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CLAIMING ILLEGAL ELECTRONIC SURVEILLANCE: AN EXAMINATION OF 18 U.S.C. § 3504(a) (1)

For many years defendants in criminal trials who suspected that the prosecution had relied upon illegal electronic surveillance were stymied in their efforts to establish the existence of such surveillance. Their difficulty resulted from a 1939 Supreme Court opinion in which Justice Frankfurter placed upon the defendant the burden of satisfying the Court that electronic surveillance was unlawfully employed and that a substantial part of the government's case derived from this surveillance. Only after such proof was made did the burden shift to the government to show that its evidence had an independent source. Behind this seemingly innocuous formulation, however, lay a peculiar paradox: the covert nature of electronic surveillance made the defendant's proof of the surveillance virtually impossible; hence the burden of proof could rarely be expected to shift. Only occasionally did defendants even attempt to...

1 The term "electronic surveillance" includes both the tapping of telephone lines and the use of electronic bugging devices. The first case in which the government admitted it had relied upon illegal electronic surveillance was Olmstead v. United States, 277 U.S. 438 (1928).

2 Nardone v. United States, 308 U.S. 338 (1939) (dictum). The central issue in the case was the admissibility of evidence obtained through the use of knowledge gained from illegally tapped conversations. The government admitted having conducted the taps. Id. at 338. See also Nardone v. United States, 302 U.S. 379, 380 (1937).

3 308 U.S. at 341.

4 Id.

5 The problem of establishing the occurrence of allegedly illegal electronic surveillance should be distinguished from establishing the occurrence of other types of governmental searches and seizures, where the occurrence of the intrusion is likely to be unquestioned. See, e.g., United States v. Kennedy, 457 F.2d 63 (10th Cir.), cert. denied, 409 U.S. 864 (1972) (shotgun removed from car); Hague v. United States, 406 F.2d 366 (9th Cir. 1968) (search of rectal cavity for narcotics); United States v. Mitchell, 322 U.S. 65 (1944) (removal of stolen property from house). See generally Note, Exclusion of Evidence Obtained by Wiretapping: An Illusory Safeguard, 61 YALE L.J. 1221 (1952).

6 Knowledge of the occurrence of illegal electronic surveillance was, of course, not foreclosed entirely. In a number of cases the government believed the surveillance to be legal and introduced surveillance records directly into evidence, only to have the courts declare the surveillance illegal. See, e.g., Katz v. United States, 389 U.S. 347, 359 (1967); Benanti v. United States, 355 U.S. 96, 106 (1957). In some cases the government acknowledged its wrongdoing. See, e.g., Giordano v. United States, 394 U.S. 310 (1969); Markis v. United States, 387 U.S. 425 (1967). Sometimes the occurrence of the surveillance emerged fortuitously in the course of the criminal proceedings. See, e.g., Etheridge v. United States, 380 F.2d 804 (5th Cir. 1967).
make the requisite showing to the court; never were they held to have met their burden of proof.\(^7\)

The allocation of the burdens of establishing electronic surveillance was radically altered by the enactment of 18 U.S.C. § 3504(a)(1), part of the Organized Crime Control Act of 1970.\(^8\) Designed to benefit the victims of illegal electronic surveillance,\(^9\) section 3504(a)(1) is applicable to federal trials, administrative hearings, and grand jury proceedings.\(^10\) The statute provides that

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.\(^11\)

Affirmance of illegal surveillance entitles a defendant to seek to exclude its fruits, and provides a grand jury witness with a defense against any

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\(^7\) See, e.g., United States v. Tanner, 279 F. Supp. 457, 479-80 (N.D. Ill. 1967) (defendants' evidence consisted of the allegation that the importance of their case in the eyes of the prosecutors made it likely that electronic surveillance had been used); United States v. Allied Stevedoring Corp., 165 F. Supp. 440 (S.D.N.Y. 1958) (defendant's evidence consisted of (1) the allegation that the evidence in question could have been obtained in no other way, and (2) the fact that a representative of the New York Telephone Company appeared in court with an envelope, the contents of which he would not permit defendant's attorney to inspect without a court order); United States v. Flynn, 103 F. Supp. 925 (S.D.N.Y. 1951), aff'd on other grounds, 348 U.S. 909 (1955) (defendant's evidence included (1) the fact that defendants were under observation by the Federal Bureau of Investigation prior to the indictment; (2) a statement by a telephone technician that his examination of the telephone in question indicated that it had been tapped; (3) the inability to get a dial tone); United States v. Frankfeld, 100 F. Supp. 934 (D. Md. 1951) (defendants' evidence consisted of an allegation that on several occasions they had been intercepted by men whom they believed to be F.B.I. agents at places about which these agents could have known only through the tapping of telephone lines). Cf. United States v. McCarthy, 292 F. Supp. 937 (S.D.N.Y. 1968).


contempt charges that may be brought for his refusal to answer questions derived from illegal electronic surveillance.\textsuperscript{12}

There is a deceptive simplicity about the procedures required by section 3504(a)(1). Indeed, the seemingly straightforward requirement that the government affirm or deny claims of illegal electronic surveillance has itself produced considerable litigation.\textsuperscript{13} There is confusion both as to the meaning of a "claim" under the statute and as to the required scope of the government response. How the statute is interpreted has significance both for the rights of defendants and witnesses and also for the judicial process which must accommodate them.

This Comment will first discuss the making of claims under section 3504(a)(1), and will show that the statute should not be read to require that claims be accompanied by evidentiary support. It will then suggest that the statute should be read to encompass claims of attorney-third party conversations. Finally, the scope of the government's response to section 3504(a)(1) claims will be examined.

\section*{I. CLAIMS OF ILLEGAL ELECTRONIC SURVEILLANCE}

Section 3504(a)(1) is a procedure for enforcing substantive rights. It does not itself confer any new rights\textsuperscript{14} or enlarge traditional notions of standing to object to illegally obtained evidence.\textsuperscript{15} Section 3504(b) defines the unlawful acts to which claims may be directed as acts involving the use of an electronic device in violation of the Constitution or of federal law.\textsuperscript{16} Thus defendants may claim that evidence is inadmissible

\textsuperscript{12} See pp. 635-37 infra.

\textsuperscript{13} See United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975); United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); In re Marcus, 491 F.2d 901 (1st Cir.), vacated on other grounds, 417 U.S. 942 (1974); United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); United States v. Fitch, 472 F.2d 548 (9th Cir.), 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 Evans, 452 F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972); In re Marx, 451 F.2d 466 (1st Cir. 1971).


\textsuperscript{15} S. Rep. No. 617, 91st Cong., 2d Sess. 154 (1970). See also In re Womack, 466 F.2d 555 (7th Cir. 1972); In re Marx, 451 F.2d 466 (1st Cir. 1971).

\textsuperscript{16} "'[U]nlawful act' means any act the use of [sic] 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." 18 U.S.C. § 3504(b)(1970).
because it was obtained in violation of the fourth amendment\textsuperscript{17} or in violation of 18 U.S.C. § 2515 (1970).\textsuperscript{18} The latter statute bars the use of evidence\textsuperscript{19} not procured in conformity with sections 2510-20,\textsuperscript{20} the wiretap provisions of the Organized Crime and Safe Streets Act of 1968.\textsuperscript{21} Defendants whose claims of illegal surveillance are affirmed by the government are entitled to disclosure of the contents of the surveillance and a hearing to determine whether the government's evidence is free from taint.\textsuperscript{22}

\textsuperscript{17} See Katz v. United States, 389 U.S. 347 (1967); Mapp v. Ohio, 367 U.S. 643 (1961); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914). Whether section 3504(a)(1) can also be used as a procedure for the enforcement of sixth amendment rights will be discussed at pp. 646-57 infra.

\textsuperscript{18} "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." 18 U.S.C. § 2515 (1970).

Congress intended a linkage between sections 3504(a) and 2515. The language used in defining the types of proceedings in which 3504(a) is inapplicable was taken from 2515. See S. REP. No. 617, 91st Cong., 2d Sess. 154 (1970).


\textsuperscript{20} Thus the effect is a codification of the exclusionary rule with respect to evidence obtained in violation of 18 U.S.C. §§ 2510-20 (1970).

18 U.S.C. §§ 2510-20 (1970) provide extensive regulation over the use of electronic surveillance at the federal and at the state level. Surveillance is permissible only where certain crimes are being investigated. Furthermore, judicial approval is required. 18 U.S.C. §§ 2516, 2518(1)-(8) (1970). See also note 26 infra.


