situation involved in the Silverthorne case to which reference has been made, and I'd like to discuss briefly the Silverthorne case, because we

think that is a different case. But in the Silverthorne case, the Silverthornes had been indicted and after they had been indicted and arrested, the government official, without any authority at all, just came into their house and made a complete sweep of all their personal property. They took all their books and records and brought it in there. And these people in turn went to the District Court and got a court order directing the return of this property, the court holding that the property had been illegally seized from the government.

After that, a new grand jury was convened which was investigating other violations of the law by these same individuals. And what the new grand jury did was to issue a subpoena for the identical books and records that had previously been taken and had been ordered returned. And this Court in a landmark opinion refused to do so. It refused to do so, I think, not announcing any general principle that whenever a witness is called before a grand jury he has the right to contest the way in which the grand jury called him, but rather on the particular circumstances of this case. Silverthorne is a three-page opinion of Justice Holmes written in its usual terse, tight style, and what he said I think reveals very clearly what was the matter of this case. He explained the government's contention as follows. He said, "The government's contention

is that although, of course, its seizure was an outrage which the government now regrets, it may copy the papers, use the knowledges obtained, and compel production."

Again, I think the Silverthorne case is the unusual situation where you just had quite outrageous conduct, where you had a search that had previously been judicially determined to be illegal. And then the government has turned around and said, "Well, we don't have to pay any attention to that. We can undercut that determination of illegality by just pulling the records back before another grand jury under a new subpoena. And this Court very properly refused to countenance that. This case, it seems to us, is the antithesis of that. This is a case in which the surveillance was made pursuant to a court order. There is no allegation here, there is no determination here, that there was anything illegal about the surveillance. They now claim the surveillance is illegal. They now object to the surveillance. But it seems to us that this is a very different situation from what you had in Silverthorne. Silverthorne is, of course, relied on by both the petitioners in this case and the respondents in the next case as announcing this broad rule. We think Silverthorne turns on its particular facts, that Silverthorne does not announce this broad rule.

The rule has been ordinarily that a grand jury may

consider any evidence it has, however it came into the grand jury's possession. This Court repeatedly has recognized that a defendant in a criminal case cannot challenge the indictment on the ground that improper evidence was produced before the grand jury.

Q Mr. Friedman, do we reach these issues at this juncture? Don't we reach them only after we consider the statutory claim?

MR. FRIEDMAN: Well, it's hard--we could approach it either way. Their contention is that--you could approach it--

Q Let's assume for the moment that it were determined that the disclosure in the grand jury is contrary to the statute. We wouldn't reach Silverthorne or any other constitutional--

MR. FRIEDMAN: That is correct. I just gave this as a background because of the argument to which I would now like to turn to show that Congress in the 1968 act not only did not intend to give the witnesses before the grand jury this right but that in fact it intended to continue, as the legislative history shows and as indeed as the footnote in Your Honor's opinion in the Alderman case indicated that it intended to continue the existing rules of standing with respect to the suppression of evidence before a grand jury. And I would now like to turn to the language of the statute

itself.

There has been a good bit of discussion here in general terms about this statute. I'd like to deal specifically with it. The first provision is in Section--

Q I want to make sure what you're addressing yourself to. We must assume at this juncture that the tap is illegal by the statute.

MR. FRIEDMAN: I think so. I have an argument as to why--

Q We're assuming that the provisions of the statute were not complied with in authorizing the interception. That's the assumption.

MR. FRIEDMAN: That's the assumption of this argument.

Q Nevertheless, you say that the statute does not permit or does not anticipate exclusion at the grand jury.

MR. FRIEDMAN: By a grand jury witness, that is correct. And I will say--I don't want to interrupt my argument now--but in the next case I will make an argument that in fact--in fact--these allegations are not enough to establish a violation of the statute, but we assume for purposes of this discussion that there has been a violation.

Q That this was an illegal interception.

