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Electronic Surveillance--Grand Jury Contemnor Denied Suppression Hearing (In re Persico)

Christopher R. Belmonte

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ELECTRONIC SURVEILLANCE — GRAND JURY CONTEMNOR DENIED SUPPRESSION HEARING

In re Persico

Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, later codified at 18 U.S.C. §§ 2510-20, in order to remedy the "totally unsatisfactory" emerging body of law[1] relating to electronic surveillance.[2] Nonetheless, confusion resulting from a conflict in the language of sections 2515 and 2518(10)(a) may have thwarted this goal.[3] Section 2515 excludes all evidence derived from illegal electronic surveillance from certain enumerated proceedings, listing, *inter alia*, a grand jury examination.[4] However, section 2518(10)(a), providing for the motion to suppress such evidence, does not include a grand jury proceeding among those wherein the motion may be made.[5] This seeming inconsistency places the witness in an unenviable position. He may possess a statutory right to exclude certain evidence from a grand jury's consideration and thus prohibit a

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1 S. REP. No. 1097, 90th Cong., 2d Sess. pt. 1, at 67-69 (1968) [hereinafter cited as S. REP. No. 1097]. The law was thought to be intolerable from the viewpoint of either privacy or justice. For a capsule history of the law prior to the Act, see 3 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 665 (1969).

2 Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized.

S. REP. No. 1097, *supra* note 1, at 66. This purpose is to be effected by the narrow prescriptions in §§ 2516 and 2518 of the instances where interceptions may be authorized and by the imposition of criminal and civil penalties in §§ 2511 and 2520 for unauthorized interceptions and disclosure of the contents of intercepted communications.

3 *See, e.g., In re* Evans, 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972); *In re* Egan, 450 F.2d 199 (3d Cir. 1971) (en banc), *aff'd sub nom.* Gelbard v. United States, 408 U.S. 41 (1972); United States v. Gelbard, 443 F.2d 837 (9th Cir. 1971), *rev'd*, 408 U.S. 41 (1972); Dudley v. United States, 427 F.2d 1140 (5th Cir. 1970). For a discussion of the impact of the linguistic inconsistency of the statute, see 33 OHIO ST. L.J. 181 (1972); 25 VAND. L. REV. 206 (1972).

4 18 U.S.C. § 2515 (1970) provides:

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

5 18 U.S.C. § 2518(10)(a) (1970) provides in part:

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

line of questioning based on such evidence. Yet, he would be incapable of asserting that right since the remedial motion to suppress such evidence would be unavailable to him.[6]

The Supreme Court took a step toward resolving this conflict in *Gelbard v. United States.*[7] *Gelbard* held that grand jury witnesses, having refused to answer questions allegedly based on illegal electronic surveillance, could invoke the exclusionary rule as a defense in contempt proceedings[8] initiated for such refusal.

In *In re Persico,*[9] the Second Circuit considered the extent to which a grand jury witness, currently subject to a contempt proceeding, could test the legality of the Government's surveillance which led to the grand jury's line of questioning. In affirming a contempt citation issued by the district court, the Second Circuit held that a grand jury witness "is not entitled to a plenary suppression hearing to test the legality of that surveillance."[10] Relying on Justice White's concurring opinion in *Gelbard,* as well as the legislative history of the

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[6] This result is not inadvertent. The Senate report of the Act provides: "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." S. REP. No. 1097, *supra* note 1, at 106. The problem is one of reconciling this provision with the exclusionary rule of section 2515. *See generally* 8 J. MOORE, FEDERAL PRACTICE ¶ 6.03 (3), at 6-41 (2d ed. 1974).

[7] 408 U.S. 41 (1972). *Gelbard* represented the consolidation of two separate actions. The Court reversed United States v. Gelbard, 443 F.2d 837 (9th Cir. 1971) and affirmed *In re* Egan, 450 F.2d 199 (3d Cir. 1971) (en banc).

In *Gelbard,* several grand jury witnesses were cited in contempt for their refusal to testify. The Government argued that the challenged wiretapping was authorized by the district court pursuant to 18 U.S.C. § 2518 (1970). The witnesses claimed that they should be allowed to inspect the Government's files and records relating to the electronic surveillance and should be afforded an opportunity to suppress the use of any evidence so secured. The Ninth Circuit affirmed the contempt, holding that

> a witness in a grand jury proceeding has no right to resort to a court to secure authoritative advance determination concerning evidentiary matters that arise, or may arise, or to exclude evidence to be used in such a proceeding.

443 F.2d at 838.

In *Egan,* the grand jury witness was cited in contempt for refusing to testify. The witness alleged that the grand jury's line of questioning was the product of illegal electronic surveillance. The Government failed to respond to the allegation. In vacating the contempt order, the majority of the Third Circuit held that no court could order a witness to testify where such testimony would violate the express congressional prohibition of § 2515, thus avoiding the issue of standing to suppress under § 2518(10)(a). 450 F.2d at 209. *See* 8 J. MOORE, FEDERAL PRACTICE ¶ 6.03(3) (2d ed. 1974); 85 HARV. L. REV. 1060 (1972).

