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In the

Supreme Court of the United States

UNITED STATES OF AMERICA, Petitioner,	)	
vs	)	No. 71-263
JOGUES EGAN and ANNE ELIZABETH WALSH, Respondents.	)	

Washington, D. C.
March 27, 1972

Pages 1 thru 45

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v.	:	No. 71-263
JOGUES EGAN and ANNE ELIZABETH WALSH, Respondents.	:	

Washington, D. C.

Monday, March 27, 1972

The above-entitled matter came on for argument at 2:09 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:

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

JACK J. LEVINE, ESQ., 1427 Walnut Street, Philadelphia, Pennsylvania 19102, (pro hac vice) for the Respondents.

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Jack J. Levine, Esq., for the Respondents	22

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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 United States against Egan and Walsh, 71-263.

Mr. Friedman, you may proceed.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case here on a writ of certiorari to the Third Circuit presents basically the same issue as was before the Court in the last case. It arises, however, in a different factual context in two respects.

Q Before you start, you said in the other case that you had treated at pages 13 and 14 of the brief in this case the Fourth Amendment grand jury cases, but you don't cite even Hale v. Henkel.

MR. FRIEDMAN: I think we do.

Q You don't cite Davis v. Mississippi.

MR. FRIEDMAN: No, we don't cite Davis v. Mississippi.

Q I would say without citing those two cases in this Court you could hardly fairly say that you have treated the problem.

MR. FRIEDMAN: Well, we dealt with it, Mr. Justice, as thoroughly as we thought was necessary to set forth the

law in this area.

Q You state on pages 13 and 14 the contrary lower court decisions which, of course, are relevant. But you don't cite the lower court decisions that go against the government nor the decisions in this Court. I just wondered if you'd want to submit a short statement on what you think the law of this Court is as of March 27, 1972.

MR. FRIEDMAN: I would be happy to, Mr. Justice. We think the law of this Court as of today is the witnesses do not have this right. We cited the cases, for example, Costello and Blue which recognize the broad role of the grand jury and the fact that evidence improperly obtained beforethe grand jury is not--

Q That case in 250 U. S., as I read it, the Fourth Amendment wasn't even involved.

MR. FRIEDMAN: No, the Blair case, which unfortunately we have misdescribed as the Civil Liberties Union point, that it did not involve the Fourth Amendment but it did announce the principle that a witness before a grand jury could not even challenge the constitutionality--

Q I'd just be interested in what the Department's view on the Fourth Amendment in grand jury cases--

MR. FRIEDMAN: I would be happy to submit such a memorandum, Mr. Justice.

The two distinctions factually between this case

and the preceding case are these. In the preceding case there was concededly court authorized surveillance, and the government acknowledged that the petitioners there had been overheard on that surveillance. In this case, the government has never admitted any surveillance and, indeed, in its brief in this Court it denies that surveillance took place.

Q So, now you finally have taken a position one way or another.

MR. FRIEDMAN: We have taken a position. There is no--

Q Section 3504 rather requires that you do it before you foist some decision-making task on a court, I suppose.

MR. FRIEDMAN: Only, Mr. Justice, 3504 requires that only if 3504 applies in the case of a witness before a grand jury.

Q But don't you think it makes quite a bit of difference whether admit that there was a tap or deny that there was a tap or you deny it was illegal or admit it was illegal in terms of what our problems are?

MR. FRIEDMAN: I think it does, except, Mr. Justice--

Q You now say no interception took place at all?

MR. FRIEDMAN: We say that there is no--if I may say, there was no overhearing of either of these witnesses. We do not take any position on whether somebody's telephone--

Q What kind of a case have we got here?

MR. FRIEDMAN: The Court of Appeals decided this case on the assumption that in fact there was overhearing because the government had not denied it.

Q I must say, let's assume in the District Court the government had come in and certified, however you normally do it, that there had been no overhearing of these witnesses. That would have been the end of the matter, wouldn't it?

MR. FRIEDMAN: Hopefully. But in some situations, Judge, the District Courts in some of these cases have said, for example, that the affidavit that we submitted denying the overhearing wasn't sufficient, and there have been situations in which despite that therehave been protracted proceedings.

Q Why should we have to deal with difficult constitutional or statutory questions just because the government is unwilling to say whether there was an overhearing or not or whether it was illegal in their view?

MR. FRIEDMAN: All I can say, Mr. Justice, is that we did not take any position on this before the lower courts because it was argued that the witnesses were not entitled to this--

Q This is just an assumed sort of a case. Let's assume that it's illegal so that we can get some decisions

on something.

MR. FRIEDMAN: It's not quite that. Let me say that--

Q Why didn't the government say yes or no in the District Court?

MR. FRIEDMAN: Because all I can answer, Mr. Justice, is that the government in these cases has consistently taken the position in this type of situation that a witness has no right to challenge this question, and the respondents--

Q I know. That's fine. But there wouldn't have been any question to be decided if the government had said there wasn't any overhearing anyway. This case would never have been here.

MR. FRIEDMAN: If the respondents had concurred in that. They now object to this statement on our part, and say they'd like us--

Q The hearing judge would have decided one way or another, wouldn't he, whether there was or not?

MR. FRIEDMAN: It's also, Mr. Justice, not quite that simple a matter for the government in these situations every time a witness makes this claim to be able to answer then and there there has or hasn't been any overhearing.