MR. FRIEDMAN: We assume that for purposes of

discussion.

Q And nevertheless you say Congress did not provide for an exclusionary rule or a rule against the use of the fruits of that tap.

MR. FRIEDMAN: That is precisely so. That's precisely our submission, Mr. Justice.

Now, when we start with Section 2515, which is set forth at page 8 of the petitioners' brief, this green document, and it's captioned: Prohibition of Use of Evidence as Evidence of Intercepted Wire or Oral Communications. And it says whenever there has been any interception of an oral or wire communication no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any--and then there is a long group of proceedings, any trial, any hearing, before any grand jury, before any legislative committee or any authority of the United States, et cetera, et cetera, if a disclosure of that information would be in violation of this chapter.

This statute provides the standard. It contains the basic prohibition upon the receipt in evidence of material in violation of the statute. However, however, it does not explain the procedures by which this right is to be implemented. And the procedures for implementing this right, as contained in Section--

Q If that's all you had, on its face it reads right on this situation, doesn't it?

MR. FRIEDMAN: It would seem to, with one qualification. I would just like to make the qualification but not argue it at length at this point. What it prohibits is the receipt in evidence of such material--

Q Or any fruits.

MR. FRIEDMAN: --or any fruits, if the disclosure of that information be in violation of this chapter, not if the interception was in violation of this chapter but if the disclosure would be in violation of this chapter, and I have this argument, which I'll make. It takes a little time as to why the disclosure would not be. But it starts with the prohibition.

However, 2518, Subparagraph 10, which is contained at page 20 of the petitioners' brief, provides the procedures for motions to suppress. And the Senate committee report on this statute--and this is the only pertinent legislative history on this title because the House committee report did not deal with the bill in its present form--said that the prohibitions of 2515, the prohibition upon the receipt of the evidence, must of course be read in light of Section 2518(10) discussed below, which defines the class entitled to make a motion to suppress. That is, 2515 itself does not contain any operative provisions as to how

the right provided there is to be enforced. That is provided by Section 2518(10). And the Senate committee also said that Section 2518(10) later on when it came to discuss that, must be read in connection with Section 2515 which it limits. In other words, the right provided in Section 2515 is limited by the standing provided in Section 2518(10), and it also said that this latter section, Subsection 10, provides the remedy for the right created in Section 2515. So that it seems to us that there is a clear interrelationship between them.

Now, what is the provision of the remedy provided in 2518(10)? Well, there are two striking things about it. The list of proceedings before which a motion to suppress may be made is the same as that in 2515, with two striking exceptions. There is no provision made in that for a grand jury proceeding, and there is no provision for that before a legislative committee. And the legislative history we think shows quite clearly that this omission was not inadvertent, that in fact Congress intentionally decided not to permit the making of these motions to suppress in connection with either a grand jury proceeding or legislative proceeding.

Q Are you saying that both with respect to a-- neither at the behest of a witness nor of a person who is being investigated?

MR. FRIEDMAN: I would say that is so, Mr. Justice, because it seems to us it's sometimes very difficult to draw the line between someone who is a witness and someone who is being--

Q Sometimes it's easy, though.

MR. FRIEDMAN: Sometimes it's easy.

Q And even when it's easy, the putative defendant himself could not either then or later claim that his indictment was illegal because it rested on an illegal interception.

MR. FRIEDMAN: That is correct. He could, of course, object to the introduction of any evidence at the trial against him based on an illegal interception.

Q Right. But he couldn't challenge his indictment on it.

MR. FRIEDMAN: That's correct, Mr. Justice.

The Senate committee in describing the subsection stated as follows: "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, citing Blue against United States. There is no intention to change this general rule. It is the intention of the provision only that

when a motion to suppress is granted in another context"--and that we think is an articulation of the basic principle that I've discussed announced in Silverthorne--"when a motion to suppress is granted in another context, it still may include use in a future grand jury proceeding. Where is there any intention to grant jurisdiction to federal courts over the Congress itself?"