[8] 28 U.S.C. § 1826(a) (1970) provides in part:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court . . . may summarily order his confinement . . . until such time as the witness is willing to give such testimony . . . .

[9] 491 F.2d 1156 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3225 (U.S. Oct. 21, 1974). Justice Douglas would have granted review of *Persico. See* 43 U.S.L.W. 3240.

[10] 491 F.2d at 1162.

Act, Judge Waterman interpreted the conflicting provisions "as requiring exclusion only when it is clear that a suppression hearing is unnecessary . . . ."[11] Accordingly, the court's unanimous decision narrowly limits the application of *Gelbard* to instances where the Government's electronic surveillance is "concededly unlawful."[12]

Persico, granted "use" and "derivative use" immunity,[13] had been called before a federal grand jury investigating the control of racketeers over legitimate businesses. When questioned as to his occupation, Persico refused to respond, claiming that the question was the product of illegal electronic surveillance. The Government, conceding the questioning stemmed from electronic surveillance, urged the legality of the surveillance based upon three court orders. The district court examined the court orders in camera and, finding them proper, denied Persico's motion that a suppression hearing be held to determine if the surveillance was unlawful.[14]

Ordered to testify under threat of contempt, Persico remained silent before the grand jury, clinging to his objection to the electronic surveillance. The district court consequently held Persico in contempt. Subsequent to the contempt citation, Persico reinstituted his motion to suppress and claimed the right to examine the documents upon

[11] *Id.* at 1161.

[12] *Id.* at 1160.

Persico allows a grand jury witness to withhold testimony only when the Government has conceded that the surveillance is unlawful or where its invalidity is patent. *Id.* at 1161. This patent invalidity would exist, for example, where no prior court order was obtained, or where the unlawfulness of the surveillance had been established in a prior judicial proceeding. *Id.*

Any attempt by Persico to establish unlawfulness by prior judicial proceeding was effectively aborted in *In re Persico*, 362 F. Supp. 713 (E.D.N.Y. 1973). Upon notification of the surveillance as required by § 2518(8)(a), and prior to being called as a grand jury witness, Persico applied to the district court for disclosure of the intercepted communications, interception orders, and applications for orders. An examination of these documents would reveal any statutory violation for which an adjudication of unlawfulness might be obtained. *See* text accompanying notes 55-63 *infra*. However, the district court denied Persico's motion as premature, thus forestalling his attempt to procure an adjudication of unlawfulness. The civil remedy provided by § 2530 once improper disclosure or use of the intercepts has been made and the suppression motion under § 2818 (10)(a) for attempted use of the intercepts as evidence were deemed sufficient protection of Persico's exclusionary right under § 2515. 362 F. Supp. at 714. Ironically, when Persico subsequently attempted to exclude the use of the surveillance before the grand jury, Judge Waterman relegated him to a "prior judicial adjudication that the surveillance was unlawful." 491 F.2d at 1162.

Although Perisco might also have filed a criminal complaint under § 2511, commencement of a criminal proceeding would be at the prosecutor's discretion. Furthermore, the Government's good faith reliance on the court order would be a complete defense in such proceeding. 18 U.S.C. § 2520 (1970).

[13] 18 U.S.C. §§ 6002-03 (1970). This immunity was granted to circumvent the witness' fifth amendment privilege. For a discussion of "use" and "derivative use" immunity, see 48 ST. JOHN'S L. REV. 347 (1973).

[14] 491 F.2d at 1158.

which the wiretaps had been authorized. Both requests were denied, as was his concurrent motion for bail pending appeal.[15]

Persico's refusal to testify before the grand jury was based upon his contention that, under *Gelbard*, he was entitled to a hearing to determine the legality of the electronic interceptions before being compelled to testify.[16] Claiming that the surveillance was presumptively illegal,[17] he argued that the mere fact that a court order had been issued should not foreclose a plenary hearing in the contempt proceeding.[18] The narrow question posed for the court's consideration was whether a grand jury witness, in defending against a contempt citation, is entitled to a suppression hearing to test the legality of electronic surveillance conducted under court order.[19]

In responding negatively to this question, Judge Waterman noted that *Gelbard* "technically" did not decide the issue whether a grand jury witness may refuse to answer questions if the interceptions were pursuant to court order.[20] However, the panel relied strongly on Justice White's concurring opinion in *Gelbard*, wherein he intimated that when the Government produces a court order, the interest in preserving the unimpeded functioning of the grand jury should prevail over the witness' interest in testing the legality of the surveillance.[21]

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[15] *Id.* at 1158-59.

[16] *Id.* at 1160.

[17] *Id.* at 1157. *See* note 20 *infra.*

[18] 491 F.2d at 1160.

[19] *See id.* at 1157-58.

[20] *Id.* at 1162.