Q Wouldn't the issue have been threshed out in the District Court if there had been an issue made of it?

MR. FRIEDMAN: I assume so.

Q And the District Court would have decided it and he may have decided it for you; and, if he had, this case would never have been here.

MR. FRIEDMAN: That is correct.

Q Mr. Friedman, suppose the question I asked Mr. Tigar--suppose the man files an affidavit and says that the U. S. Attorney beat me over the head until I confessed. Would the government feel obliged to deny that?

MR. FRIEDMAN: I would think so.

Q Why not deny this?

MR. FRIEDMAN: I'm sorry. In what context is this? I'm sorry.

Q Motion to suppress.

MR. FRIEDMAN: A motion to suppress. I think the government would deny. That would, I assume, be an independent motion to suppress. When we put the case, if I may--

Q I just don't see why the government can't deny it. Does the government deny it now?

MR. FRIEDMAN: Yes, we do deny it. Yes, we do. We say there has been no overhearing of either of these two ladies--

Q When did you find that out?

MR. FRIEDMAN: I don't know when we found it out,

Mr. Justice.

Q You found it out like you usually do. In all the post-Alderman cases you looked around and you often certified in this Court or in some other court there was or there was not an interception.

MR. FRIEDMAN: I assume that when this demand was made, this triggered an investigation and at some point in the proceedings we concluded that there was no basis to--

Q Mr. Friedman, in light of what you now say, why shouldn't we just vacate this and send it back and let you start all over again in the District Court? Why should we grapple with these problems if the case is going to disappear?

MR. FRIEDMAN: I think one problem in this case--in this case--as distinguished from other cases, the claim is now made that they deny this allegation.

Q Then you'll have an issue then to have determined in the District Court. But why should we? Don't we have enough things to do around here without dealing with cases on hypotheses?

MR. FRIEDMAN: The issue, of course, is before the Court in the preceding case. In this case we have this decision of the Court of Appeals that was based on the assumption that there had been illegal wiretapping.

Q I take it, if we sent it back, the Court of

Appeals opinion would be vacated too.

MR. FRIEDMAN: If you vacated the judgment, I think you'd still have the precedent standing. It would be weakened a good bit.

Q If there wasn't any wiretapping; it's just an advisory opinion anyway.

MR. FRIEDMAN: It's perhaps an advisory opinion that I suspect will have considerable impact before the Third Circuit and all the district courts in the Third Circuit.

Q Compared with one of the other cases we had this morning, as of right now what is the "case in controversy" that is before us?

MR. FRIEDMAN: The case of controversy is--

Q Is the opinion of a court, not the judgment. It's opinion, isn't it?

MR. FRIEDMAN: I think the case of controversy, Mr. Justice, is whether or not these witnesses were properly held in contempt for refusing to answer the questions. That's the case of controversy, and that depends on whether they were required to answer the questions in the face of their claim of illegal electronic surveillance. That seems to me is the case of controversy. And there still is a controversy. They still, I'm sure when counsel gets up, will vigorously deny that they had any obligation and they will say, I'm sure,

that despite the government's denial they're entitled to a hearing before they had to testify.

Q I just can't see how both of you together can convince us to take a case where the substance is now gone.

MR. FRIEDMAN: Well, I agree--

Q What's wrong with sending it back and let you stand up in the Court of Appeals or the District Court and saying no, there was no tap?

MR. FRIEDMAN: I cannot find any objection to doing that except all I can say, Mr. Justice, to that is that--

Q The opinion is still there.

MR. FRIEDMAN: The opinion is still there and that the Court of Appeals decided it on that basis. The Court of Appeals decided it on that basis. The Court of Appeals announced a rule in this case.

Q If you told the Court of Appeals what you're telling us, they wouldn't have decided that way maybe.

MR. FRIEDMAN: The Court of Appeals announced the rule in this case.

Q The whole point is the facts haven't changed from the time the case was filed until now. The facts haven't changed. It's that the government took a little time to catch up with the facts. [Laughter]

MR. FRIEDMAN: The Court of Appeals said--it

amended its opinion subsequently to read as follows--

Q Where are you reading now?

MR. FRIEDMAN: This is from an addendum to the Court of Appeals opinion which is contained in Sister Egan's brief in opposition in this case, at page 16; it's this white document.

What the Court of Appeals said was, "Since Sister Egan has not yet been afforded a hearing regarding her allegations of illegal electronic surveillance by the government, for the purpose of this appeal we assume her allegations to be true." So, the Court of Appeals seems to have announced a rule that would, if the government has not denied these allegations, the case will be decided on the basis that those allegations are true, and it proceeded to decide the case on that basis.

Q It seems I've heard that someplace else in law, that where allegations are made and not denied they are considered to be true. Haven't I heard that someplace before?

MR. FRIEDMAN: That's the normal rules of pleading.

Now, the other aspect of this case is that unlike Mr. Gelbard or Mr. Parnas, both of these two ladies before being called before the grand jury, were given full transactional immunity, not the narrow use immunity but the full transaction immunity, which means that neither of these witnesses could be subject to any criminal prosecution or

penalty for any testimony they gave. The facts with respect to both of these ladies are very similar.

