The Burger Court Opinion Writing Database

Gelbard v. United States

408 U.S. 41 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1972

Re: No. 71-110 - Gelbard v. U. S.
No. 71-263 - U. S. v. Egan

Dear Bill:

Please join me in your dissent in the above.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1972

Re: No. 71-110 - Gelbard v. U. S.
No. 71-263 - U. S. v. Egan

Dear Bill:

Please join me in your dissent in the above.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

P. S. (WHR-only) -- I suggest that the second sentence of your dissent tends to weaken its primary thrust. I would be inclined to omit it or recast it so as to reflect that "the Court's conclusion while supported by some language in some of the sections is not supported when the statutory scheme is read in light of the legislati history." However, I join your opinion either way. --WEB

WEB

ambiguities within

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 31, 1972

Dear Chief:

My records indicate that in No. 71-110 - Gelbard v. United States, the vote was five to four to reverse. If that is the vote, I would suggest that Bill Brennan receive the assignment.

William O. Douglas

The Chief Justice

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 29, 1972

Dear Bill:

Re: No. 71-110 - Gelbard v. U. S.
No. 71-263 - U.S. v. Egan

Please join me in your opinion.

I may possibly file a separate opinion but it will in no way derogate from what you have written in this fine opinion.

William O. Douglas.

Mr. Justice Brennan

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 26, 1972

Dear Bill:

As respects all the cases which we are holding for Nos. 71-110 and 71-263, I agree with all your recommendations.

W. O. D.

Mr. Justice Brennan

B

You joined Co's

The Solicitor General

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated: 6-5

Nos. 71–110 AND 71–263

Recirculated: _____

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, concurring.

Although I join in the opinion of the Court, I believe that, independently of any statutory refuge which Congress may choose to provide, the Fourth Amendment shields a grand jury witness from any question (or any subpoena) which is based upon information garnered from searches which invade his own constitutionally protected privacy.

All of these cases have a common theme. In each a grand jury witness is seeking to prove and to vindicate suspected unconstitutional seizures of his own telephone conversations. And, in every relevant respect, the proceedings below were in striking parallel to those in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385.

In that case, after federal agents unlawfully seized papers belonging to the Silverthornes and to their lumber company, the documents were returned upon order of the court. In the interim, however, the agents had copied them. After returning the seized originals, the prosecutor attempted to regain possession of them by

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71–110 AND 71–263

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1972]

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I would hold that Title III of the 1968 Act offends the Fourth Amendment, as does all wiretapping and bugging, for reasons which I have often expressed elsewhere. *E. g., Cox* v. *United States,* 405 U. S. —; *Williamson* v. *United States,* 405 U. S. —; *Katz* v. *United States,* 389 U. S. 347, 359; *Berger* v. *New York,* 388 U. S. 41, 64; *Osborn* v. *United States,* 385 U. S. 323, 340; *Pugach* v. *Dollinger,* 365 U. S. 458, 459; *On Lee* v. *United States,* 343 U. S. 747, 762. In each of the present cases a grand jury witness seeks to prove and vindicate suspected unconstitutional seizures of his own telephone conversations. And, in every relevant respect, the proceedings below were in striking parallel to those in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385.

(?)
5/8
chgs

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas; J.

Nos. 71–110 AND 71–263

Circulate:

Recirculated: 6/9/72

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1972]

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Please join me

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Brennan, J.

Circulated: 5/29/72

Recirculated:

SUPREME COURT OF THE UNITED STATES

Nos. 71–110 AND 71–263

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These cases present challenges to the validity of adjudications of civil contempt, entered pursuant to 28 U. S. C. § 1826 (a),[1] of witnesses before federal grand

[1] Section 1826 (a) provides:

"Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

"(1) the court proceeding, or

"(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

This provision was enacted as part of the Organized Crime Control Act of 1970. It was intended to codify the existing practice of the federal courts. S. Rep. No. 91–617, 91st Cong., 1st Sess., 33, 56–

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Brennan, J.

Circulated: _____

Recirculated: 5/30/72

SUPREME COURT OF THE UNITED STATES

Nos. 71–110 AND 71–263

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These cases present challenges to the validity of adjudications of civil contempt, pursuant to 28 U. S. C. § 1826 (a),[1] of witnesses before federal grand juries

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B

P 7, 8, 10, 19

Joined 5/30

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Brennan, J.

Circulated: _____

Recirculated: 6/1/72

SUPREME COURT OF THE UNITED STATES

Nos. 71–110 AND 71–263

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 20, 1972

MEMORANDUM TO THE CONFERENCE

RE: Cases held for No. 71-110 Gelbard v. United States and No. 71-263 - Egan v. United States

The 6 cases listed at the top of page 15 were held for the above cases. I recommend the following dispositions:

No. 71-256 - United States v. Evans. The District of Columbia Court of Appeals held that a Grand Jury witness may invoke 18 U.S.C. § 2515 as a defense to contempt charges for refusal to testify on the ground that the questioning would be based on illegal wire interception of their communications. I would Deny.