In *Gelbard*, the Ninth Circuit held that grand jury witnesses had no right to invoke the § 2515 exclusion as a defense in a contempt proceeding. 408 U.S. at 61 n.22. The Supreme Court reversed and remanded, holding that these witnesses are possessed of such right. *Id.* at 52. For purposes of its decision, the Court assumed that despite the court order, the invocation of the exclusionary defense would prohibit the evidence derived from the surveillance from introduction before the grand jury. *Id.* at 46-47. However, the Supreme Court reserved to the district court the resolution of the specific issue of "whether [these witnesses] may refuse to answer questions if the interceptions were pursuant to court order." *Id.* at 61 n.22.

The Third Circuit's decision in *In re* Egan, 450 F.2d 199 (3d Cir. 1971), *aff'd sub nom.* Gelbard v. United States, 408 U.S. 41 (1972), was also based upon the assumption that the witness' allegations of illegality were true since she had not been afforded a hearing. 450 F.2d at 201-02. In *Egan*, however, the Government produced no court order.

It was probably these assumptions upon which Persico relied in claiming that the surveillance was "presumptively illegal." 491 F.2d at 1157. *See* text accompanying note 17 *supra.* However, the district court denied Persico's right to a suppression hearing, not his right to invoke a § 2515 defense. As previously mentioned, the *Gelbard* assumption of unlawfulness was premised on the Ninth Circuit's denial of a right to invoke the exclusionary rule as a defense. Moreover, *Gelbard* makes no mention of an evidentiary presumption of unlawfulness. Although not expressly addressing his remarks to the question of a presumption of unlawfulness, Judge Waterman may have believed that the district court's in camera examination of the court orders was sufficient to rebut any such presumption. 491 F.2d at 1158, 1162. *See* text accompanying note 33 *infra.*

[21] Where the Government produces a court order for the interception, however,

Judge Waterman also examined the legislative history of the Act,[22] discerning two apparently inconsistent statutory policies: "the exclusion of illegally acquired evidence and the maintenance of unimpeded grand jury proceedings . . . ."[23] He concluded that to allow a plenary suppression hearing in order to establish alleged illegality would frustrate the latter aim of the legislation.[24]

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and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute.

408 U.S. at 69-70 (White, J., concurring).

Mr. Justice White's dictum has been subjected to criticism in *In re* Korman, 351 F. Supp. 325, 328 (N.D. Ill. 1972), *aff'd*, 486 F.2d 926 (7th Cir. 1973) and in Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1, 11 (1972). First, the grand jury investigation would be interrupted only as to the witness cited in contempt. Moreover, the interest to be balanced against the due functioning of the grand jury would seem to be the liberty of the witness refusing to testify rather than the abstract "federal wiretap statute." Finally, hearings have not been considered intolerably disruptive of grand jury functioning where common law, constitutional, or statutory privileges are involved. *See* United States v. Dionisio, 410 U.S. 1, 9 (1973), *quoting* Branzburg v. Hayes, 408 U.S. 665, 688 (1972); Note, *United States v. Dionisio: The Federal Grand Jury and the Fourth Amendment*, 73 COLUM. L. REV. 1145 (1973); 85 HARV. L. REV. 1060, 1069 (1972).

22 S. REP. NO. 1097, *supra* note 1. This report has been a fertile source of confusion. *See, e.g.*, cases cited note 3 *supra*; Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1 (1972); Duff & Harrison, *The Grand Jury in Illinois: To Slaughter a Sacred Cow*, 1973 U. ILL. L.F. 635; 60 GEO. L.J. 1340 (1972); 85 HARV. L. REV. 1060 (1972); 33 OHIO ST. L.J. 181 (1972); 25 VAND. L. REV. 206 (1972).

It was the ambiguous language of the report which led Chief Judge Bazelon to declare in *Evans* that "it is our function to interpret statutes, not committee reports . . . ." *In re* Evans, 452 F.2d 1239, 1244 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972).

23 491 F.2d at 1161.

24 *Id.* at 1161-62.

Additional support for the court's decision to foreclose Persico's suppression hearing was gleaned from "[t]he Supreme Court's continuing concern over potential obstructions to the expeditious performance of the grand jury's function [as] illustrated by its recent decision in *United States v. Calandra* . . . ." *Id.* at 1160 n.3. *See* United States v. Calandra, 414 U.S. 338 (1974). However, the court's attempt to buttress its decision by relying on *Calandra* is unpersuasive. *Calandra* denied the extension of a fourth amendment right to exclude evidence from a grand jury. *Gelbard* recognized a grand jury witness' statutory right to refuse testimony by invoking the § 2515 exclusionary rule as a defense in a contempt proceeding. To deny a suppression hearing to vindicate a specifically granted statutory right on the strength of a decision denying the extension of a fourth amendment right is a *non sequitur*. Although *Calandra* expressed concern over the expeditious performance of the grand jury's function, the Supreme Court explicitly distinguished the *Gelbard* holding on the basis of Title III, which "represented a congressional effort to afford *special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance*." 414 U.S. at 355 n.11 (emphasis added).