In January, 1971, Sister Egan, who is a Catholic nun and the other respondent, Miss Walsh, is not, was subpoenaed to appear before a grand jury sitting in Harrisburg, Pennsylvania investigating various alleged violations of the criminal code. This is the same grand jury that returned the indictment in the Berrigan case. The first indictment in that case was returned two days before, and Sister Egan was named as an unindicted co-conspirator.

Sister Egan appeared before the grand jury and refused to answer any questions, claiming that this would violate her rights under the Fifth Amendment. And following this she was first given more limited so-called use immunity and then the day after when it became apparent to the government that she would continue to assert her privilege under the Fifth Amendment, she was given the full transactional immunity.

She was then called before the grand jury and refused to answer any questions other than giving her name and her address. She was asked and refused to answer approximately 70 or 80 other questions. And following her refusal, the District Court held her in civil contempt and ordered her committed until she purged the contempt.

She gave six different grounds for refusing to answer the questions. And the pertinent one set forth at page 54 of the record here--this is the provision relating to the alleged illegal wiretap, number four at the top of page 54, where she said: "The evidence on the basis of which I have been named as a non-indicted co-conspirator, subpoenaed to testify and answer questions was secured by illegal wiretap. In addition, all or some of the telephone communications monitored by the United States Government involve communications within the Roman Catholic Church of America and specifically between my provincial headquarters and the offices of the Church in New York, Rome, and throughout the United States."

The second witness, Miss Walsh, was called before the grand jury in April of 1971, three months later. She was initially given full transactional immunity. She refused to answer all the questions put to her before the grand jury, and the same thing happened. Both of these ladies were therefore held in civil contempt. A divided Third Circuit reversed by a vote of five to three. All members of the court, all five judges, agreed that the 1968 act gave a witness before a grand jury the right to challenge the evidence which led the grand jury to call the witness. In addition, two of the judges also believed that the Fourth Amendment gave the witnesses this right.

The government's arguments in this case are substantially the same as those which it made in the last case, both under the Fourth Amendment and under the statute. And I would therefore like to turn briefly to the argument that I was making when the Court--of the argument in the previous case terminated. And that is the applicability of Section 3504 to this claim. 3504 is set forth at our brief in the Egan case at page 33, and I had previously indicated that what it did was to limit the total amount of hearings that would be required in cases of electronic surveillance occurring prior to 1968. It had that cutoff date.

And then it goes on and says if there is any hearing before a grand jury upon a claim by a party aggrieved, that evidence is inadmissible because it is the primary product of an unlawful act, defined as electronic surveillance, or the exploitation of such act. The opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act.

Although this refers to the making of such a claim at a proceeding before a grand jury, the claim, to be entertained, must be made by a party aggrieved. And in discussing this section, the legislative history speaks of someone who makes a claim--speaks of a claim by a defendant, uses the word by a defendant with standing to challenge the unfair practices. A defendant is ordinarily not viewed

as someone who is a witness before a grand jury. And, furthermore, standing comes again to the question I have previously discussed as to whether or not--whether or not--a mere witness before a grand jury has standing.

And it seems to us it would be most anomalous, we think, that the Congress,which in this statute in 1970 was attempting to reduce the volume litigation growing out of claims of illegal electronic surveillance, would at the same time have given to grand jury witnesses a right to challenge evidence before a grand jury that they didn't have under the 1968 act. We think that the whole basic purpose of this statute was to reduce the amount of litigation relating to surveillances taking place before June, 1968. And, indeed, the legislative history indicates that Senator McClellan stated that this section was limited to surveillance that occurred prior to June, 1958.

Of course, we deny any surveillance, but if there was any surveillance in the case, it would appear that it took place before that date.

I would like to now turn to another argument in this case--

Q Before you leave 3504, if you're going to leave it now, is this the whole section, pages 33 and 34--

MR. FRIEDMAN: Yes.

Q --that relates to the Egan case? It doesn't

say what happens after the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act. It stops in mid-air. It doesn't say what happens--

MR. FRIEDMAN: I think a fair reading of this is if the government denies, that presumably is the end of it unless--

Q It doesn't say so.

MR. FRIEDMAN: It doesn't say so. But it does go on then to say that in the event, presumably if the government admits it, it then goes on, it seems to me and that I think is a preliminary determination. The first thing to find out is whether the government acknowledges it or denies it. If the government acknowledges it--

Q You read it that if the government denies it, that's the end of it?

MR. FRIEDMAN: I would think so.

Q That's not, I know, the issue here.

MR. FRIEDMAN: And then if the government acknowledges it, if they meet the standards of the two next subsections, then you have the hearing on it.

Now, the argument is made by the respondents in this case and by the position adopted by some of the judges in the Court of Appeals that it would violate Section 2514--I'm sorry, 2510--if the government used this evidence before the grand jury. That is, they say 2510 prohibits the use of

any evidence before the grand jury if the evidence is obtained in violation of the statute; and, therefore, the argument is that the District Court should not lend its authority, in effect, to permit or force the prosecutor to violate the statute and commit a crime.

I think this argument fails to take adequate account of the precise language of the statute. The statute says not that the receipt in evidence of any intercepted communication that is prohibited if it violates the statute. What it says is its prohibited if the disclosure of that information would be in violation of this chapter. That is, the prohibition is the use before a grand jury or court of any evidence if the disclosure of that would violate this chapter. That's in Section 2515 at page 60 of the Egan brief now--I have shifted to the Egan--

Q Of the respondents' Egan.