No. 71-379 - Reed v. United States
No. 71-5100 - Bacon v. United States
No. 71-5672 - Olsen v. United States
No. 71-5737 - Reynolds v. United States

In all of the above cases it was held that Grand Jury witnesses are not entitled to invoke the prohibition of § 2515 as a defense to contempt charges. I would grant and vacate and remand each of the judgments for reconsideration in light of Gelbard v. United States.

No. 71-405 - Egan v. United States - This is a conditional cross-appeal by appellees Egan and Walsh in No. 71-263 being decided with Gelbard. I would Deny.

W.J.B. Jr.

Wm Douglas
O.T. 71
71-110

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5th DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Nos. 71–110 AND 71–263

Recirculated: 6/21/72

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These cases present challenges to the validity of adjudications of civil contempt, pursuant to 28 U. S. C. § 1826 (a),[1] of witnesses before federal grand juries

[1] Section 1826 (a) provides:

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 31, 1972

Nos. 71-110 & 71-263
Gelbard v. United States

Dear Bill,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-21-72

Recirculated:

Nos. 70-110 & 71-263 - Gelbard & Parnas v. United States

Mr. Justice White, concurring in the Court's opinion and judgment.

Under 28 U.S.C. § 1826(a) a witness who refuses to testify "without just cause" may be held in contempt of court. Here, grand jury witnesses are involved, and the just cause claimed to excuse them is that the testimony demanded involves the disclosure and use of communications allegedly intercepted in violation of the controlling federal statute and hence inadmissible under 18 U.S.C. § 2515.

The United States asserts that § 2515 affords no excuse to grand jury witnesses under any circumstances. Reliance is placed on § 2515(10)(a) and the legislative history of the statute. I agree with the Court, however, that at least where the United States has intercepted communications without a warrant in circumstances where court approval was required, it is appropriate in construing and applying 28 U.S.C. § 1826 not to require the grand jury witness to answer and hence further the plain policy of the wire-tap statute. This unquestionably works a change in the law with respect to the rights

no changes — first printed draft

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Nos. 71-110 AND 71-263

Recirculated: 6-23-72

David Gelbard and Sidney Parnas, Petitioners, 71-110 *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

United States, Petitioner, 71-263 *v.* Jogues Egan and Anne Elizabeth Walsh. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 26, 1972]

MR. JUSTICE WHITE, concurring in the Court's opinion and judgment.

Under 28 U. S. C. § 1826 (a) a witness who refuses to testify "without just cause" may be held in contempt of court. Here, grand jury witnesses are involved, and the just cause claimed to excuse them is that the testimony demanded involves the disclosure and use of communications allegedly intercepted in violation of the controlling federal statute and hence inadmissible under 18 U. S. C. § 2515.

The United States asserts that § 2515 affords no excuse to grand jury witnesses under any circumstances. Reliance is placed on § 2515 (10)(a) and the legislative history of the statute. I agree with the Court, however, that at least where the United States has intercepted communications without a warrant in circumstances where court approval was required, it is appropriate in construing and applying 28 U. S. C. § 1826 not to require the grand jury witness to answer and hence further the plain policy of the wiretap statute. This unquestionably works a change in the law with respect to the rights

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 30, 1972

Re: Nos. 71-110 and 71-263 - Gelbard v. U. S., etc.

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1972

Re: No. 71-110 - Gelbard v. U.S.
No. 71-263 - U.S. v. Egan

Dear Bill:

Please join me in your dissent.

Sincerely,

H.A.B.

Mr. Justice Rehnquist

cc: The Conference

June 21, 1972

Gelbard and Egan

Dear Byron:

This refers to our several conversations concerning the above cases.

I have now decided to join Bill Rehnquist.

This has been a difficult decision for me only because of § 2515, which I am not able fully to reconcile. I agree, however, with Bill Rehnquist that there is at least an implied conflict between § 2515 and § 2518(10)(a). In view of the established rule against challenging grand jury testimony, one would not expect Congress to change this rule in an ambiguous way. Indeed, the legislative history rather convincingly indicates that Congress did not intend to change the rule.

The right asserted by Parnas was "to inspect all applications, orders, tapes and transcripts relating to such electronic surveillance", to be followed presumably by a motion to suppress the use before the grand jury. This was in a case where the Ninth Circuit found that the tap had been authorized under Title III. If this were allowed, grand jury investigations could be seriously impeded.

I understand from our last conversation that Bill Brennan is adding a footnote to the effect that his opinion does not address the scope of inquiry on a motion to suppress before a grand jury. I do not think this meets my concern.

Accordingly, in this case where a fully satisfactory opinion probably cannot be written either for the Court or in dissent, I have concluded to join Bill Rehnquist. I have always thought his position was right as a matter of policy and legislative intent.

As this is an area in which I have had no experience my conversations with you were most helpful.

Sincerely,

Mr. Justice White

cc: Pete

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 21, 1972

Re: No. 71-110 Gelbard v. U. S.
No. 71-263 U. S. v. Egan

Dear Bill:

Please join me in your dissent.