In United States v. Dionisio, 410 U.S. 1 (1973), the Court stated that the grand jury "must be free to pursue its investigations unhindered . . . *so long as it does not trench upon the legitimate rights of any witnesses called before it*." *Id.* at 17-18 (emphasis added). The Court therein affirmed the order of contempt pursuant to 28 U.S.C. § 1826(a) (1970) which issued after a hearing had been held.

Apart from the absence in *Calandra* of the unique problems posed by the misuse of electronic surveillance, another crucial distinction exists in that the grand jury witness in *Calandra* was not defending a contempt citation, as was Persico. In determining whether Persico had a right to a suppression hearing in defending a contempt citation,

Persico argued that a contempt proceeding is sufficiently removed from a grand jury investigation so as to render inapplicable the proscription against suppression hearings in a grand jury proceeding. This contention was deemed only superficially tenable, the court believing that the contempt mechanism is so closely bound to the grand jury proceeding that "any expansion of the breadth of inquiry" in the contempt proceeding would necessarily inhibit the "smooth functioning" of the grand jury.[25] Persico also asserted that Rule 42 of the Federal Rules of Criminal Procedure, which provides for a hearing whenever the contempt is not committed in the actual presence of the court, should have been applied.[26] The court disposed of this assertion by noting that the purpose of Persico's confinement was coercive, not punitive.[27] Hence, the nature of the contempt was civil,[28] and the summary procedure was therefore applicable.[29]

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the interest to be balanced against the unimpeded functioning of a grand jury would be his right to due process in a proceeding to deprive him of his personal liberty. *See* United States v. Alter, 482 F.2d 1016, 1023 (9th Cir. 1973). In denying Persico's right to a suppression hearing, Judge Waterman erroneously measured his interest as merely a "witness's [*sic*] interest in exploring in depth the validity of the surveillance." 491 F.2d at 1160.

25 491 F.2d at 1162. *But see* Cobbledick v. United States, 309 U.S. 323 (1940), wherein Justice Frankfurter, for a unanimous Court, wrote:

> Whatever right [a grand jury witness] may have requires no further protection . . . than that afforded by the district court *until the witness chooses to disobey and is committed for contempt. At that point the witness' situation becomes so severed from the main proceeding* as to permit an appeal. . . . [T]his too may involve an interruption . . . of the investigation. But *not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail.*

Id. at 328 (citations omitted) (emphasis added). *See also* 9 J. MOORE, FEDERAL PRACTICE ¶ 110.13(2) (2d ed. 1973).

26 491 F.2d at 1162.

Under FED. R. CRIM. P. 42(a), a direct criminal contempt may be summarily punished only if the contempt is committed in the actual presence of the court. Notice and a hearing are required under rule 42(b) for any contempt occurring outside the actual presence of the court. *See* 8A J. MOORE, FEDERAL PRACTICE ¶ 42.04(2) (2d ed. 1974); 3 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE §§ 707, 709 (1969).

27 491 F.2d at 1162.

28 For an explanation of the distinction between criminal and civil contempt, see 8A J. MOORE, FEDERAL PRACTICE ¶ 42.02(2) (2d ed. 1974); 3 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 704 (1969). Professor Moore believes that such a facile distinction is undesirable.

29 *See* 28 U.S.C. § 1826(a) (1970); note 8 *supra.*

The legislative history of § 1826 states cryptically that "[t]he procedure is designed to codify present practice." H.R. REP. No. 1549, 91st Cong., 2d Sess. pt. 6, at 46 (1970). The Ninth Circuit interpreted "present practice" as the application of rule 42(b), which requires notice and a hearing, to a contempt proceeding against a recalcitrant witness under § 1826(a). United States v. Alter, 482 F.2d 1016 (9th Cir. 1973). The Ninth Circuit found that the Supreme Court had "effectively banished" the impression that the word "summarily," as used in § 1826(a), evokes the concept of a summarily punishable direct criminal contempt. 482 F.2d at 1020-31. *See* notes 44-46 & accompanying text *infra.*

Both Professors Moore and Wright regard the use of summary contempt with disfavor. *See* 8A J. MOORE, FEDERAL PRACTICE ¶ 42.02(1), at 42-6 (2d ed. 1974); 3 C. WRIGHT,

The decision of the court in *Persico* indicates that the law relating to electronic surveillance remains in a "totally unsatisfactory" state. By focusing on Justice White's concurring opinion in *Gelbard* and on the rather nebulous history of Title III,[30] as opposed to the *Gelbard* majority's opinion and recent developments in other circuits, Judge Waterman may have overlooked the remedial nature of Title III. Furthermore, the court's holding that a grand jury witness never has a right to a suppression hearing may well eviscerate the effect of *Gelbard*. The section 2515 exclusionary defense will be of little avail if a witness cited in contempt is denied the right to a hearing to resolve genuine issues as to whether the questioning was the product of illegal electronic surveillance.[31] Hence, the witness is consigned "to abandon . . . [his] claim or languish in jail."[32]

Judge Waterman did acknowledge that Persico's claim of unlawfulness was entitled to some type of judicial cognizance. However, he observed that "[i]nasmuch as [the district judge] conducted an in camera inspection . . . [of the court orders], Persico received all that he was entitled to receive."[33] Thus, an in camera inspection was deemed sufficient protection of any right asserted by Persico in the contempt proceeding.