MR. FRIEDMAN: Of the respondents' Egan brief.

So, therefore, we must look to other sections of the statute to ascertain what disclosure is prohibited. And the prohibitions on disclosure contained in 2511, which begins at page 53 in the Egan brief, and the critical sections, subsections (c) and (d) on page 54, prohibit willful disclosure or willful use of any intercepted communication knowing or having reason to know that the information was obtained through the interception in violation

of this subsection. That is, the disclosure is only illegal, it seems to us, if in fact the person using it knew or has reason to know.

In this case, assuming arguendo there was an interception in this here, there is another provision in this statute, Subsection 3, pages 55 to 56, which was before this Court several months ago in the Keith case, U. S. against United States District Court, Subsection 3 at pages 55 to 56, which says nothing in this chapter shall limit the constitutional power of the President--about halfway down the first paragraph on page 56--"to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or violence or other unlawful means, or against any other clear and present danger to the structure or existence of the Government." Then it goes on and says, "The contents of any communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable."

Our position is that as long as it has not been definitively determined that the interception without a warrant in national security cases is illegal--and the Court, of course, will decide that in the Keith case--at least as long as that is the situation, the prosecutor could not be

charged with knowing or having reason to know that any evidence obtained as the result of an allegedly illegal interception of anyone's telephone conversation in this field, that the disclosure of that would be in violation, because the prosecutor as far as he was concerned had every reason to believe that at least at that point it was permissible to conduct any such electronic surveillance.

Q This argument you didn't make in the last case. It's equally applicable to both cases, is it not?

MR. FRIEDMAN: Oh, yes. Oh, yes.

Q The argument you're now making.

MR. FRIEDMAN: In fact, it's more applicable in the last case. It's clear in the last case, it seems to me, that a prosecutor who knows that the interception has resulted from an order of the District Court cannot be tried with knowing or having reason to know that it is in fact illegal because of some allegations that there were some irregularities in the thing.

Q This argument is equally applicable to both cases, except a little more so to the previous one.

MR. FRIEDMAN: That's right.

Q And not necessary, on the other hand, for you to win either case. It's an alternative argument, is it not?

MR. FRIEDMAN: That is correct.

Q In both cases.

MR. FRIEDMAN: That is correct, Mr. Justice.

And in conclusion I'd just like to say one other thing, which is in this whole area it's very easy for witnesses before a grand jury to make allegations that they have been subjected to illegal wiretapping. They are coming all the time; the allegation is that they have been subjected to illegal wiretapping.

In this case, at page 87 and 88, the record, is a motion made by Miss Walsh for disclosure of electronic surveillance. And there's a long list of things she wanted to have disclosed, various things, and it's not easy for the government to answer these questions. If, for example, A's telephone were tapped, over the period of a week they might here hundreds of telephone--

Q So, you say that the government really should have the privilege of either complying with disclosure or having litigated whether the person making the motion is an aggrieved person, that you should have the privilege of saying, "You aren't entitled to have your question answered"?

MR. FRIEDMAN: Precisely.

Q And even though that involves difficult constitutional and statutory questions perhaps.

MR. FRIEDMAN: We think that's what the statute provides, and we think the witness before the grand jury is

fully protected--

Q So, when a witness says or when a person makes this motion for disclosure, as in this case, and says, "I am an aggrieved person. B, please disclose," you say you may deny that they are an aggrieved person and until that is settled, even though it involves an appeal here, you don't have to disclose?

MR. FRIEDMAN: Because once this issue is decided, Mr. Justice, by this Court, whether or not a witness is an aggrieved person, it seems to me that will end that aspect of the litigation.

Q Unless you lose.

MR. CHIEF JUSTICE BURGER: Mr. Levine.

ORAL ARGUMENT OF JACK J. LEVINE, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Let me say a word or two about the question that has come up with regard to the procedural posture that this case is in now. The position that the government took in the trial court was that they would refuse to affirm or deny the existence of the surveillance not because they didn't know but because the witness had no such right. And, indeed, in the Court of Appeals government counsel was asked by Chief Judge Hastey, "Do you want to take a position on

that?" or words to that effect. And government counsel, as I recall, responded, "No, our position is that it's irrelevant because the witness doesn't have the right to raise the issue.

There was no denial in this case until the government filed its petition for certiorari. And any allegations with regard to the existence or non-existence of surveillance in this case is outside of the record.

I might also say in that regard that inasmuch as the government refused to affirm or deny surveillance in the District Court, they also refused to say whether or not a court order or a national security tap was involved. So that to the extent that the government argues that it may not be a violation of the criminal section of the statute, if there is such a specification, their representation, I would submit, is likewise irrelevant. In the past it was decided in the District Court and on appeal; the government refused to say anything. And on that basis the Court assumed that there may have been surveillance and that, more important, decided that the witness had a right to raise the issue and had a right to get a reply from the government.

If we read the government's brief in the Egan case, and indeed in the early portion of government's counsel argument, there is an awful lot of discussion of the exclusionary rule. And I think it's most important to

analyze why it is that the government relies so heavily upon what they call the exclusionary rule in past cases of this Court dealing with the use of testimony in subsequent proceedings.