\textsuperscript{22} Alderman v. United States, 394 U.S. 165 (1969). However, where the illegal electronic surveillance was conducted prior to June 19, 1968, disclosure need only be made if a judge determines that the contents "may be relevant" to a pending claim. 18 U.S.C. § 3504(a)(2) (1970). See also In re Dellinger, 357 F. Supp. 949, 957 n.12 (N.D. Ill. 1973). Moreover, where the event in question occurred more than five years after the date of surveillance and the surveillance occurred before June 19, 1968, no disclosure is necessary. 18 U.S.C. § 3504(a)(3) (1970). See also In re Grand Jury Investigation, 486 F.2d 1013 (3rd Cir. 1973), cert. denied, 417 U.S. 919 (1974); Korman v. United States, 486 F.2d 926, 931 n.9 (7th Cir. 1973); In re Evans, 452 F.2d 1239, 1248 n.32 (D.C. Cir. 1971), cert. denied. 408 U.S. 930 (1972). For discussions of possible constitutional problems raised by sections 3504(a)(2) and (a)(3), see McClellan, The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties? 46 NOTRE DAME LAWYER 55 (1970); Note, Organized Crime Control Act of 1970, 4 U. MICH. J.L. REFORM 546 (1971).

In the case of national security electronic surveillance, disclosure is made only follow-
Grand jury witnesses may also make claims under section 3504(a)(1). Unlike defendants, however, such witnesses have no standing to complain that illegally obtained evidence violates their fourth amendment rights. Such witnesses do, however, have statutory rights which permit them to refuse to answer questions derived from illegal electronic surveillance. The Supreme Court held in *Gelbard v. United States* that section 2515 provides a defense to contempt charges for those grand jury witnesses who show that the questions asked of them were based on illegally intercepted conversations. Following a governing a determination of its illegality in an ex parte in camera proceeding. *See Giordano v. United States*, 394 U.S. 310, 314-5 (1969) (Stewart, J., concurring); *Alderman v. United States*, 394 U.S. 165, 184 (1969). *See also* *United States v. Lemonakis*, 485 F.2d 941, 961-62 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974).

*See note 10, supra.* Only a witness can raise a claim in the grand jury setting. *See Gelbard v. United States*, 408 U.S. 41, 54 (1972).


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

*See* notes 18-19 *supra.* The protection against illegal electronic surveillance afforded grand jury witnesses by § 2515 is less embracing than the protection defendants have under the fourth amendment. The statute does not cover electronic surveillance conducted in a foreign country. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 89 (1968) (by implication). *See also United States v. Toscanino*, 500 F.2d 267, 279 (2d Cir. 1974). Surveillance conducted for national security purposes is also not covered. *See* 18 U.S.C. § 2511(3) (1970). *See also* United States v. United States Dist. Court, 407 U.S. 297 (1972) (§ 2511(3) held to be a mere disclaimer of legislation in the national security area, rather than affirmative, statutory authorization for such surveillance). It is not clear whether statutory authorization exists for electronic surveillance conducted with the consent of one of the parties to the conversation, or whether such surveillance is covered only by the fourth amendment. Section 2511(2)(c) of 18 U.S.C. sets forth types of electronic surveillance which do not require judicial authorization, one of which is surveillance conducted with consent. § 2511(2)(c). Though the Court in *United States v. United States Dist. Court*, *supra* at 304, suggested that the exemptions amounted to affirmative statutory authorization and not a disclaimer, it never directly confronted the issue of surveillance conducted by consent. To conclude that Congress intended to provide affirmative statutory authorization for such surveillance seems anomalous, in light of the fact that Congress was not sufficiently concerned about it to require, as it did for other forms of electronic surveillance, see 18 U.S.C. § 2519 (1970), that records be kept as to its use.

*See Gelbard v. United States*, 408 U.S. 41 (1972). The right of a grand jury witness to object to illegally obtained evidence on the basis of section 2515 exists independently of the fourth amendment. Thus the decision in *Gelbard* was not overruled by *United States v.*
ervative affirmance of a witness’s claim of illegal electronic surveil-

\[\text{There must be a determination as to whether the surveillance tainted the questions.}^{30}\] Questions found to be tainted may not be asked.\[31\]

The case law is chaotic on the question of which claims are sufficient to compel the government to search its files to determine whether it has conducted illegal electronic surveillance. The Supreme Court side-stepped the issue in its opinion in Gelbard,\[32\] and the circuit courts of appeal have developed a variety of interpretations. Some opinions have indicated that all claims compel a governmental response, regardless of whether they have been substantiated.\[33\] There are, on the other hand, a number of cases which require that claims be accompanied by supportive evidence.\[34\] The value of the latter opinions is diminished, however, because of their failure to discuss the amount or quality of the evidence


18 U.S.C. § 3504(a)(2) & a(3), the statutory qualifications to the disclosure principle, apply to grand jury witnesses. See note 22 supra.

See Gelbard v. United States, 408 U.S. 41 (1972). See also In re Mintzer, 511 F.2d 471, 473 (1st Cir. 1974) (sufficient for prosecutor to swear by affidavit that his questions were not tainted by any illegal surveillance).


The question presented in Gelbard was whether grand jury witnesses could rely upon 18 U.S.C. § 2515 (1970) as a defense to contempt charges imposed for their refusal to testify. The Court assumed that the government had acknowledged conducting illegal electronic surveillance. 408 U.S. at 46-47. It thus was able to avoid the question of whether a sufficient claim had been made.

United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); In re Evans, 452 F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972). None of these opinions is satisfactory. Evans was based on the assumption that the government’s response was relatively effortless. 452 F.2d at 1247-49. See also In re Egan, 450 F.2d 199, 220 (3d Cir. 1971) (Rosen, J., concurring), aff’d on other grounds sub nom Gelbard v. United States, 408 U.S. 41 (1972). But see p. 659 and note 82 infra. In another case, some support for the claim in question already existed. See United States v. Toscanino, supra. In Vielguth, the government had already denied having conducted surveillance; it was therefore unnecessary for the court to decide whether the government should be required to answer.

See United States v. Stevens, 510 F.2d 1101, 1105-06 (5th Cir. 1975); United States v. See, 505 F.2d 845, 856 n.18 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975); United States v. Alter, 482 F.2d 1016, 1027 (9th Cir. 1973); United States v. Doe, 460 F.2d 328, 335-36 (1st Cir. 1972), cert. denied, 411 U.S. 909 (1973). See and Stevens would require denials in good faith in response to unsupported claims, but neither would require a search of the government files. See p. 659 infra.
which must be produced. While it is possible that all of these courts would consider sufficient a showing less persuasive than that required prior to the enactment of the statute, none of the opinions discussed the issues in these terms.

A. The Word "Claim"

One approach for determining the meaning of "claim" is to focus upon the word itself. One court has indicated that its ordinary meaning suggests that unsubstantiated claims are acceptable. It seems more appropriate, however, to examine the word "claim" in the context of the statute in which it appears. Section 3504(a) consists of three sections, each of which includes the word "claim." Sections (a)(2) and (a)(3), however, deal with procedures for the disclosure of illegally obtained evidence after the illegality has been established. Claims directed at the inadmissibility of evidence already determined to have been illegally obtained are by their very nature not unsubstantiated. If one assumes that "claim" must have the same meaning in all three parts of section 3504(a), it follows that claims in section 3504(a)(1) must also be substantiated. But symmetry may not have been the foremost concern of the drafters. Indeed, caution is especially warranted where, as here, the word is not likely to have been considered a technical term.

The use of the word "claim" in the legislative history of section 3504(a)(1) is likewise confused and contradictory. Twice on the Senate floor and once at hearings in the House of Representatives, Senator

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35 See pp. 632-33 supra.
36 The formulation provided in United States v. Alter, 482 F.2d 1016, 1026 (9th Cir. 1973) applies only to claims of attorney surveillance. See also United States v. Vielguth, 502 F.2d 1257, 1259 (9th Cir. 1974).
37 United States v. Vielguth, 502 F.2d 1257, 1258 (9th Cir. 1974).
38 The text of section 3504(a)(1) appears at p. 633 supra. Section 3504(a) (2) reads: "Disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility. . . ." (emphasis added). Section 3504(a)(3) reads as follows: "no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act." (emphasis added).
Wiretapping

McClellan, the sponsor of section 3504(a)(1), substituted the phrase "motion to suppress" for the word "claim." Since motions to suppress require evidentiary support, the substitution suggests that section 3504(a)(1) claims must also be supported. However, reliance on the use of "motion to suppress," the meaning of which may not have been carefully evaluated beforehand, is not clearly justified in view of the fact that Congress did not even consider the phrase as a possible alternative formulation. Moreover, the legislative history reveals additional substitutions for the term "claim." The words "request" and "charge" were at times used, but neither of these terms suggests that substantiation is required.