The Supreme Court's opinion in *Gelbard* strongly suggests that a recalcitrant grand jury witness' claim of unlawful surveillance would merit a deeper probe than that afforded in *Persico*. Writing for the majority of the Court, Justice Brennan noted that "the protection of privacy was an overriding congressional concern"[34] in the enactment

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FEDERAL PRACTICE & PROCEDURE § 707, at 165 (1969). No authority was cited by Judge Waterman in applying the summary contempt procedure in *Persico*.

30 *See* note 22 *supra*.

31 *Persico* leaves the witness dependent for the preservation of his exclusionary right upon the integrity and good faith of the Government in conceding that the questioning is the product of unlawful surveillance. Such dependence was generally abhorred by the Supreme Court in Kastigar v. United States, 406 U.S. 441 (1972). *See also* text accompanying notes 66-68 *infra*. For a discussion of the Second Circuit's determination that a prior adjudication of the illegality of the surveillance would justify a witness' refusal to testify, see note 12 *supra*.

32 Cobbledick v. United States, 309 U.S. 323, 328 (1940).

33 491 F.2d at 1162. This aspect of the court's decision is peculiar in light of United States v. Huss, 482 F.2d 38 (2d Cir. 1973). In *Huss*, a trial witness appealed an order of contempt for his refusal to testify. Chief Judge Kaufman, in a unanimous opinion, stated that

> when illegal electronic surveillance has come to light it is the adversary system, not representations by the government and not *in camera* decisions by the court, which must be relied upon to determine whether overheard matter is "relevant" to the taint hearing.

Id. at 50, *citing* Alderman v. United States, 394 U.S. 165, 183-84 (1969). *See also* 3 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 708, at 171 (1969).

34 408 U.S. at 48.

of Title III, and that " '[o]nly by striking at all aspects of the problem [of unlawful surveillance] can privacy be adequately protected.' "[35] This "overriding congressional concern" would seem to merit greater protection of privacy than that afforded by an in camera examination of the court orders. To deny a plenary suppression hearing in the face of the witness' claim of unlawfulness may well be "adding to the injury of the interception the insult of compelled disclosure."[36] A suppression hearing subsequent to the contempt proceeding would come too late to prevent that insult.

Additional factors within the *Gelbard* decision strongly imply that an unyielding witness defending a contempt citation is entitled to something more than an in camera examination of court orders produced *ex parte*. First, the *Gelbard* majority held that section 702 of the Organized Crime Control Act of 1970,[37] entitled "Litigation concerning sources of evidence," established the procedure to be followed " 'upon a claim by a party aggrieved that evidence is inadmissible because' of an illegal interception."[38] The in camera inspection afforded Persico would appear to fall short of the "litigation" contemplated by the *Gelbard* majority. Second, Justice Douglas, concurring in *Gelbard*, forcefully stated that "these witnesses deserve opportunities to prove their allegations and, if successful, to withhold from the

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35 *Id.* at 50, *quoting* S. REP. No. 1097, *supra* note 1, at 69.

36 408 U.S. at 51-52.

37 18 U.S.C. § 3504 (1970). This section provides in part:

> (a) In any . . . proceeding in or before any . . . grand jury . . .
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> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
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> . . . .
>
> (b) As used in this section "unlawful act" means any act [*sic*] the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

38 408 U.S. at 54, *quoting* 18 U.S.C. § 3504(a) (1970).

The Court in *Gelbard* also considered the legislative history of § 2518 which states that "the provision does not envision the making of a motion to suppress in the context of [the grand jury] proceeding itself." S. REP. No. 1097, *supra* note 1, at 106. The Court believed that "[t]his assertion is not ambiguous, for motions to suppress evidence to be presented to a grand jury would presumably be made in court." 408 U.S. at 59-60 n.20.

The Court recognized the rule, as stated in the report, that "[n]ormally, there is no limitation on the character of evidence that may be presented to a grand jury . . . ." *Id.* at 60, *quoting* S. REP. No. 1097, *supra* note 1, at 106. It was stated, however, that "that rule has nothing whatever to do with the situation of a grand jury witness who has refused to testify and attempts to defend a subsequent charge of contempt." 408 U.S. at 60.

The Court then concluded that "suppression motions, as a method of enforcing the prohibition of § 2515, must be made in accordance with the restrictions upon forums, procedures, and grounds specified in § 2518(10)(a)." *Id.* at 61.