Their argument and their use of the exclusionary rule is based upon a critical premise which, we submit, is false. And that premise is that Sister Egan in the trial court sought to invoke the exclusionary remedy in order to remedy a past and prior violation of her statutory rights independent of what was happening in the grand jury. And I would submit to this Court that that premise is false and that really what we're involved with here is a question of whether or not it violates the law to compel within the grand jury room, both statute and constitutional, within the grand jury room divulgence and disclosure of illegally ascertained conversations. And when the Court asks the question, What's the harm to the witness if the evidence isn't being used against him or her?, the answer is that the harm to the witness comes from the divulgence and the disclosure which is prohibited by the statute. And, as you look at Section--

Q What is the disclosure in the grand jury? If someone just asks a person about some events and it doesn't involve quoting anything out of an overheard conversation or even referring to it, but nevertheless it

had its roots in that conversation, is that disclosure?

MR. LEVINE: I would submit that that would be use under--I forget; (c) is use and I think subsection (d) is disclosure under--

Q What was involved in here, did you think, disclosure of the conversations or use or both?

MR. LEVINE: Well, we never found out because there was--

Q What are we arguing about then? What are we arguing about now, quoting conversations or--

MR. LEVINE: Questions as to the purport and meaning of the conversation, what was said, and questions of that kind. I would suggest to the Court in that context that the statutory definition of the contents of a communication includes not only the actual words spoken but the purport and content of the message.

And so, as we look at 2511 (c) and (d), we find that not only has the actual interception been deemed an invasion of rights of privacy, but the use in the disclosure as well has been made a statutory crime. And in addition to 2511 (c) and (d), we have 2515 which has already been referred to in the previous arguments. 2515 is an absolute prohibition against the use or introduction in a grand jury of evidence obtained in violation of any provision of a chapter. And I might mention in that context, Your Honors,

that 2517, Subsection 3, specifically says that there can be no testimony in a grand jury as to illegally--as to electronic surveillance evidence unless that evidence was obtained by means authorized by the chapter. So, not only do we have the criminal sanction in 2515, we have another separate section which talks about use of evidence in a grand jury on the condition that it's obtained by means authorized under the statute.

The government has suggested that notwithstanding the broad language of 2515 and the existence of the criminal sections and so on, that there is some limitation imposed by the motion to suppress section, which is 2518, Subsection 10(a). The first requirement of 2518, 10(a), is that Sister Egan by an aggrieved person, and an aggrieved person is statutorily defined as a person whose own conversations were intercepted, whose own wire or oral communications were overheard. There is no requirement that such a person be a defendant in a criminal proceeding. And, indeed, Congress expressly rejected that condition in the statute.

In 1967, Senator McClellan introduced a bill into the Senate which defined "aggrieved party" as a defendant in a criminal proceeding. That bill wasn't passed, and in 1968 Senator Hruska introduced a subsequent bill which changed that language and defined "aggrieved person" as a

party to a communication. The legislative history isn't cited in the brief, but a section-by-section comparison of these two provisions can be found in the Congressional Record at Volume 114, Part 10, 90th Congress second session, page 13,211.

In addition to the aggrieved party terminology--aggrieved person terminology in the section--which Sister Egan clearly is, there can be no doubt that a grand jury inquiry constitutes a proceeding as that word is used in the statute; and, indeed, Hale v. Henkel, which was mentioned earlier by Mr. Justice Douglas, is most apposite in that regard, as are cases like Cobbledick v. United States or other cases which arise in the context of contempt hearings held to adjudicate issues that arise in the grand jury.

And in addition to the meaning of the word "proceeding," there can be no doubt that a proceeding on an order compelling testimony initiated by the government is also a proceeding before a court under authority of the United States, which is the language in 2518, 10(a), and hearing on a government application for contempt would likewise be covered by the statute. And, indeed, Judge Gibbons's dissent in the Egan case in the Third Circuit concedes this point, concedes that notwithstanding any issue as to whether or not a grand jury is covered, certainly a contempt application or hearing on an order to compel

testimony would be covered by the statute, and I believe he refers to that as a non-issue.

The government draws--tries to draw--support from the omission of the term "grand jury" in 2518, 10(a). And it parallels that omission with the omission of "legislative committees," and it says that those two omissions indicate an intent on the part of Congress not to make the 2515 remedy available to witnesses before such bodies.

The reference to omission of legislative committees is really very interesting, because the analysis--let me step back for a second. As we've analyzed 2518, 10(a), we've drawn a distinction between the situation of an actual witness as opposed to someone who isn't subpoenaed and therefore not in the grand jury or not brought before the court, a distinction between parties and non-parties, and there is a very curious sentence in the legislative history of 2518, 10(a), from which we draw support for our position on the distinction.