B. The Legislative History

Section 3504(a)(1) was largely ignored by Congress as it considered the Organized Crime Control Act of 1970. There are very few explanations of the statute, and those which do appear are ambiguous. In an attempt to clarify the meaning of the text of section 3504(a)(1) in the course of the House hearings, Senator McClellan remarked: "The . . . requirement that the government affirm or deny the occurrence of the alleged invasion of the defendant’s rights actually places a burden on the government, rather than the defendant." Considered by itself, this statement seems to imply that a mere assertion by the defendant is sufficient to require a government response. But when examined in the context of the legislative history of which it is a part, the meaning is more ambiguous, insofar as Senator McClellan on several occasions equated "claim" with "motion to suppress." An alternative interpretation of McClellan's statement therefore might be that section 3504(a)(1) serves

41 Fed. R. Crim. P. 41(e) and Form 16.
42 See notes 39-40 supra.
45 Congressional consideration of § 3504(a)(1) was overshadowed by concern with §§ 3504(a)(2) and 3504(a)(3). See, e.g., Hearings on S.30 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 166-68, 314-16, 497-98 (1970). Senators Kennedy and Hart were so strongly opposed to § 3504(a)(2) and (a)(3) that they sought to delete § 3504 in its entirety. See 116 Cong. Rec. 952-54 (1970).
47 See p. 638 supra.
to guarantee a government response after the claimant has provided some evidentiary support in the form of a motion to suppress.48

The inclusion of section 3504(a)(1) in the Organized Crime Act of 1970 had initially been suggested by the Justice Department, which had adopted a policy in the preceding two years of examining its files to ascertain in all "reasonable cases"49 whether illegal electronic surveillance had been conducted.50 The Department recommended that its current policy be enacted into law.51 The Justice Department's formulation of its previous policy is thus another source of guidance as to the meaning of section 3504(a)(1). However imprecise the phrase "reasonable cases" might be, it nonetheless suggests the existence of a category of unreasonable cases as well as some threshold for determining which cases warrant a search of the records.52

If it is assumed that Congress intended to enact without modification the policy of the Justice Department, it would seem that the defendant or witness must make a showing that his claim is "reasonable." But the assumption that the enactment of section 3504(a)(1) was intended merely to rubber-stamp the Justice Department policy is questionable. It is more plausible that the Department's policy served instead as a catalyst for the Congressional formulation without limiting the scope of the latter. In describing its policy of examining its files, the Justice Department spoke only of having conducted such examinations on behalf of defendants.53 Congress, however, drafted section 3504(a)(1) in order to allow for claims by grand jury witnesses as well.54 Thus, in enacting the statute,

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48 Cf. Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 657 (1970) (statement of Donald L. Gainer, Deputy Chief, Legislation and Special Projects Section, U.S. Dep't of Justice, suggesting that the distinctive feature of section 3504(a)(1) was that it granted greater assurance of disclosure to the defendant than he had previously).


50 Id. The Justice Department was not confessing continuous flagrant violations of the law. Rather, it was admitting to electronic surveillance conducted prior to the time when warrant procedures were required, which were subsequently held to be illegal.

51 Id.

52 In the course of describing the policy, the Attorney General stated that since "valid allegations of the existence of unlawful electronic surveillance will decrease . . . during the next few years . . . the burden on the Department will not be unacceptably heavy." S. REP. No. 617, 91st Cong., 2d Sess. 138 (1970) (emphasis added).


54 See note 10 supra. Moreover, the conclusion by the Supreme Court in Gelbard v. United States, 408 U.S. 41 (1972), that grand jury witnesses may rely on 18 U.S.C. § 2515 (1970) as a defense to contempt charges, was based partly on the availability to them of section 3504(a)(1). Id. at 52.
Congress apparently went beyond Justice Department policy. Even assuming, therefore, that one knew the parameters of the Justice Department’s “reasonable case,” it would not be appropriate to conclude that Congress intended to adopt that standard.

The legislative history does provide, however, a number of grounds for inferring that claims do not have to be substantiated. An evaluation of these inferences requires some familiarity with the types of evidence defendants and grand jury witnesses have used to support claims of illegal electronic surveillance. Such evidence has included expert proof of the existence of surveillance,55 discovery of a bug,56 and testimony of strange noises on the telephone.57 Less direct indications of surveillance which have been offered as evidence include the appearance of F.B.I. agents at meetings previously arranged by telephone,58 the unavailability of telephone records (suggesting the possibility that they had been turned over to the F.B.I.),59 and a government official’s refusal to answer questions about surveillance.60 Sworn statements based on information and belief that the questions asked or evidence produced could not have been ascertained without recourse to illegal electronic surveillance have also been offered.61

I. The Purpose of Section 3504(a)(1)

The motivation for the enactment of section 3504(a)(1) was the protection of victims of illegal electronic surveillance.62 Thus it is important to consider how a requirement that claims be substantiated would comport with the achievement of this protection. Requiring evidentiary support for claims of electronic surveillance is at best a modified version of the rule laid down by Nardone v. United States63 that defendants must

57 United States v. Alter, 482 F.2d 1016 (9th Cir. 1973) (offered in support of challenge to government’s denial); Beverly v. United States, 468 F.2d 732, 738 (5th Cir. 1972) (same); In re Horn, 458 F.2d 468, 471 (3d Cir. 1972) (same).
58 See United States v. Alter, 482 F.2d 1016, 1025 (9th Cir. 1973).
59 See In re Horn, 458 F.2d 468 (3d Cir. 1972)
60 See Korman v. United States, 486 F.2d 926 (7th Cir. 1973).
61 See United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975); United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974); Bacon v. United States, 466 F.2d 1196 (9th Cir. 1972).
62 See p. 633 supra.
63 308 U.S. 338 (1939).
prove the occurrence of the surveillance. But just as the very nature of electronic surveillance made such proof virtually impossible, so the production of even a modicum of evidence is apt to be exceedingly difficult. Even if the right to invoke the procedures of section 3504(a)(1) were to require only a modest evidentiary showing, the evidence would be largely unavailable. Furthermore, any evidentiary requirement would foreclose arbitrarily the making of claims. Not only is much of the evidence which claimants manage to procure produced by government carelessness, but expert proof of electronic surveillance is often not obtainable, since such devices frequently cannot be detected. Requiring any evidentiary support for claims would therefore make the statute's procedures available principally to claimants fortunate enough to have been targets of sloppy government investigations. To give "claim" such an interpretation would cause the statute to fall short of its goal of protecting victims of illegal electronic surveillance.

The claimant who possesses compelling proof of the occurrence of illegal electronic surveillance is not dependent upon the government's acknowledgment of its wrongdoing. If he is a defendant, he may proceed directly to a motion to suppress the evidence. If he is a grand jury witness, he may refuse to answer questions and rely upon 18 U.S.C. § 2515 as a defense to contempt charges. Such a claimant is thus precisely the person who least needs the protection which section 3504(a)(1) was enacted to provide.

2. The Protection of Privacy

Section 3504(a)(1) permits the ascertainment of violations of rights of defendants and witnesses under section 2515, which prohibits the use of electronic surveillance without obtaining a warrant. The availability of evidence of illegal electronic surveillance is unpredictable, and the notion, expressed in some cases, that claims supported by extensive evidence "deserve" detailed government responses, whereas unsupported or poorly supported claims warrant only vague government responses, is misguided. But see United States v. Stevens, 510 F.2d 1101, 1105-6 (5th Cir. 1975); United States v. See, 505 F.2d 845, 854 n.18 (9th Cir. 1974), cert. denied.

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64 See p. 632 supra.
65 See p. 632 supra.
66 See p. 641 supra.
67 See Graham, Can You Find Out if Your Telephone Is Tapped? ESQUIRE, May, 1973, at 244. It also is conceivable that if production of such evidence were required, the government would improve its technology so that the number of claimants who might be able to utilize such proof would progressively decrease. See In re Evans, 452 F.2d 1239, 1249 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972).
69 See p. 636 supra.
70 Since the availability of evidence of illegal electronic surveillance is unpredictable, the notion, expressed in some cases, that claims supported by extensive evidence "deserve" detailed government responses, whereas unsupported or poorly supported claims warrant only vague government responses, is misguided. But see United States v. Stevens, 510 F.2d 1101, 1105-6 (5th Cir. 1975); United States v. See, 505 F.2d 845, 854 n.18 (9th Cir. 1974), cert. denied.
in official proceedings of evidence obtained by illegal electronic surveil-

lance. The Senate Report on section 3504(a)(1) makes it clear that Congress regarded sections 3504(a)(1) and 2515 as linked statutes. This linkage makes relevant an inquiry as to how a particular interpreta-

tion of section 3504(a)(1) would affect the underlying purpose of section 2515. Congress’s motivation is enacting section 2515 was the protection of the privacy of individual communication and expression. Thus it is essential to consider the impact on the privacy of defendants and wit-

nesses of a requirement that claims be substantiated.