Government any further rewards of its 'dirty business.' "[39] Finally, Justice Rehnquist's dissent was premised on the notion that the majority holding would extend a plenary suppression hearing to a recalcitrant grand jury witness. The dissent interpreted the majority as holding that the witnesses "*must* be entitled to the discovery and factual hearing which they seek . . . ."[40] In addition to the apparent misinterpretation of *Gelbard*, Judge Waterman's opinion in *Persico* fails to make any mention of the reaction to *Gelbard* by other circuits. The inquiry in other circuits has focused on whether the grand jury witness has raised substantial issues sufficient to entitle him to a suppression hearing in a contempt proceeding.[41] In *Beverly v. United States*,[42] the Fifth Circuit granted extensive hearings to a grand jury witness defending a contempt charge, despite the Government's denial that any electronic surveillance had taken place.[43] In *United States v. Alter*,[44] the Ninth Circuit determined that "a proceeding in contempt to compel a federal grand jury witness to testify is . . . criminal enough to require the application of Rule 42(b) . . . ."[45] The recalcitrant witness in *Alter* was thus entitled to an "uninhibited adversary hearing" on his claim of unlawful electronic surveillance notwithstanding the Government's denial of any such surveillance.[46] Despite this

39 408 U.S. at 63 (Douglas, J., concurring) (citation omitted). *See also* Justice Douglas' dissent from the denial of certiorari in Meisal v. United States, 412 U.S. 954 (1973).

40 408 U.S. at 79 (Rehnquist, J., dissenting) (emphasis in original).

41 *See, e.g., In re* Korman v. United States, 486 F.2d 926 (7th Cir. 1973); United States v. Fitch, 472 F.2d 548 (9th Cir.) (per curiam), *cert. denied*, 412 U.S. 954 (1973); United States v. Doe, 460 F.2d 328 (1st Cir. 1972), *cert. denied*, 411 U.S. 909 (1973); *In re* Horn, 458 F.2d 468 (3d Cir. 1972). *See also* 8 J. MOORE, FEDERAL PRACTICE ¶ 6.03(3), at 6-41 (2d ed. 1974).

42 468 F.2d 732 (5th Cir. 1972). *Beverly* also allowed a grand jury witness to refuse testimony when his counsel had been subjected to electronic surveillance.

43 After a show cause hearing, the lower court cited the witness in contempt. Under *Gelbard*, the Fifth Circuit vacated the contempt order and remanded for further hearings and entry of findings of fact and conclusions of law notwithstanding the Government's denials of electronic surveillance. *Id.* at 737-38 n.10. The court held that once a claim of illegal electronic surveillance is filed, the district judge should require "specific affirmances or denials under Title 18, U.S.C., Section 3504(a)(1) . . . as the prerequisite to civil contempt orders on refusals by the witness to testify." *Id.* at 752. The court then outlined the requirements for a claim of unlawful electronic surveillance of counsel. *Id.*

44 482 F.2d 1016 (9th Cir. 1973).

45 *Id.* at 1023. In reaching this decision, Judge Hufstedler stated that the interest of an unimpeded grand jury investigation "must nevertheless yield to the paramount due process right of a potential contemnor to have adequate notice and a fair opportunity to defend himself." *Id.* It is submitted that this balance more accurately reflects the interests at stake than the balance employed by Judge Waterman in *Persico*. *See* text accompanying note 21 *supra*. *See also* note 24 *supra*.

46 482 F.2d at 1020, 1024. Judge Hufstedler stated that

> [t]he constitutional guarantee of due process of law means more than a silhouette of justice; it requires that judicial determinations affecting the freedom of the individual be openly arrived at after full, fair, and vigorous debate on both sides of all substantial issues.

authority, the court in *Persico* focused upon, and answered negatively, the question whether the witness would ever be entitled to such a hearing.

Assuming *arguendo* that the holding of *Persico* was meant to be strictly limited to its facts,[47] a suppression hearing in a contempt proceeding should not be precluded by mere production of a court order. Indeed, on facts defying distinction from *Persico*, the Court of Appeals for the First Circuit, in *In re Lochiatto*,[48] reached a conclusion inconsistent with that of the Second Circuit. In *Lochiatto*, the district court had held a recalcitrant grand jury witness in contempt after having conducted an in camera examination of court orders produced by the Government.[49] Chief Judge Coffin, writing for a unanimous panel, reversed the contempt, finding "no basis in the statute for concluding that prosecutorial say-so is a sufficient guarantee of lawfulness . . . ."[50] Recognizing the importance of the unimpeded functioning of the grand jury, the chief judge also weighed "the articulated congressional skepticism about electronic monitoring as an insidious invasion of privacy to be singled out for *special scrutiny and safeguards*"[51] and the fact that "the affected individual has much at stake."[52] Balancing

Id. at 1024. He then listed the requirements of a claim of electronic surveillance sufficient to raise such an issue. *Id.* at 1026.