The sentence--and I believe it may have been referred to by government counsel--in explaining the omission of legislative committees says, "Nor was this provision intended to grant to the federal courts jurisdiction over the Congress itself," and the case cited is Hearst v. Black. I will come to Hearst v. Black in the sentence, but there

is something very curious about the sentence from the legislative history that I just spoke of. Not only does it appear to contradict the inclusion of legislative committees in 2515, it also appears to conflict with the line of cases in this Court, most notably Watkins v. United States, which do hold that the federal courts do have the power, indeed the duty, to review the propriety of congressional action if and when a legislative witness is brought to a contempt proceeding. And then we turn to Hearst v. Black which is cited in the government's brief. Hearst v. Black was a case in which a Senate subcommittee subpoenaed telegraph records from the telegraph company and not from Hearst. Presumably those records related to Hearst and he sought to intervene to prevent the committee's use of those documents in its proceeding. And what the court said was that inasmuch as Mr. Hearst hadn't been subpoenaed, wasn't before the committee, hadn't been ordered to testify, he couldn't intervene and simply stop the proceedings. It was significant the case went on to say that if Hearst had been before the committee as a subpoenaed witness, he would have the right to litigate the lawfulness of the committee's action. And that's precisely what we're talking about in our analysis of 2518, 10(a), when we say there is a world of difference, and it's not too hard to ascertain, in answer to the question that Mr. Justice White,

I think, asked earlier between someone who subpoenaed and therefore before the court to compel testimony or any contempt hearing, and someone who isn't subpoenaed. There's a difference between Sister Egan who's called in and compelled to divulge and disclose her own conversation as opposed to a third party agent or somebody else who comes in and testifies without her knowledge.

Notwithstanding the fact that it would still be a crime if the agent did it, she may not be able to stop that. And such a holding would be consistent with cases like Hearst and Blue v. United States, which I'll come to in a moment. There is a very important distinction between someone who is subpoenaed and is compelled to testify and someone whose own right to privacy may have been invaded but not by the actions of the prosecutor or the grand jury or the court.

The subject of 18 U.S.C. 3504 has come up. I think that that section is absolutely crucial. The government has said that what could be more anomalous than Congress using in 3504, widening the rights that had been made available in Title 3, which was passed in 1968, because the government's position is that Title 3 didn't give the witness any right. Well, I suggest to the Court that it would be very anomalous if 3504 had changed Title 3 and that in fact it didn't change Title 3 and that, moreover, the inclusion

of grand juries in 3504 was an express adoption of the provision of Title 3 which had been enacted two years earlier.

Moreoever, in that context the government's position that since a witness isn't a party as such to a grand jury proceeding, he or she doesn't have any rights to object to surveillance. That position makes the plain language of 3504 nonsensical because not only does 3504 include the term grand jury, it also talks about aggrieved parties. And clearly what that section--

Q In a grand jury who are the parties?

MR. LEVINE: Who are the parties?

Q Yes, sir.

MR. LEVINE: Well, the witnesses in the proceeding--

Q There are no parties in a grand jury except the government. You don't become a party until the government indicts you.

MR. LEVINE: I would suggest, sir, that you become a party to a judicial proceeding if and when the government seeks affirmatively to bring you in before a judge and seek to use the power of the court to compel your testimony.

Q Anyway, I thought the question of party was party to an oral communication. Aggrieved person means party to an oral communication. Is that what you're talking about?

MR. LEVINE: Yes, sir. I understood Mr. Justice Marshall's question to be, Who would be a party to a grand jury proceeding? Am I correct?

Q My whole point was you were putting so much emphasis on whether somebody was a party or not at a grand jury, they are talking about aggrieved parties, they are not talking about parties in the official sense in a grand jury.

MR. LEVINE: No, Your Honor, I wasn't talking about--

Q Well, that's what I was trying to find out.

MR. LEVINE: I was talking about the significance of being involuntarily made a party to a court proceeding in which the evidence is sought to be compelled from you and then further being made a party to a contempt proceeding. And what our position is, and indeed there was no pre-testimony motion to suppress filed in this case, is that if and when the government seeks affirmatively to invoke the power of the court, the court is duty-bound not to compel testimony, to compel divulgence and disclosure in express violation of 2511 (c) and (d), unless and until there has been a determination that the surveillance was lawful.

Q Do you understand the government's position to be that no one may challenge on the basis of being in conflict with this act, the introduction of any evidence before a grand jury?

MR. LEVINE: Your Honor, are you talking about course in document, like Blue--

Q At any time.

MR. LEVINE: I would say--

Q The government clearly claims that no witness before a grand jury may challenge the illegality of the evidence which the government is using.

MR. LEVINE: Yes, sir.

Q How about anybody else?

MR. LEVINE: The defendant can't challenge it because he hasn't been indicted yet presumably, and once he is indicted and you're presented with a Blue kind of situation, then he's got adequate pre-trial, trial, and post-trial motions that he can use.

Q May the defendant challenge the indictment itself?

MR. LEVINE: So far as I know, there aren't any constitutional cases on that. I can refer the Court to--

Q It seems that 3504 at least contemplates the possibility that somebody may be challenging the introduction of some evidence before a grand jury some day.

MR. LEVINE: I would suggest that also in that sense--in other words, because it talks about--

Q It talks about a grand jury.

MR. LEVINE: Yes,sir, and certainly a witness would

have that--

Q I don't know whether a witness would, but they certainly seemed to contemplate that some exclusionary arguments might go on before a grand jury in some context in connection with somebody.

MR. LEVINE: Yes, I would say that's true.

Q Who are they? Who are those people?

MR. LEVINE: Well--

Q You say it's the witness.

MR. LEVINE: It's clearly the witness.

Q Who else might it be?

MR. LEVINE: I would--

Q Is there anyone else before a grand jury but a witness?

MR. LEVINE: I can't think of anybody else, no. Of course, I haven't given it much thought. I mean, it appears to me that the whole--

Q That's your argument though, isn't it?