Of course, if the petitioners are correct that this provision permits a witness before a grand jury to challenge the evidence, then by the same token a witness before a congressional committee could object to answering questions put before the committee because he said the committee called me as a result of evidence obtained through an illegal wiretap.

The contempt proceeding is, we think, so closely connected with the grand jury proceeding that it can fairly be said to raise the issue, in the language of the committee, in the context of a grand jury proceeding. The only way a witness can be compelled to testify before a grand jury is to hold him in civil contempt, to get the court to tell the witness, as the witness was told in this case, that they must stand committed for the life of the grand jury until they answer the questions.

Q It's interesting you don't cite any of the Fourth Amendment cases dealing with a grand jury in your brief.

MR. FRIEDMAN: Mr. Justice, we do, I believe, but they're cited in the brief in the Egan case.

Q Oh, I see.

MR. FRIEDMAN: The Egan case was the case in which we do cite the grand jury cases and discuss them at pages 14 to 15 of our Egan brief; we cite a number of Court of Appeals cases which have declined to permit this type of motion to be made before a grand jury. Our brief in this case, because of the fact that in this case--

Q In the other brief do you deal with the (Dinotia?) case of the Seventh Circuit?

MR. FRIEDMAN: No, I'm afraid not, we don't.

Now, I'd also like to turn to another provision of the statute which reflects the same intention on the part of Congress, and that is Subsection 9 in the middle of page 20, which says, "The contents of any intercepted wire communication shall not be received in evidence or otherwise disclosed in a trial hearing or other proceeding unless each party is given ten days notice thereof."

Two things about the language. It speaks of trial hearing or the proceeding, and it speaks of a party. Ordinarily a witness is not viewed as a party before the grand jury. The word "party" as we use it in our law means party to a trial. Once again the legislative history, the Senate report, confirms that view, because in speaking of

paragraph 9 what the Senate committee says is, "Proceeding is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing," citing again Blue against United States.

So, once again it seems to us that the legislative history of this provision is as clear as can be that Congress did not intend by these words to give any rights to a witness before a grand jury. The suggestion has been made both in this case and in the following case that this statute is so clear on its face that no resort need be had to the legislative history. It's clear on its face, they say, because they look to the definition of aggrieved party and they say the people who have been overheard come under the definition of aggrieved party; therefore, that's the end of the matter. This is a very complicated statute. The text of this title alone occupies 23 or 24 printed pages in the brief. It is a statute that is certainly not clear on its face. It's difficult to know what these things mean, and I think it's essential in this case to have resort to the legislative history to ascertain precisely what Congress was seeking to do, precisely what rights Congress was giving to these people, whether Congress was intending for the first time to give witnesses before the grand jury the right to

challenge the introduction of evidence before it.

As I have indicated, Congress did not leave witnesses in this situation without a remedy. Congress provided an unusual thing. It provided a specific suit for damages in Section 2520 of the statute. And this provision would permit a witness if he has in fact been injured by an illegal surveillance to recover damages. Indeed, it's a rather unusual provision because it permits putative damages, not only actual damages and attorneys' fees but putative damage.

With this as far as the 1968 act is concerned, I'd like to turn to another provision which is a provision of the second statute, the 1970 statute. The claim has been made that even if the 1968 statute perhaps did not give these witnesses any right, nevertheless the 1970 statute did. And that is a provision, Section 3504, and that provision was a reaction to this--Congressional reaction--to this Court's decision in the Alderman case. Congress was concerned as a result of the Alderman decision there would be an enormous increase in the number of hearings required in court to litigate all of these claims of illegal electronic surveillance. Congress attempted to reduce the number of those hearings. What Congress did in this section--and it can be found on page--the end of our brief in this case--I'm sorry--

Q It's not in the green brief.

MR. FRIEDMAN: No, it's not in the green brief, Mr. Justice. It is in the government's brief in the next case.