47 Judge Waterman narrowly framed the issue as involving electronic surveillance conducted under court order. 491 F.2d at 1157-58. However, his statement of the court's holding was much broader in focus:

> We hold that in contempt proceedings initiated when a witness . . . refuses to answer questions propounded by a grand jury because he claims he is entitled to a hearing to ascertain whether the questions posed are the product of unlawful electronic surveillance the witness is not entitled to a plenary suppression hearing to test the legality of that surveillance.

Id. at 1162.

The Second Circuit has favorably reiterated the *Persico* ruling that a recalcitrant grand jury witness defending a contempt citation is not entitled to a suppression hearing. *In re* Vigorito, 499 F.2d 1351, 1354 (2d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3123 (U.S. Sept. 4, 1974) (No. 74-232). *Vigorito* denied the right to a suppression hearing to a non-witness seeking to exclude evidence from the grand jury's consideration.

48 497 F.2d 803 (1st Cir. 1974).

49 *Id.* at 805.

50 *Id.* at 806. *See also* United States v. Huss, 482 F.2d 38, 50 (2d Cir. 1973), wherein the Second Circuit stated:

> [W]e cannot rely solely on the government's "good faith" representation on such a critically contested issue. Indeed, the government's good faith did not prevent illegal wiretapping here . . . .

51 497 F.2d at 807 (emphasis added). The court noted that "[i]t is clear from *Gelbard* that this concern survives passage through grand jury doors." *Id.*, *citing* United States v. Calandra, 414 U.S. 338, 346, 355-56 n.11 (1974).

52 497 F.2d at 807. Although the witness could avoid incarceration by testifying, the First Circuit

> read the statutory scheme as giving a witness the right to avoid a Hobson's choice between jail and testimony by mounting at least a limited challenge which, like a declaratory judgment, can clarify his rights before he risks sanction.

Id. See note 25 & text accompanying notes 31-32 *supra*.

these considerations, the First Circuit held that the witness was entitled to

> an opportunity for inspection of these limited materials: the authorized application of the Attorney General or his designate, . . . the affidavits in support of the court order, the court order itself, and an affidavit submitted by the Government indicating the length of time the surveillance was conducted.[53]

Thus, the mere existence of a court order did not foreclose the witness' right to disclosure as a preliminary step to a suppression hearing.[54]

It is well settled that the mere existence of a court order does not preclude the unlawfulness of the surveillance. The existence of a court order is merely one of many statutory requirements for a lawful invasion of an individual's privacy.[55] For example, in *United States v. Giordano*,[56] the Supreme Court held that improper authorization of an application for a court order in violation of section 2516(1)[57] rendered the surveillance unlawful and was a ground for suppression under section 2515.[58] Justice White, writing for a unanimous Court, found that "pre-application approval was intended to play a central role in the statutory scheme and . . . suppression must follow when it is shown that this statutory requirement has been ignored."[59] Furthermore, in *United States v. Huss*,[60] the Second Circuit reversed a civil contempt because the Government had destroyed original wiretap tapes in violation of section 2518(8)(a).[61] These decisions evidence

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53 497 F.2d at 808.

54 Indeed the crux of Justice Rehnquist's dissent in *Gelbard* was premised on the notion that the majority had entitled the witnesses to "sweeping discovery as a prelude to a full [suppression] hearing." 408 U.S. at 73 (Rehnquist, J., dissenting).

55 *See, e.g.*, 18 U.S.C. §§ 2516, 2518 (1970).

56 416 U.S. 505 (1974).

57 18 U.S.C. § 2516(1) (1970) provides in part:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications . . . .

58 We conclude that Congess did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specially designated by him and that primary or derivative evidence secured by wire interceptions *pursuant to a court order* issued in response to an application which was, in fact, not authorized by one of the statutorily designated officials must be suppressed under 18 U.S.C. § 2515 . . . .

416 U.S. at 508 (emphasis added).

59 *Id.* at 528.

60 482 F.2d 38 (2d Cir. 1973).

61 *Id.* at 50-51. 18 U.S.C. § 2518(8)(a) (1970) provides in part:

> The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded. . . . They shall not be

the fact that any one of a number of violations of the statutory requirements may be a ground for suppression,[62] and thus represent "just cause" for the grand jury witness' refusal to testify.[63]

The foregoing review of authorities indicates that a recalcitrant grand jury witness, alleging unlawful surveillance as a defense in a contempt proceeding, should be entitled to a plenary suppression hearing to determine the lawfulness of the surveillance. As a court order does not preclude illegality, it should not preclude a full adversarial hearing to test the lawfulness of the surveillance. To forego the adversarial procedure may involve the courts in what ultimately might prove to be illicit governmental activity.[64] Surely the interest in preserving an uninterrupted grand jury investigation cannot be so compelling as to justify this ominous possibility. Obligating a witness who may be the victim of illegal wiretapping to testify under threat of imprisonment, absent a hearing to test the legality of the surveillance, "is to stand our whole system of criminal justice on its head."[65]

An early suppression hearing would not only protect the rights of victimized witnesses but would also avoid the waste of precious judicial time. Judge Waterman's reliance upon the Government to concede unlawful surveillance[66] presupposes that its illegality will be promptly discovered. However, an appellate court has not infrequently

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destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years.