MR.LEVINE: Yes, sir, but as far as I can conceive, a witness is clearly involved in a grand jury proceeding and if and when he or she is brought to a contempt proceeding or a proceeding on an order to compel grand jury testimony, the witness would have the right to affirmance or a denial of surveillance.

Q Mr. Levine--

MR. LEVINE: Yes, sir.

Q --is it your position that Section 2518, 10(a), even though it doesn't expressly include the word "grand jury," covers grand jury proceedings?

MR. LEVINE: Yes, sir, it is.

Q How do you account for the omission of the inclusion of the term "grand jury"?

MR. LEVINE: Your Honor, the only way that I can account for it is by this distinction that I have drawn between parties and non-parties.

Q There can be parties and non-parties in any number of situations. That wouldn't go to the substantive forum in which they were participating.

MR. LEVINE: Well, yes, sir, it would. Take the situation where there has been some illegal--there has been an invasion of privacy under the statute and the person whose own privacy was invaded was not subpoenaed before the grand jury but some third party was called as a witness to introduce the tapes or whatever. That would be a situation in which the person whose rights were invaded would not be--under 2518, 10(a)--would not be able to keep that evidence out of the grand jury, because he or she wasn't actually put forth. That's the kind of example I could think of of a situation where right be being violated under--in a grand jury--but it would make sense to exclude--well, I'm not being

clear. What I'm basically saying is that there are some situations where you would have an invasion of rights in the grand jury, but there wouldn't be an appropriate forum in which the person whose rights were invaded would be able to litigate the issue. And traditionally the way these cases have come up is that you don't get a decision from the foreman of the grand jury or whoever as to whether or not your rights are being violated; you refuse to testify for one reason or another and then you're brought before the court. And our position is that anybody who is put in that position does have standing under the statute.

Q Because it refers to the word "court." You say that is sufficient, even though it doesn't mention grand jury?

MR. LEVINE: I think it's sufficient either way. And I think that--

Q Why did Congress include "grand jury" in one section and not in another?

MR. LEVINE: Well, for the same reason that they included "legislative committee" in one section and not in another. There may be situations where your rights are being violated there, but inasmuch as you're not a party there is nothing you can do about it in that context. You may be able ti file a civil suit or something like that. That's the only way I can account for the omission, and I

think that for present purposes and in the way in which this case arose the issue may not be crucial because there wasn't any motion to suppress filed pre-testimony. The issue arose at the--there was a refusal to answer and then the witness, Sister Egan, was brought to the hearing on the application to compel testimony, and then the contempt proceeding.

Now, really, I think it's important to understand that what the government is saying in this case is that not understanding 2511 (c) and (d) and not understanding 2515 and not understanding 3504, that these statutes just don't apply because "grand jury" doesn't mean grand jury, it means something else. And to divulge or use or disclose doesn't mean that, it means something else. And not only are they urging that position for the proposition that the witness doesn't have standing, they are saying in addition that when the witness is brought before the court, the court has got no power to do anything about it and, in fact, has to compel without choice the commission of a statutory crime through the express provisions of 2511. And I would suggest to this court that that's an unacceptable interpretation both of the statute and apart from the statute under the supervisory power of this court, and I would suggest a case like Elkins v. United States where you've got the imperative of judicial integrity involved and indeed

the express legislative finding in Title 3 in Section 801(b) as enacted was the need to protect the integrity of court and administrative proceedings. And I suggest to this Court that Judge Wright was correct in his concurrent opinion in the D. C. Circuit when he said that to hold otherwise would be to stand our whole system of criminal justice on its head.

Q Mr. Levine--

MR. LEVINE: Yes, sir.

Q --what would have been your position in the District Court if the government had done what it has done in this Court and denied in the words of 7504 the occurrence of the alleged unlawful act?

MR. LEVINE: Denial by way of affidavit in the absence of any evidence to the contrary has been accepted by every court that has had this question before. It has happened in the Third Circuit since Egan came down. It has happened in the First Circuit--

Q You mean if the government had come in with an affidavit and denied any wiretap and the interception of any conversation with Sister Egan, that would have been accepted without more? Is that what you're saying?

MR. LEVINE: In the absence--I would say that's probably what would happen, yes, sir.

Q And then you would not have been here.

MR. LEVINE: I think that's right, yes. I don't think there is any question about it. Indeed, the other cases which--

Q Now the government tells us here it does what perhaps it should have done in the District Court.

MR. LEVINE: Well, all I can say is that insofar as Sister Egan is concerned, if they had done that there, this case wouldn't be here and she would have either testified or been jailed. But in the posture--

Q Why shouldn't we let this go back to the District Court and vacate everything that has come up here and let it go back and start over again?

Q Before Sister Egan would be sentenced to contempt, though, without these legal issues being decided, if she's presented here, I suppose she ought to know, have the opportunity to answer or not on the assumption that there wasn't any wiretapping.

MR. LEVINE: I'm sorry, Your Honor, I didn't follow that.

Q If a witness for a grand jury refuses to answer on the assumption, because the government won't say anything else, on the assumption that there has been illegal tapping, that's one thing. But if she refuses to answer, knowing that there hasn't been any taps, that's another thing.

MR. LEVINE: Yes, sir.