An examination of the types of evidence, which defendants and wit-

nesses have produced to support their claims, reveals that some such evidence involves disclosures of the communications which Congress sought to protect by enacting section 2515. For example, a claimant might allege that the questions asked or evidence produced could not have been acquired without the use of electronic surveillance. Substantiation of such an allegation is likely to require the claimant to supply the names of the participants in and the subject matter of private conversations from which the government may have procured its information. Similarly, a detailed presentation of the facts surrounding encounters with F.B.I. agents at meetings previously arranged by telephone would seem to re-

quire a disclosure of the identity of the parties with whom one spoke and the nature of the arrangements made. It would be ironic, and certainly not the intention of Congress, for the privacy of defendants and witnesses to be compromised in the course of their attempts to protect themselves from invasions of that privacy. Moreover, in at least some cases, a require-

ment that supporting evidence accompany claims of illegal electronic surveil-

lance might force a claimant to reveal information of a self-

incriminating nature.

See pp. 635-37 supra.


See p. 641 supra.


See, e.g., United States v. Weinberg, 108 F. Supp. 567 (D.D.C. 1952). Defendant was charged with falsely testifying as to his Communist affiliations. He moved to suppress evidence on the grounds that a telephone conversation between him and the wife of a noted Communist had been illegally wiretapped. But his defense to the charges against him consisted in a denial of any Communist connections. Therefore in his motion to suppress he
C. Conserving Judicial Resources

The inappropriateness of requiring evidence in support of claims made under section 3504(a)(1) can also be inferred from the legislative purpose underlying sections 3504(a)(2) and 3504(a)(3). Both provisions place limitations upon the disclosure of surveillance records in order to reduce the amount of litigation on suppression issues. Yet a requirement that claimants come forward with evidence presupposes at least some form of judicial review, since the government, as the adversary party, cannot itself determine whether the evidence produced is sufficiently compelling to warrant a response. Thus, requiring evidentiary support for claims would entail an additional expenditure of judicial time. The amount of time so expended would of course vary, depending upon whether there was an adversarial hearing or merely an ex parte examination, and also upon the range of factors which the judge took into account in making his decision. But whatever the form of the review, the fact remains that it would entail an increase in the amount of judicial resources devoted to suppression issues. It is highly unlikely that Congress intended to reduce the amount of suppression litigation by enacting sections 3504(a)(2) and (a)(3), only to have it increased again by the litigation necessitated by section 3504(a)(1).

referred only to the "alleged" telephone conversation between himself and the wife of the Communist. The court denied the motion to suppress because defendant had not indicated that he had in fact been a party to an intercepted conversation.

In Simmons v. United States, 390 U.S. 377 (1968), the Court held that the government could not use at trial testimony offered in support of a motion to suppress by the defendant. While this precedent would presumably protect the defendant whose claim of surveillance was supported by incriminating evidence relevant to the subject-matter of his trial, it would not clearly be applicable to a defendant whose evidence did not relate to his present trial but which nevertheless had the potential for subjecting him to additional prosecution. Nor would the principle of Simmons be of any help to grand jury witnesses who have not yet been indicted.

The judge might rely solely on the evidence of surveillance brought forward by the claimant. Alternatively, he might also take into consideration various extrinsic factors. For example, in Bufalino v. Immigration and Naturalization Serv., 473 F.2d 728 (3rd Cir.), cert. denied, 412 U.S. 928 (1973), the judge took into consideration the defendant's history of using delaying tactics. In In re Evans, 452 F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972), the judge found the subject-matter of the grand jury inquiry to be relevant to an assessment of the frivolousness of the claim.

Congress examined sections 3504(a)(2) and (a)(3) in detail. See note 45 supra. If Congress had intended the goal of sections 3504(a)(2) and (a)(3) to be undercut by section 3504(a)(1), certainly it would have mentioned this explicitly.
It should not be assumed, however, that section 3504(a)(1) can operate without causing delay in the trial or grand jury proceeding in which the claim is raised, even if it is not necessary to determine whether the claim warrants a response. Some delay is unavoidable, since the trial or grand jury investigation must be discontinued until the claimant receives the government’s affirmance or denial.\(^{82}\) Congress’s enactment of section 3504(a)(1) implies a willingness to accept the necessary consequences of its operation.\(^{83}\)

\(^{82}\) Preparation of the government’s response takes approximately three weeks. Telephone conversation with Marvin Loewe, Deputy Chief, Organized Crime and Racketeering Section, U.S. Dep’t of Justice, Nov. 13, 1975.

\(^{83}\) There is nothing either on the face of section 3504(a)(1) or in any of its legislative history which suggests when claims may be raised. The issue of timing must be resolved by reference to the substantive rights which the statute seeks to protect and to any relevant policy considerations.

The substantive right conferred on grand jury witnesses by the decision in Gelbard v. United States, 408 U.S. 41 (1972) is, in fact, a limited one. The case merely holds that Section 2515 provides a defense to contempt. It does not accord such witnesses the right to move to suppress either evidence or subpoenas. \(\text{Id. at 60-61.}\) See also Cali v. United States, 464 F.2d 475, 478 (1st Cir. 1972); S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968) (18 U.S.C. § 2518(10)(a) (1970), which authorizes motions by defendants to suppress evidence obtained by electronic surveillance, not appropriate to grand jury proceeding). However, the fact that a witness has already answered some questions should not prevent him from making a claim. The justification for not adopting a waiver notion in this instance is that some witnesses may not suspect that their conversations have been intercepted until after they have heard a number of questions. See Bacon v. United States, 466 F.2d 1196, 1197 (9th Cir. 1972). Application of the waiver concept would encourage many witnesses to raise section 3504(a)(1) claims early in the grand jury proceeding on the chance that some future development would cause them to suspect electronic surveillance. More claims would tend to be made than would otherwise be the case, thus causing unnecessary delay in the proceedings.

Defendants are required to make any motions to suppress prior to trial, unless they are not then aware of the grounds for the motion. 18 U.S.C. § 2518(10)(a) (1970). \(\text{See also 18 U.S.C. § 2518 (9) (1970); United States v. Moon, 491 F.2d 1047, 1049 n.2 (5th Cir. 1974).}\) The preference for having such motions made before trial is largely to afford the government a right to appeal from orders granting such motions. \(\text{See 18 U.S.C. § 2518 (10)(b) (1970). If the suppression hearing is postponed until the trial has begun, jeopardy has attached. If the government loses the motion to suppress and the defendant is acquitted, the prospect of double jeopardy will prevent appeal by the government and re-trial of the accused. See United States v. Spagnuolo, 515 F.2d 818, 822 n.1 (9th Cir. 1975). Therefore, defendants should be allowed to make claims of electronic surveillance under section 3504 (a)(1) prior to trial to permit the pretrial resolution of the suppression issues.}\)

The fact that motions to suppress may be made after the trial has begun if the defendant is not aware of the grounds beforehand implies that a defendant who seeks a government response to a claim of electronic surveillance after his trial has begun will not have waived his right to obtain one. \(\text{Cf. United States v. D’Andrea, 495 F.2d 1170, 1173 n.9 (3rd Cir.), cert. denied, 419 U.S. 855 (1974) (claim made on 32d day of trial).}\)
The inevitability of such delay raises the question of whether rules could be developed which would prevent the raising of frivolous claims. An examination of this possibility, however, reveals that it is unworkable. It may seem reasonable to posit that there exist certain types of prosecutions and investigations in furtherance of which the government does not conduct electronic surveillance, and that therefore all claims made with respect to such prosecutions and investigations could be barred automatically. Even if this assumption is granted, however, it seems clear that evidence at least potentially relevant to all crimes may be obtained from electronic surveillance that was initially conducted for other purposes. Thus it does not seem possible to devise rules for the automatic exclusion of claims of electronic surveillance.

II. CLAIMS OF ILLEGAL ELECTRONIC SURVEILLANCE OF ATTORNEY-THIRD PARTY CONVERSATIONS

A number of defendants and witnesses have attempted to use section 3504(a)(1) to ascertain whether conversations of their attorneys have been intercepted by illegal electronic surveillance. These efforts have met with varying degrees of success, largely because the cases are split on the question of the appropriateness of the statute for such a purpose. There is also confusion surrounding the related question of whether such claims must be accompanied by evidentiary support. To comprehend the

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85 It is not that most crimes involve the use of the telephone, but rather that given its widespread use, the telephone is a potential source of information as to virtually every type of crime which has or may be committed.
86 Section 2517 (5) of 18 U.S.C. provides procedures for the use of electronic surveillance for prosecutorial purposes other than those specified in the authorization order. This provision is thus a clear indication that electronic surveillance is often used for purposes beyond those for which it was originally intended. Cf. U.S. v. Tortorello, 480 F.2d 764, 782-83 (2d Cir.), cert. denied, 414 U.S. 866 (1973); U.S. v. Brodson, 393 F. Supp. 621 (E.D. Wis. 1975).
88 See, e.g., United States v. Alter, 482 F.2d 1016, 1025, 1026 (9th Cir. 1973) (implying statute inappropriate); United States v. Fitch, 472 F.2d 548 (9th Cir.), cert. denied, 412 U.S. 954 (1973) (same). But see United States v. See, 505 F.2d 845, 855-56 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975); Beverly v. United States. 468 F.2d 732, 752 n.23 (5th Cir. 1972).
89 Compare Beverly v. United States, 468 F.2d 732, 738-39, 749-50 (5th Cir. 1972) (an inability to get a dial tone on a specified telephone line used by a named attorney who at the time was representing claimant, held sufficient to compel a government response) with
sources of such uncertainty, two categories of conversations must be distinguished: conversations between the attorney and the defendant or witness he represents, and conversations between the attorney and third parties concerning the defendant’s or witness’s case. There is no question that section 3504(a)(1) embraces claims regarding the first category of conversations, since both section 2515 and the fourth amendment confer standing to object to the surveillance of conversations to which the claimant was a party.