[62] *But cf.* United States v. Chavez, 416 U.S. 562, 570 (1974), wherein a majority of the Court intimated that not every statutory violation would be a ground for suppression. The Court held that misidentification in violation of §§ 2518(1)(a), (4)(d) is not a ground for suppression where the application for the court order had in fact been properly authorized pursuant to § 2516(1). *Id.* at 571. Justice Douglas, writing for the minority, believed that "disclosure is 'in violation of' Title III when there has not been compliance with any of its requirements." *Id.* at 585.

[63] The fact that the grand jury's questioning was based upon inadmissible evidence would constitute "just cause" for the witness' refusal to testify under 28 U.S.C. § 1826(a) (1970). *See* note 8 *supra.*

[64] The Second Circuit in *Huss* presumably realized this danger:

> If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

482 F.2d at 52-53, *quoting* Olmstead v. United States, 277 U.S. 438, 471, 485 (1928) (Brandeis, J., dissenting).

The legislative history of the preamble to Title III of the Act also recognized the protection of the integrity of the court as one of the goals of the Act. S. REP. No. 1097, *supra* note 1, at 89.

[65] *In re* Evans, 452 F.2d 1239, 1252 (D.C. Cir. 1971) (Wright, J., concurring), *cert. denied*, 408 U.S. 930 (1972).

[66] *See* note 12 and accompanying text *supra.*

found it necessary to overturn a contempt adjudication[67] or a criminal conviction[68] due to the discovery of evidence previously overlooked by the Government. The time of both the lower court in rendering its determination and the appellate court on review is thereby needlessly consumed by virtue of the Government's inefficient search of its wiretap records. A full adversary hearing would minimize the instances of such unwarranted expenditure of judicial time and effort.

The decision in *Persico* also appears to frustrate the congressional policy sought to be fostered in the field of electronic surveillance. First, by promulgating Title III, Congress intended to provide uniformity in this area of the law.[69] However, the present conflict in the circuits leaves a grand jury witness' right to object to unlawful surveillance dependent upon the geographic location of the court wherein the objection is raised.[70] Furthermore, *Persico* overlooks the fundamental congressional intent to strictly limit the use of electronic surveillance and the "overriding congressional concern" to protect individual privacy.[71] In keeping with this intent, the federal wiretap statute[72] should be strictly construed in favor of the rights of the individual.[73]

Christopher R. Belmonte

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[67] *In re* Marcus, 491 F.2d 901 (1st Cir. 1974), *judgment vacated sub nom.* Marcus v. United States, 42 U.S.L.W. 3674 (U.S. June 10, 1974); United States v. Smilow, 472 F.2d 1193 (2d Cir. 1973).

[68] Alderman v. United States, 394 U.S. 165 (1969). The *Alderman* Court vehemently rejected the sufficiency of an in camera judgment where the liberty of the individual is at stake. *Id.* at 183-84.

> Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice . . . is nowhere more evident than . . . where an issue must be decided on the basis of a large volume of factual materials . . . .

Id. The application for a court order, the court order itself, and the Government's records of the surveillance constitute the very "large volume of factual materials" crucial to the determination of the lawfulness of the surveillance in *Persico*. The Court in *Alderman* pointed out that adversary proceedings substantially reduce the incidence of error in such a context by alleviating the trial judge's burden of examining the voluminous material in camera and by allowing the litigants to participate in the inspection. *Id.* at 184, 209. Indeed, where the liberty of the recalcitrant witness turns upon the lawfulness of the surveillance as determined from the "large volume of factual materials," the incidence of error should be minimized by an adversary hearing.

[69] *See* note 2 *supra*.

[70] By denying certiorari in *Persico*, 43 U.S.L.W. 3225 (U.S. Oct. 21, 1974), the Supreme Court has declined an opportunity to resolve this conflict.

[71] *See* United States v. Chavez, 416 U.S. 562, 596 (1974) (Douglas, J., concurring in part and dissenting in part); Gelbard v. United States, 408 U.S. 41, 47-48 (1972); *In re* Lochiatto, 497 F.2d 803, 807 (1st Cir. 1974).

[72] 18 U.S.C. §§ 2510-20 (1970).

[73] *See* United States v. Chavez, 416 U.S. 562, 597 (1974) (Douglas, J., concurring in part and dissenting in part); United States v. Stanley, 360 F. Supp. 1112 (N.D. Ga. 1973); United States v. Robinson, 359 F. Supp. 52 (S.D. Fla. 1973); 60 GEO. L.J. 1340, 1346 (1972).