Q In Egan.

MR. FRIEDMAN: In Egan at pages 33 and 34. And this provision contains three subsections; and I'd like, in order to explain, first to discuss the last two and then come to the first one, because the only one we're relying on is the first one.

The last two provisions said as follows: With respect to any electronic surveillance taking place before June 19, 1968--and that was the effective date of Title 3 of the 1968 act--there shall not be required any hearing with respect to the validity of that surveillance unless the information brought to bear may be relevant to the claim of inadmissibility of the evidence. That was a congressional concern that people who made all sorts of allegations, but there may have been some kind of a taint and that as a result of that taint the evidence would be rendered inadmissible.

Then they went on beyond that and said that in any event, if there was electronic surveillance before the June, 1968 date and the surveillance occurred more than five years prior to the conduct that is at issue in the case, there was

to be no consideration. In other words, any possible taint of an electronic surveillance that occurred more than five years before the time at which the evidence of violation is involved, that was too attenuated. That was the basic purpose of the statute.

Then what it said was that in any trial, hearing, or other proceeding in or before any court, grand jury, et cetera, et cetera; this language does include the word "grand jury," does not include the word "legislative committee."

And it says, "Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act"--and unlawful act is defined in the statute to mean electronic surveillance--"the government shall affirm or deny that allegation."

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Do you have anything further, Mr. Tigar?

REBUTTAL BY MR. TIGAR

MR. TIGAR: Yes, Mr. Chief Justice, just a few words of rebuttal, if I may, about the proper meaning to be ascribed to these statutory terms to which Mr. Friedman referred.

The government's position seems to be that only if the legislative history is ambiguous need we read the statute here. I invite the Court's attention first to

Section 2515 of the statute, which is at page 8 of the appendix of our brief. That section forbids receiving in evidence in any trial, hearing or other proceeding in or before any grand jury certain evidence if disclosure would be in violation of this chapter.

A part of this chapter, to which that statute refers, is surely Section 2511 which makes it a criminal offense to disclose information obtained in violation of the Crime Control and Safe Streets Act, particularly Section 2511, Subdivision 1(c), reprinted at page 5 of the appendix of our brief. So, there is in 2515 not just a right but a remedy.

The legislative history, if the Court please, does say that Section 2518, Subdivision 10 of the statute, which has to do with notice and hearing, is not intended to apply to a grand jury proceeding. And it cites the case of Blue v. United States. We don't contest the holding in Blue in this proceeding. We're not saying that a person indicted has the right to challenge the legality of the evidence the grand jury heard, and we're not saying in this case that a person who suspects that she or he is being investigated by the grand jury--

Q But you would say it though, wouldn't you?

MR. TIGAR: Pardon?

Q You would say it though, wouldn't you? Did you

say that the witness could complain but the person who is indicted may not? Is that it?

MR. TIGAR: I think, Mr. Justice White, that the preponderant rule in the circuits these days undercuts the borad language of the Costello case. Yes, sir. And I think when the Court next gets the issue, that there be a good argument made that you can--

Q What about under the statute, though? Do you think Congress intended for the person who is indicted to be able to challenge the indictment on the grounds of illegally obtained evidence put before the grand jury?

MR. TIGAR: I think so, Mr. Justice White, in this kind of a case.

Q Let's assume you're wrong on that.

MR. TIGAR: If I'm wrong on that, Mr. Justice White, I think--

Q Are you wrong on this case then?

MR. TIGAR: No, we're not wrong on this case, because--

Q That's kind of a tough line to draw, isn't it?