Neither section 2515 nor the fourth amendment, however, provides standing for objections to surveillance of conversations between the claimant’s attorney and third parties even when the topic of the conversation is the claimant’s own case. Yet obviously the interception of such conversations may reveal evidence damaging to a defendant’s case. There is also the possibility that the defendant’s trial strategy may be uncovered. Similarly, such interceptions may provide material for questions of witnesses. The potential dangers inherent in such interceptions thus make it essential to consider, with regard to both defendants and grand jury

United States v. Alter, 482 F.2d 1016, 1024-26 (9th Cir. 1973) (inability of named attorney to get dial tone on specified telephone line on specified date held insufficient). The court in Alter held that the following information must be set out: "(1) the specific facts which reasonably lead the affiant to believe that named counsel for the named witness has been subjected to electronic surveillance; (2) the dates of such surveillance; (3) the outside dates of representation of the witness by the lawyer during the period of surveillance; (4) the identity of the person(s), by name or description, together with their respective telephone numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance took place; and (5) facts showing some connection between possible electronic surveillance and the grand jury witness who asserts the claim or the grand jury proceeding in which the witness is involved." Id. at 1024-26. Defendants also have been held to the Alter requirements. See, e.g., United States v. See, 505 F. 2d 845, 856 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

See, e.g., United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974); United States v. Fitch, 472 F.2d 548, 549 n.3 (9th Cir.), cert. denied, 412 U.S. 954 (1973).


See pp. 635-37 supra.

It should be noted, however, that the fourth amendment would confer standing in this situation if the conversation took place on the claimant’s premises. See Alderman v. United States, 394 U.S. 165 (1969). Standing would also be conferred under 18 U.S.C. § 2515 (1970). See S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968), which indicates that the class of those entitled to invoke section 2515 is intended to reflect the standing rules of the fourth amendment.

Additionally, it may serve as a basis upon which to indict him for other crimes. See generally Hoffa v. United States, 385 U.S. 293 (1966).


witnesses, first, whether there exist substantive rights, the violation of which provides standing for objections to such interceptions, and second, assuming that there are such rights, whether the procedures mandated by section 3504(a)(1) are appropriate for their protection.

A. Defendants

In the case of defendants, standing to object to interceptions of attorney-third party conversations can be derived from the sixth amendment's guarantee of the assistance of counsel. This constitutionally mandated "assistance" has been held to include effective assistance, and effective assistance, in turn, has been interpreted to require consultation free from governmental intrusion. Since the ultimate interest protected by the guarantee is the "privacy and confidentiality of the lawyer's work in preparing the case," the scope of the mandated privacy is not limited to discussions in which the attorney and defendant are the sole participants. Instead it extends to conversations which the attorney has with third parties for the purpose of preparing his client's legitimate

97 "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." U.S. CONST. amend. VI.


101 Where the defendant does participate in the discussion, he will have standing to object to government intrusions on the basis of the fourth amendment as well as the sixth amendment. See p. 647 supra. If neither the attorney nor the defendant participates in the conversation, the sixth amendment protection may still apply if the conversation was held between two intermediaries of the attorney and defendant such as to constitute a communication link between the latter two. See United States v. Seale, 461 F.2d 345 (7th Cir. 1972).

102 Sometimes these third parties will be other attorneys. See, e.g., United States v. Rosner, 485 F.2d 1213, 1220 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974).

The sixth amendment does not protect the defendant from private individuals who infiltrate his meetings with his attorneys; it merely protects against governmental interferences. See Rosner, supra at 1226-27. Therefore, a defendant may not invoke the sixth amendment if a third party divulges to the prosecution the substance of such a meeting. However, in at least a few cases the defendant may be able to rely upon the common law attorney-client privilege. See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, ch. 10 (2d ed. E. Cleary 1972).

103 The procedure for determining whether an attorney's conversation was conducted in furtherance of his representation of his client is an in camera examination by the trial judge of the transcript of the surveillance. See, e.g., In re Tierney, 465 F. 2d 806, 813 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973).
defense, regardless of whether the defendant himself is a participant. The traditional remedy for sixth amendment violations was to give the defendant a new trial, regardless of whether the governmental interception could be shown to have tainted the prosecution's case. At present, however, the law as to the appropriate remedy is in a state of flux. Recent decisions have distinguished the earlier cases as involving "gross" governmental intrusions, but have not provided a definition of "gross." These cases have indicated that where the government intrusion is not "gross," a new trial is appropriate only if the defendant can show that the interception caused him prejudice. As an alternative to a new trial, some courts have concluded the possibility of merely excluding any evidence tainted by sixth amendment violations.

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104 See Hoffa v. United States, 385 U.S. 293, 308 (1966). But see In re Terkel, 256 F. Supp. 683 (S.D.N.Y. 1966). In the latter case the court held that a discussion between a lawyer, client, and a third party, the purpose of which was to work out the details of a pay scheme, was protected by the sixth amendment.


Some courts have noted that there may be cases where the taint is so pervasive that a new trial would not accord the defendant sufficient protection; in such cases, dismissal of the charges would be necessary. See Hoffa v. United States, supra at 308; United States v. Rosner, supra at 1228. See also State v. Cory, supra at 376, 382 P.2d at 1022-23.

B. Grand Jury Witnesses

While defendants may rely upon the sixth amendment\(^{111}\) to give them standing to object to governmental interception of their attorneys' conversations, the legal status of identical objections made by grand jury witnesses is highly precarious.\(^{112}\) The reason for this is that the two potential sources for standing of grand jury witnesses prove to be illusory.

The sixth amendment is one potential source for standing. However, the text of the amendment\(^{113}\) presents a formidable barrier to the application of its "right to counsel" clause to grand jury proceedings.\(^{114}\) The phrases "counsel for his defense" and "all criminal prosecutions" would seem to preclude the inclusion of the grand jury, whose investigation ordinarily\(^{115}\) precedes the initiation of any formal prosecution. Thus, the Supreme Court has held the "assistance of counsel" clause inapplicable prior to the indictment of the accused.\(^{116}\) One justification for holding the

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\(^{111}\) Defendants are also protected by the fifth amendment, since the accused's sixth amendment right to counsel has been incorporated within the fifth amendment due process clause. See Massiah v. United States, 377 U.S. 201 (1964); Johnson v. Zerbst, 304 U.S. 458 (1938); Coplon v. United States, 191 F.2d 749, 757 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952); Neufield v. United States, 118 F.2d 375, 383 (D.C. Cir. 1941), cert. denied, 315 U.S. 798 (1942).

\(^{112}\) Two cases have stated specifically that grand jury witnesses have standing to object to electronic surveillance of their attorneys but neither identified the substantive basis for such standing. See Beverly v. United States, 468 F.2d 732, 751 (5th Cir. 1972); In re Tierney, 465 F.2d 806, 812 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973). But see United States v. Fitch, 472 F.2d 548, 549 n.3 (9th Cir.), cert. denied, 412 U.S. 954 (1973).

\(^{113}\) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const. amend. VI.

\(^{114}\) Justice Burger has maintained that the language of the sixth amendment simply will not permit such a construction. See Coleman v. Alabama, 399 U.S. 1, 23-25 (1970) (Burger, C.J., dissenting).


\(^{116}\) Kirby v. Illinois, 406 U.S. 682 (1972) (sixth amendment right to counsel held not to apply to a post-arrest, pre-indictment confrontation between the accused and victims). There is no right to counsel even after indictment unless the context is such that the accused requires legal advice. See United States v. Ash, 413 U.S. 300 (1973) (right to counsel not applicable at a post-indictment photographic display).

The Supreme Court has held that a witness does not have the right to the presence of an attorney in the grand jury room. Anon. v. Baker, 360 U.S. 287 (1959); In re Groban, 352 U.S. 330, 333 (1957). See also United States v. George, 444 F.2d 310 (6th Cir. 1971).
right to counsel clause applicable to grand jury witnesses is the need to insure that the witness's responses to questions do not unwittingly\textsuperscript{117} compromise any of his rights.\textsuperscript{118} However, the present trend of Supreme Court decisions appears to limit the application of the right to counsel clause,\textsuperscript{119} thus suggesting that the Court is unlikely to adopt such an expansive view of the sixth amendment.