Q I just understood you to say that if that had happened, she'd either be in jail with the keys to the jail in her pocket, or she would have testified.

MR. LEVINE: Yes, sir, and that's what's happening in every--

Q She has been adjudged in contempt.

MR. LEVINE: Yes, sir.

Q So, what we'd have to do would be vacate the adjudication and contempt and everything else that has happened and go back and have the government file its affidavit and deny that there was ever any tap or any interception of any oral communication of hers, and that then puts her in a position where she can go back before the grand jury and testify or not; is that it?

MR. LEVINE: Yes, sir, and that is what has happened in the Marcus case in the First Circuit and in the other cases that have come up. In other words, the government took the position that she doesn't have a right to know either way, and she said that she did and that's how the case came up on appeal.

Since then the government has taken a position--a different position--in a number of cases and have filed wiretap disclaimers. They have done it in the Third Circuit, the First Circuit, the Sixth Circuit, I believe, or the Seventh Circuit, and indeed they have done it in the Ninth

Circuit in the Russo case--

Q I have the impression--I think I'm right--that this Court has accepted disclaimers of wiretapping made by the Solicitor General and acted on it without more.

MR. LEVINE: You mean--

Q After the Alderman decision.

MR. LEVINE: Well, she--I'm not sure I follow this. But I--what I'm trying to say is that if in fact there is a remand, it has to be for the purpose, I would say, of the government filing its affidavit, having her brought before the court and said, "Okay, the issue is settled now. Will you or will you not testify?"

Q That's what I'm suggesting.

MR. LEVINE: Yes, sir.

Q And vacate the present outstanding adjudication of contempt to give her that opportunity.

MR. LEVINE: Yes, sir.

Q Unless you don't want to vacate it.

MR. LEVINE: No, I don't see how you--it seems to me that--well, quite frankly I actually hadn't thought about this, to be perfectly honest with you. The case is going to be decided. If in fact it's decided adversely to us, that's it. If it's decided favorably to us, then there will be a remand anyway for the same purpose that you just suggested, that the government put the affidavit in--

Q If we decided, we're deciding something of a hypothetical case, are we not?

MR. LEVINE: Well, not on the record before the Court.

Q Well, it is now. The Solicitor General says there has been no wiretapping.

MR. LEVINE: Well, first of all, the Solicitor General is not the person that--

Q Mr. Justice Brennan just suggested to you that perhaps this Court in past cases have accepted here the Solicitor General's representation that there hadn't been any wiretapping.

Q Even though nothing had been done of that kind below.

MR. LEVINE: Yes, sir. Well, if in fact that's the case, then I would say that there's no difference. But there definitely has to be--this affirmation has to be in the record.

Q Your point is, I suppose, that in the previous case we're going to have to decide this issue. And if we accept the government's argument in the previous case, then it doesn't make any difference whether or not there was or was not a wiretap.

MR. LEVINE: Yes, sir.

Q And the government's right. Then your client

has been rightfully held to be in contempt, even under the assumption, contrary to the fact as it now presently appears, there was illegal wiretapping.

MR. LEVINE: Yes, sir. The issue--

Q The issue is going to be decided in the previous case. That's your point, isn't it?

MR. LEVINE: Right. Regardless of what happens, one way or another the issue is going to be decided. If it's decided adversely to us--

Q I just don't understand that. Why should your client be in contempt no matter how we decide the other case? If the affirmation of denial is made below and she goes and is willing to appear and testify before the grand jury, and because we decide the other case in the government's favor, why should she have gone to jail?

MR. LEVINE: I'm sorry, I thought what I was saying before was that she can't be held--i in fact there is a denial on the record--she can't be held in contempt until when confronted with that she says--

Q That's right. And she says that unless she won't appear to testify--

MR. LEVINE: That's right, yes, sir. I'm sorry. When I say that's what happened in the Marx case, that's exactly what happened in the Marx case.

MR. CHIEF JUSTICE BURGER: Your time is up,

Mr. Levine.

MR. LEVINE: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Mr. Friedman, we'll go through and you have four minutes left.

REBUTTAL BY MR. FRIEDMAN

MR. FRIEDMAN: I'd just like to say to Mr. Justice Brennan, I think it's important to look at page 46--

Q Which brief now?

MR. FRIEDMAN: --of the government's petition.

Q Which case then?

MR. FRIEDMAN: This is in this case, in the Egan case. Forty-six of the government's petition which contains the opinions of the Court of Appeals, the very last sentence of the opinion says, "The judgment of contempt would be vacated and the case remanded for a hearing to determine whether the questions propounded to Sister Egan resulted from illegal electronic surveillance directed at her."

Q Oh, you mean it has already been vacated, the contempt?

MR. FRIEDMAN: Yes, the contempt has been vacated because the Court of Appeals has reversed the District Court's decision, determination, of contempt, and has said that Sister Egan was entitled to litigate this issue in this context.

Q The Court of Appeals decided the questions on the merits.

MR. FRIEDMAN: That's correct.

Q Without knowing whether there was electronic surveillance or not.

MR. FRIEDMAN: That is correct. And, of course, our position, as I've indicated, is that we do not think in this situation she is entitled basically under the statute to litigate this issue at all.

MR. CHIEF JUSTICE BURGER: Gentlemen, the case is submitted.

[Whereupon, at 3:08 o'clock p.m. the case was submitted.]

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