Sincerely,

Lewis

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 29, 1972

Re: Nos. 71-110 and 71-263 - Gelbard and Parnas v. U.S. and U.S. v. Egan and Walsh

Dear Bill:

I plan to circulate a dissenting opinion in these cases in the near future.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

B/

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

No. 71-110 Gelbard and Parnas v. United States

No. 71-263 United States v. Egan and Walsh

From: Rehnquist, J.

Circulated: 6/15/72

Recirculated:

MEMORANDUM OF MR. JUSTICE REHNQUIST

Disposition of this case depends on the sorting out of admittedly conflicting implications from different sections of the principal statute involved. The Court's conclusion, while supportable if regard be had only for the actual language of the sections, is by no means compelled by that language. Its conclusion is reached in utter disregard for the relevant legislative history, and quite without consideration of the sharp break which it represents with the historical modus operandi of the grand jury. It is, in my opinion, wrong.

The Court states the question to be whether witnesses threatened with contempt under 28 USC § 1826(a) "are entitled to invoke this prohibition of § 2515 as a defense to contempt charges brought against them for refusing to testify." Ante, page 2. The question as thus framed by the Court has been so abstracted and refined, and divorced from the particulars of these two cases, as to virtually invite the erroneous answer which the opinion of the Court gives.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 71-110 - Gelbard and Parnas v. United States

I have sent a revision of my draft dissent to the printer today, and because there may be some delay in circulating it, I set forth below the two changes being made:

(1) Between the paragraphs on page 13, the following language will be inserted:

"The omission of 'grand jury' from the designated forums in § 2518(10)(a) is not explainable on the basis that though the testimony is sought to be adduced before a grand jury, the motion to suppress would actually be made in a court, which is one of the forums designated in § 2518(10)(a). The language 'in any trial, hearing, or proceeding before' quite clearly refers to the forum in which the testimony is sought to be adduced. But even more significant is the inclusion among the designated forums of 'department' 'officer' 'agency' and 'regulatory body'. Congress has almost without exception provided that issues as to the legality and propriety of subpoenas issued by either agencies or executive departments should be resolved by the courts. It has accomplished this result by requiring the agency to bring an independent judicial action to enforce obedience to its subpoena. See, e.g., 15 USC § 79(r) Utility Holding Company Act; 15 USC § 78(u) Securities Exchange Act; 41 USC § 35-45 Walsh-Healy Public Contracts Act; 50 USC App. 2155 Defense Production Act of 1950;

47 USC § 49 Communications Act; 46 USC § 1124 Merchant Marine Act of 1946; 26 USC § 7604 Internal Revenue Act; 16 USC § 825(f)(c) Electric Utility Companies Act; 15 USC § 717(m)(d) Natural Gas Act; 7 USC § 511 (n) Tobacco Inspection Act. This general mode of enforcement of agency investigative subpoenas was discussed in the context of the Fair Labor Standards Act in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

"Thus if Congress in § 2518 had intended to focus on the forum in which the hearing as to the legality of the subpoena is to be determined, rather than the forum in which the testimony is sought to be adduced, it would have omitted not only grand juries, but departments, officers, agencies, and regulatory bodies as well from the coverage of § 2518(10)(a). For questions as to the legality of subpoenas issued by all these bodies are resolved in the courts. By omitting only grand juries in § 2518, Congress indicated that it was dealing with the forum in which the testimony was sought to be adduced, and that the suppression hearing authorized by the section was not to be available to grand jury witnesses.

(2) Following the first sentence of text on page 14, after the quotation, the next sentence will be changed to read as follows:

"This intimation is not only inconsistent with the language of the section itself, as pointed out, ante, page 13, but it attributes to the drafters of the report a lower level of understanding of the subject matter with which they were dealing than I believe is justified."

W.H.R.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 22, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 71-110 - Gelbard v. United States
No. 71-263 - United States v. Egan

The following footnote has been sent to the printer for inclusion on page three of the typewritten draft of my dissenting opinion:

> "In the case of respondents Egan and Walsh, the government in the District Court did not state whether it had engaged in electronic surveillance. In this Court, however, the government represented that respondents Egan and Walsh had not been subjected to electronic surveillance. In light of this development, I would remand these cases to the District Court in order to give the respondents another opportunity to testify."

Sincerely,

W.H.R.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 71–110 AND 71–263

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 26, 1972]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, dissenting.

Disposition of this case depends on the sorting out of admittedly conflicting implications from different sections of the principal statute involved. The Court's conclusion, while supportable if regard be had only for the actual language of the sections, is by no means compelled by that language. Its conclusion is reached in utter disregard for the relevant legislative history, and quite without consideration of the sharp break which it represents with the historical *modus operandi* of the grand jury. It is, in my opinion, wrong.

The Court states the question to be whether witnesses threatened with contempt under 28 U. S. C. § 1826 (a) "are entitled to invoke this prohibition of § 2515 as a defense to contempt charges brought against them for refusing to testify." *Ante,* p. 2. The question as thus framed by the Court has been so abstracted and refined, and divorced from the particulars of these two cases, as to virtually invite the erroneous answer which the opinion of the Court gives.