A second potential source of standing for grand jury witnesses is the fifth amendment's due process clause, the scope of which is not limited to those accused of crime.\textsuperscript{120} Several Supreme Court opinions have stated specifically that the due process clause protects unindicted individuals from prejudicial procedures utilized in criminal investigations.\textsuperscript{121} Assessment of contentions that such procedures constitute a denial of due process is based on the "totality of the circumstances,"\textsuperscript{122} and involves balancing the harm to the victim against the government's interest in efficient investigations of crime.\textsuperscript{123} However, the very concept of due

\textsuperscript{117} There is some implicit support for this view in United States v. Ash, 413 U.S. 300, 313 (1973), where the Court stated that only in proceedings where the accused requires advice in coping with legal problems is the application of the sixth amendment's right to counsel clause appropriate.

\textsuperscript{118} Grand jury witnesses are protected by the fifth amendment privilege against self-incrimination and by statutory and common law privileges. A witness is also protected by the fourth amendment against subpoenas duces tecum, the demands of which are unreasonable. See United States v. Calandra, 414 U.S. 338, 346 (1974). See also In re Berry, 521 F.2d 179, 181-83 (10th Cir.) (per curiam), cert. denied, 96 S. Ct. 30 (1975).

\textsuperscript{119} In 1967 the Supreme Court held that the right to counsel clause was applicable to a pretrial line-up. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967). In 1972 the Supreme Court limited these cases and held that the right to counsel did not apply until after indictment even if the accused had already been arrested. Kirby v. Illinois, 406 U.S. 682 (1972). In 1973 the Court imposed an additional limitation, holding that the right to counsel clause was inapplicable even after indictment, unless the proceeding was one in which legal advice was necessary. United States v. Ash, 413 U.S. 300 (1973).

\textsuperscript{120} See, e.g., Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Dent v. West Va., 129 U.S. 114 (1889).


process is so nebulous that a witness would likely be forced to demonstrate enormous prejudice to himself from the surveillance in order to establish that due process has been denied. Hence, even if courts would be willing to apply the due process clause to electronic surveillance of the attorneys of grand jury witnesses, probably all but the most egregious intrusions would be upheld.

Thus, neither the fifth amendment's due process clause nor the sixth amendment can be relied on as a source of standing for witnesses to object to the interception of their attorneys' conversations. Indeed, any possibility that these amendments might provide the basis for a witness's refusal to answer questions derived from illegal electronic surveillance would seem to have been foreclosed by the 1974 Supreme Court decision in United States v. Calandra. The Court's holding in Calandra that there is no constitutional requirement in grand jury proceedings for the exclusion of evidence obtained in violation of the fourth amendment would seem to apply with equal force to the exclusion of evidence obtained in violation of the fifth amendment's due process clause or the sixth amendment's right to counsel clause.

To appreciate the inevitability of such an application, it is necessary to note that Calandra held only that there is no constitutional necessity in grand jury proceedings for the fourth amendment exclusionary rule; the Court did not hold that the fourth amendment itself had no place in grand jury proceedings. Indeed, the opinion specifically notes that a grand jury witness has standing to object to a subpoena duces tecum on the grounds that compliance would constitute an unreasonable search and seizure under the fourth amendment. In the latter situation, the Court explained, the constitutional violation would be prevented prior to its occurrence by means of judicial intervention. The function of the exclusionary rule, on the other hand, is to bar evidence which has already been procured illegally. In other words, Calandra precludes only the retrospective, but not the prospective, application of the fourth amend-

125 Grand jury witnesses of course have the right to refuse to answer self-incriminating questions. See note 118 supra.
126 414 U.S. 338 (1974). Prior to Calandra two cases held that grand jury witnesses had standing to object to electronic surveillance of their attorneys. See In re Tierney, 465 F.2d 806, 812 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973); Beverly v. United States, 468 F.2d 732, 751 (5th Cir. 1972). See also note 112 supra.
127 See pp. 652-53 infra.
ment to the grand jury. Moreover, the Court strongly implied that there is also no necessity in the grand jury for the retrospective application of any constitutional right; indeed, the Court devotes a full page to a discussion of the prospective nature of the constitutional and statutory rights of grand jury witnesses. A number of examples of such rights are provided, thus making clear that the remarks are not limited to the fourth amendment. The discussion concludes with the statement that remedying the violation of these rights after the fact (i.e., by means of an exclusionary rule) is not constitutionally required; only where it is possible to prevent the violation in advance is judicial intervention appropriate.

Yet it is only the retrospective, and not the prospective application of the fifth and sixth amendments which would be relevant to the grand jury witness who sought to refuse to answer questions thought to be derived from illegal electronic surveillance. The constitutional violation has already occurred by the time the witness is questioned, and judicial intervention after the fact cannot serve a preventive function. Moreover, there is no reason to believe that the Court would regard a sixth amendment exclusionary rule in the grand jury setting more favorably than the fourth amendment exclusionary rule. Indeed, the Court has on several occasions expressed a general resistance to the interruption of grand jury proceedings for any reason, including the vindication of constitutional rights.

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129 Id.
130 Id.
131 The Court in United States v. Calandra, 414 U.S. 338 (1974), specifically rejected the theory that the asking of questions based on evidence obtained in violation of the fourth amendment constituted a "fresh and independent violation of the witness's constitutional rights." Id. at 353-54.
132 The Supreme Court has reserved judgment as to whether even an equivalent standard of exclusion should apply under the sixth amendment as under the fourth. See Hoffa v. United States, 385 U.S. 293, 309 (1966). See also United States v. Vielguth, 502 F.2d 1257, 1260 (9th Cir. 1974) (sixth amendment rights seen as less important than fourth amendment rights). With regard to the fifth amendment, the Court in United States v. Calandra, 414 U.S. 338 (1974) said that indictments are not challengeable on the grounds that they were procured through the violation of the defendant's fifth amendment privilege against self-incrimination. Id. at 344-45. This has been interpreted as meaning, at least for the purposes of grand jury proceedings, that the fifth amendment does not supersede the fourth amendment in importance. In re Weir, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974).
C. Section 3504(a)(1) and the Sixth Amendment

Though grand jury witnesses do not possess substantive rights which confer standing to object to the illegal electronic surveillance of their attorneys, defendants have standing to make such objections on the basis of the sixth amendment's guarantee of the right to counsel. Thus the remaining consideration is whether defendants may utilize section 3504(a)(1) to compel the government to affirm or deny whether their attorneys' conversations have been intercepted.

The text of the statute indicates that claims must be made by a "party aggrieved." While the legislative history is silent as to the meaning of this phrase, a statement in the Senate Report indicates that case law principles of standing determine who may utilize section 3504(a)(1). Since the case law acknowledges that electronic surveillance of a defendant's attorney may violate the defendant's sixth amendment rights and thus confer standing upon him, it seems reasonable to infer that the statute can encompass sixth amendment claims.

The statute further indicates that the "party aggrieved" must claim that "evidence is inadmissible." The use of such language may at first appear to preclude claims of sixth amendment violations, since the traditional remedy in such cases has been a new trial, rather than the exclusion of evidence. But more recent cases have conceded that it is appropriate in at least some instances to exclude evidence tainted by sixth amendment violations. Moreover, there is precedent for a liberal interpretation of

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134 See pp. 648-49 supra.
135 See p. 633 supra.
137 See pp. 648-49 supra.
138 See p. 649 supra. See also United States v. Seale, 461 F.2d 345, 365-66 (7th Cir. 1972). To enable the defendant to show taint in this context, some courts have found relevant the principle of Alderman v. United States, 394 U.S. 165 (1969), that surveillance which violates the fourth amendment must be disclosed to the defendant to permit him to demonstrate that the surveillance tainted his trial. See United States v. Seale, supra, at 365-66. See also United States v. Vielguth, 502 F.2d 1257, 1260 (9th Cir. 1974).

The relevance of the Alderman disclosure principle to the sixth amendment context is a further indication of the appropriateness of using § 3504(a)(1) for sixth amendment claims. Section 3504(a)(2) of 18 U.S.C. which imposes limits upon the principle of disclosure mandated by Alderman, was designed to apply to those claims made under section 3504(a)(1) which the government affirms. See H. Rep. No. 1549, 91st Cong., 2d Sess. 51 (1970). Clearly, the application of Section 3504(a)(2) to claims of sixth amendment violations which are affirmed is possible only if the Alderman principle is considered relevant to violations of the sixth amendment.
the phrase "evidence is inadmissible" as used in section 3504(a)(1). The Supreme Court in Gelbard held that the phrase could be read to encompass the inadmissibility of a witness's testimony.\textsuperscript{140}

The statute indicates that for evidence to be inadmissible, it must have been derived from an "unlawful act." Section 3504(b) defines an "unlawful act" as the use of an electronic device in violation of the Constitution or of federal law.\textsuperscript{141} This definition indicates no restriction as to which portion of the Constitution the act must violate, and thus makes plausible the inference that sixth amendment violations are included.\textsuperscript{142} The language of section 3504(a)(1) thus presents no bar to the making of sixth amendment claims.