MR. TIGAR: It is not a tough line, Mr. Justice White, because the person who is indicted, that is, who is made a defendant, who has never been called before the grand jury, has available the motion to suppress his criminal case, which, if the grand jury indictment is based solely on

wiretap evidence, is going to win anyway, because the evidence the government has at trial and all the evidence they have at trial is going to be suppressed. That's typical in these gambling cases where the government's whole case is "Jerry, a nickel on the Bears for Sunday, right? Right." And that's the interstate telephone conversation, it's a bet, it's a violation of the anti-racketeering legislation, and that's the government's whole case. If that tap is illegal, the government's case founders, the motion to suppress--

Q That's the way it happens sometimes.

MR. TIGAR: It is the way it happens, and that's why there are cases in the Ninth and Seventh Circuits dismissing indictments because the evidence before the grand jury was illegal.

Q But it doesn't necessarily follow in every case. The government's trial evidence would be tainted.

MR. TIGAR: It doesn't necessarily follow in every case, no.

Q Let's assume one where it doesn't.

MR. TIGAR: In that case, the motion to suppress in the criminal case still gives the criminal defendant the protection against the material being used against him or her. The only person left unprotected then in the government's scheme of things would be the grand jury witness

who the government finds out about because of an illegal bug, who gets hauled off the streets and is told, "You had better answer these questions we're making up. You had better help in the disclosure of this illegally overheard material. Otherwise you are going to go to jail for the life of the grand jury."

Q "Or you might be indicted yourself."

MR. TIGAR: Or one might be indicted oneself, yes, Mr. Justice White. [Laughter]

The government's position, also if the Court please, is anomalous because of the citation of Section 2520. The government says presumably that Mr. Parnas and Mr. Gelbard could get a judgment in a civil case that they had been illegally overheard. That would be res judicata. And then when they came before the grand jury, I guess the government couldn't use this illegally overheard material. What's the difference here? The only difference is the case is riper than it would be if they came in and brought a strike civil action without them ever having gotten a subpoena to appear before the grand jury. It's ripe because they are about to go to jail. This conclusion, Mr. Justice White, if the Court please, that we come to, rests not just on Silverthorne, which is a little different from this case, but on Wise v. Henkle in 220 U. S., and there this Court said in no uncertain terms that the district judge has the power to

control the illegal conduct of its officers in the execution of its process. The rule of Wise v. Henkle has not been disturbed by any subsequent decision and nothing in this statute or in the legislative history evinces any congressional intention to disturb it in cases arising under the 1968 act. And so Mr. Parnas and Mr. Gelbard are in no different a position before the grand jury than any other witness who resists the compulsion to testify by invoking some privilege, designed to protect not against incrimination but privacy.

The federal rules of evidence that have been proposed are full of such privileges, trade secrets, political vote, priest-penitent, lawyer-client; there are common law ones, such as a version of the marital privilege mentioned in the dissent in the Wyatt case and the diplomatic privilege.

Q Mr. Tigar, what would happen if A beats up B and makes B tell a story to the grand jury about C. What remedy does B have?

MR. TIGAR: If A is a government agent--

Q A is a priest. [Laughter]

MR. TIGAR: Then aside from his remedy in the canon law courts--[laughter]--which he would have, the civil remedy that B would have would be against A. And since there is no state action involved at the point of the

beating, there isn't at that point anything that the law could take notice of.

Q Suppose it was a state officer who beat him up.

MR. TIGAR: If it was a state officer that beat up B to tell a story about C, then Judge Learned Hand's opinion in In re Fried, which is cited in our brief, indicates that in such a situation the federal court has under its plenary equity powers the right, and some would say the duty under appropriate circumstances, to intervene to protect against the consequences.

Q How?

MR. TIGAR: How? If B had already testified by suppressing the use of that evidence against C; if he had not, by giving him the right not to.

Q What could B do before he testified?

MR. TIGAR: He could bring a suit citing In re Fried as authority, Mr. Justice Marshall.

Q Which would be decided a month after he testified.

MR. TIGAR: Well--

Q Or six months.

MR. TIGAR: --he could refuse to testify and ask that the court uphold his claim as the petitioners did here.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:08 o'clock p.m. the case was submitted.]

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