Moreover, nothing in the legislative history refutes the idea that the procedures of section 3504(a)(1) are applicable to sixth amendment claims. Section 3504(a)(1) was adapted from a Justice Department policy dating back to at least 1966.\textsuperscript{143} This policy constitutes an important basis for inferring the scope of the statute which it generated.\textsuperscript{144} An examination of Justice Department admissions of illegal electronic surveillance between 1966 and 1970 reveals that in at least three cases the Justice

\begin{itemize}
  \item \textsuperscript{140} Gelbard v. United States, 408 U.S. 41, 54 (1972).
  \item \textsuperscript{141} See note 16 supra.
  \item \textsuperscript{142} The constitutional and statutory requirements for judicial approval of electronic surveillance are based on the fourth amendment. See, e.g., Katz v. United States, 389 U.S. 347 (1967); Berger v. N.Y., 388 U.S. 41 (1967). The statutory requirements for electronic surveillance contained within 18 U.S.C. §§ 2510-20 (1970) were designed to conform to the constitutional mandates of Katz and Berger. See S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968). The cases concerning sixth amendment violations caused by the electronic surveillance of defendants' attorneys have all involved surveillance which failed to comply with the requirements mandated by the fourth amendment. See, e.g., Hoffa v. United States, 387 U.S. 231 (1967); United States v. Seale, 461 F.2d 345 (7th Cir. 1972); Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952).

  The presence of fourth amendment violations in these cases is to be distinguished from the question of whether the defendants possessed standing to object to such violations. For example, in Hoffa, one petitioner possessed fourth amendment standing and the rest did not. All, however, were held entitled to object to any sixth amendment violation. Id. at 233. No case has presented squarely the issue of whether electronic surveillance which does not violate the fourth amendment may nevertheless violate the sixth amendment if the surveillance intrudes upon discussions of the defendant's attorney relevant to the defendant's case. See Tierney v. United States, 409 U.S. 1232 (1972).

  \item \textsuperscript{144} The argument was made earlier that the meaning of "claim" suggested by the Justice Department's policy should not limit its meaning in the context of section 3504(a)(1). See p. 640 supra. This argument was justified because there was considerable evidence that Congress intended to expand it. Id. The present argument relies upon the absence of any Congressional intention to narrow the Justice Department policy. There is thus no inconsistency between the present argument and the argument made earlier.

\end{itemize}
Department singled out for special concern the occurrence or possible occurrence of sixth amendment violations. Furthermore, it seems clear that the Congressional purpose of protecting victims of illegal electronic surveillance is enhanced by interpreting section 3504(a)(1) to include sixth amendment claims. As former Justice Douglas put it, "[t]he conversation of one's lawyer over the telephone may be as helpful to Big Brother as the conversation of the accused [himself]."

Finally, there is no reason to require even a low threshold of evidentiary support for sixth amendment claims made under the statute. First, the extreme difficulty in amassing any evidence of electronic surveillance militates against such a requirement. Second, even a low evidentiary threshold would necessitate some form of judicial review to ascertain whether the threshold has been met in a particular case. But since Congress enacted sections 3504(a)(2) and (a)(3) to decrease the amount of judicial time spent on suppression issues, it is unlikely that it intended to have it replaced by litigation made necessary by section 3504(a)(1).

Third, the sixth amendment's guarantee of the right to counsel protects the defendant's attorney from government intrusion into the preparation of his client's case. A defendant who sought to show that evidence produced against him could not have been acquired without the electronic surveillance of his attorney may have no alternative but to provide the government with the subject matter of at least some of his attorney's conversations. Yet the production of such evidence compromises the very integrity of the consultations he is seeking to protect.

For these reasons claims of electronic surveillance of the defendant's attorney, like claims of the surveillance of the defendant himself, should not require evidentiary support. As with claims of surveillance of the

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146 See p. 641 supra.
148 See p. 642 supra.
149 Id.
150 See pp. 648-49 supra.
151 Cf. Coplon v. United States, 191 F.2d 749, 758 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952). It might be possible to have only the judge see such evidence. Cf: United States v. Kovel, 296 F.2d 918, 924 (2d Cir. 1961). However, none of the cases which have required evidentiary support for claims of attorney surveillance have adopted such an approach. See, e.g., United States v. Alter, 482 F.2d 1016, 1026 (9th Cir. 1973). Furthermore, even if such an approach were adopted, the other problems discussed at p. 656 supra would remain.
defendant, it is impossible to develop a set of rules which would prevent the raising of tenuous claims, for there is no category of cases in which the possibility of electronic surveillance of attorneys can be dismissed with certainty. However, the very nature of the alleged sixth amendment violation does suggest one limiting principle. Since the violation consists of an interference with the attorney’s representation of the defendant, the violation cannot occur prior to the start of such representation. The defendant could be required to attach to his claim the period of representation by the attorney in question, an approach which has been followed in several cases. In responding to the claim, the government will be concerned only with verifying the occurrence of electronic surveillance conducted within a limited time frame; thus the investigation will be expedited, and delay in the trial proceedings can be minimized.

III. GOVERNMENT RESPONSES TO CLAIMS OF ILLEGAL ELECTRONIC SURVEILLANCE

The confusion in the case law with regard to the interpretation of section 3504(a)(1) is not confined to the requirements for making claims of illegal electronic surveillance. It also extends to the nature of the government’s required response to such claims, that is, the significance of the obligation to “affirm or deny the occurrence of the alleged unlawful act.”

One source of uncertainty is the question of how the government should respond when it has conducted electronic surveillance which it believes to be legal. The argument has been made that since the claim is directed at illegal surveillance, the government should not have to

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152 See p. 646 supra.
153 Revelation of the name of defendant’s attorney and the dates of his representation have been held not to violate the confidentiality of the attorney-client relationship. See, e.g., United States v. Pappadio, 346 F.2d 5 (2d Cir. 1965), vacated on other grounds, 384 U.S. 364 (1966); Colton v. United States, 306 F.2d 633 (2d Cir. 1962); United States v. Dickinson, 308 F. Supp. 900 (D. Ariz. 1969), aff’d, 421 F.2d 702 (9th Cir. 1970) (per curiam). But see Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).
155 See note 135 supra.
156 See, e.g., Beverly v. United States, 468 F.2d 732, 752 n.23 (5th Cir. 1972) (not necessary to include such surveillance). But see In re Horn, 458 F.2d 468, 471 (3rd Cir. 1972) (all such surveillance should be included).
acknowledge surveillance it considers to be legal. 157 This argument is
specious for several reasons. First, the decision as to whether the surveil-
lance was conducted lawfully is a legal decision, to be distinguished from
the factual question of whether there was any surveillance at all. Since
ultimate legal judgments should not be made by one of the adversaries in
a controversy, a conclusory denial by the government should be unac-
ceptable. 158 Second, the Senate Report on section 3504(a)(1) provides
clear support for the position that the government must acknowledge
electronic surveillance which it considers to be legal. Indeed, the Report
expressed the expectation that questions concerning the legality of court-
ordered electronic surveillance and surveillance conducted pursuant to
the national security exception would repeatedly arise under the stat-
ute. 159


158 Neither the text of section 3504(a)(1) nor its legislative history directs itself to the
right of a claimant to challenge the government's denials to claims of illegal electronic
surveillance, and a detailed examination of this topic is beyond the scope of this Comment.
However, it should be noted that there are in fact three types of challenge which a claimant
might wish to make.

First, a claimant might attack the government's assertion that the surveillance was
See also United States v. Crabtree, 475 F.2d 755 (5th Cir. 1973); United States v.
Robinson, 472 F.2d 973 (5th Cir. 1973). The Supreme Court in Gelbard v. United States,
408 U.S. 41 (1972), reserved the question as to whether grand jury witnesses might make
such a challenge. Id. at 61 n.22. However, In re Lochiatto, 497 F.2d 803 (1st Cir. 1974),
accorded grand jury witnesses a limited right to make such a challenge. But see United
States v. Worobyzt, 522 F.2d 196 (5th Cir. 1975).

Second, a claimant might challenge the sufficiency of the government's denial as a
matter of law. See Korman v. United States, 486 F.2d 926 (7th Cir. 1973) (unsworn denial
challenged); In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914
(1973) (challenge to the number of agencies contacted).

Third, a claimant might wish to challenge the truth of the government's assertion that
no electronic surveillance was conducted. A defendant who wished to make this challenge
would probably have to establish the occurrence of the surveillance in accordance with the
burden of proof laid down by Nardone v. United States, 308 U.S. 338 (1939). See also
United States v. Ledesma, 499 F.2d 36 (9th Cir.) cert. denied, 419 U.S. 1024 (1974). In
his concurrence in Gelbard, Justice White suggests that grand jury witnesses may not
challenge the truth of a denial. 408 U.S. at 71 (White, J., concurring). But see Korman v.
United States, supra; United States v. Alter, 482 F.2d 1016, 1027 n.19 (9th Cir. 1973).

159 In some categories of electronic surveillance, no case has held that court orders are
required. These are surveillance conducted with the consent of one of the parties to the
conversation, and foreign national security surveillance. Domestic national security surveil-
ance does, however, require prior judicial approval. See United States v. United States
Dist. Court, 407 U.S. 297 (1972). See also notes 22 and 26 supra.

Because a United States District Attorney is often not aware of the source of leads provided by other government agencies, an adequate government response to a claim of illegal electronic surveillance must include statements from government officials in Washington. There is some confusion in the cases as to the appropriate manner of selecting the federal agencies from which such statements are solicited. The majority view requires only that inquiries be directed at the seven agencies which have obtained permission from the Justice Department to conduct electronic surveillance pursuant to a court order. A minority position is that any other agency with responsibility for the subject matter of the case should also be contacted. The minority position is preferable for two reasons. First, the majority view assumes that electronic surveillance is conducted only by those agencies specifically authorized to utilize it, and thus ignores electronic surveillance that is blatantly illegal. Other apparently lawful surveillance may nevertheless be illegal because of an isolated defect, such as the continuation of the surveillance beyond the period authorized by the court. If only those agencies which have received permission to conduct electronic surveillance are contacted, it is likely that the only incidents of illegality which will emerge will be of the second type. But certainly there ought to be at least as much concern with the occurrence of blatantly illegal surveillance. Second, an inquiry directed only at those agencies permitted to conduct surveillance pursuant to court order may overlook those forms of electronic surveillance which do not require judicial approval.

161 See, e.g., Black v. United States, 385 U.S. 26 (1966). Occasionally the fact that information was obtained from electronic surveillance will be denoted by a code to which the prosecuting attorney is not privy. See, e.g., United States v. Alderisio, 424 F.2d 20, 24 n.6 (10th Cir. 1970); United States v. Schipani, 289 F. Supp. 43, 50 (E.D.N.Y. 1968), aff'd, 414 F.2d 1262 (2d Cir. 1969), cert. denied, 397 U.S. 922 (1970).


163 These agencies are the Federal Bureau of Investigation; Secret Service; Internal Revenue Service; Bureau of Alcohol, Tobacco, and Firearms; Customs Service; Drug Enforcement Administration; and Postal Service. See, e.g., United States v. Grusse, 515 F.2d 157, 160 (2d Cir. 1975); In re Harris, 383 F. Supp. 1036, 1038 (N.D. Cal. 1974). See also 18 U.S.C. § 2516 (1970).

164 In United States v. Alter, 482 F.2d 1016, 1027 (9th Cir. 1973), the government response was criticized for failing to justify limiting the inquiry to the agencies which received permission from the Justice Department to conduct electronic surveillance. See 18 U.S.C. § 2518(1)(d) (1970).
Most courts have required that the government response be in the form of a sworn affidavit. This requirement is desirable both as a symbolic recognition of the importance of the response and to insure greater care on the part of those responsible for the preparation of answers. Courts have also insisted that the government's answer indicate which agencies were contacted, a requirement which is essential to the ascertainment of whether all relevant agencies were reached. Some courts have required only that the government reply incorporate the substance of the responses from the government agencies; in at least one case, however, the prosecution appended copies of the letters received from the agencies. The latter approach seems preferable, as the filtering inherent in summarizing the various responses may serve to obscure any ambiguity or uncertainty in any one of the responses.

**CONCLUSION: LIMITATIONS OF THE STATUTE**

By providing a mechanism for the discovery of illegal electronic surveillance, section 3504(a)(1) is an important device for barring the use of evidence obtained by such means. At the same time, however, there are certain limitations inherent in the procedures which it establishes.

First, the successful functioning of the procedures presupposes that the government will willingly admit to its own wrongdoing. But such an assumption may not be justified. While in a number of cases litigated before the statute was enacted, the government acknowledged having conducted illegal electronic surveillance, the government was free to choose whether and when it would make such admissions. Section 3504(a)(1) raises the question of whether the government will be willing to acknowledge illegality whenever others ask it to do so. The govern-

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167 See, e.g., United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974); United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); In re Harris, 383 F. Supp. 1036 (N.D. Cal. 1974). But see United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975).


169 See, e.g., United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); Korman v. United States, 486 F.2d 926 (7th Cir. 1973).

170 In re Harris, 383 F. Supp. 1036 (N.D. Cal. 1974). There was no indication that the court required this procedure.

ment’s reluctance to admit having conducted illegal electronic surveillance in a particular case may be compounded by the fact that Congress has enacted statutes which provide heavy criminal and civil penalties for the illegal use of electronic surveillance. Indeed, in its decision in Gelbard, the Supreme Court acknowledged that failure to obtain appropriate authorization for electronic surveillance might result in the trials of government prosecutors themselves.

Despite these problems, however, there appears to be no alternative to relying upon the government’s acknowledgement of its own illegal activities. For only the government has access to the relevant information: “The government is handicapped . . . because [it has] too many records. Yet that is little comfort to [the claimant], who has none.” However, section 3504(a)(1) would still provide significant protections if it is read to compel disclosure of surveillance which the government, believes to be legal. Indeed, it is inevitable that in at least some of these cases the courts will conclude that such surveillance was nonetheless illegal. Thus, certain prophylactic protections would remain.

The second limitation is the inefficient method by which the information necessary for the government’s response is obtained from the various federal agencies. The Department of Justice is informed by the prosecuting attorney that a claim of illegal electronic surveillance has been made. The Department, in turn, sends letters to the appropriate agencies, and forwards the replies it receives to the prosecuting attorney. An alternative method would be the establishment of a central,

172 See 18 U.S.C. § 2511(1) (1970), providing fines of not more than $10,000 or imprisonment for not more than five years, or both, for the prohibited interception of wire or oral communications; 18 U.S.C. § 2520 (1970), authorizing the recovery of civil damages for anyone whose communication is illegally intercepted. Such a person is entitled to actual damages, punitive damages, and litigation costs.

173 408 U.S. 41, 52 (1972). Two complete defenses to any civil or criminal action are provided by 18 U.S.C. § 2520 (1970). The first is a good faith reliance on a court order. The second is good faith reliance upon the provisions of 18 U.S.C. § 2518 (1970), which allows for the interception of communications without a court order in emergency situations if authorization is obtained within forty-eight hours after the interception. It is conceivable that the government prosecutor might plead the fifth amendment rather than affirm the occurrence of illegal electronic surveillance.

174 In re Evans, 452, F.2d 1239, 1249 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972).

175 See pp. 657-58 supra.


The establishment of such a computer bank would serve to streamline the series of separate inquiries made necessary by the present system. However, its establishment might at the same time threaten privacy far more than does the present system. The very existence of such a computer bank would make the information contained within it available for pernicious purposes; thus the present fragmentation of information regarding electronic surveillance is to this extent protective.\footnote{179}

Both the fourth amendment and section 2515 allow challenges to illegal electronic surveillance conducted by state officials.\footnote{180} However, there is nothing in the legislative history of section 3504(a)(1) to indicate that the federal government is required to determine whether the state government has conducted any electronic surveillance for which the claimant has standing to object.\footnote{181} But since state and federal officials involved in the prosecution of crime may share information obtained from electronic surveillance,\footnote{182} the possibility exists that in some instances the federal government's case was constructed at least in part on the basis of electronic surveillance conducted by the state. At least where the federal government is aware of the fact that its evidence was obtained in this manner, it should be required to acknowledge this in its response. Such a requirement would not obligate the federal government to make any inquiries to determine this fact, nor would it be inconsistent with the government's obligation to affirm or deny the use of electronic surveillance allegedly in violation of the Constitution or federal law.\footnote{183}
The enactment of 18 U.S.C. § 3504(a)(1) (1970) provides an essential tool for the realization of constitutional and statutory prohibitions against the use of evidence obtained from illegal electronic surveillance. This Comment has analyzed how alternative interpretations of section 3504(a)(1) comport with the protection of rights under the fourth and sixth amendments and under 18 U.S.C. § 2515 (1970). The successful functioning of this statute is nonetheless uncertain, since success depends upon the government’s willingness to acknowledge its own wrongdoing.

—Margaret V. Sachs