CRIMINAL PROCEDURE—GRAND JURY—REMEDY OF EXCLUSIONARY RULE HELD INAPPLICABLE TO GRAND JURY PROCEEDINGS—*United States v. Calandra*, 414 U.S. 338 (1974).

During late 1970 and early 1971, federal agents intensively investigated gambling and bookmaking activities in Cleveland, Ohio. The investigation was focused upon Joseph Lanese. The agents wiretapped Lanese's telephone with court permission and conducted a physical surveillance of other suspected participants in the gambling operation.[1] Based on the information obtained from these activities and an informant, a warrant was issued for the search of the Royal Machine and Tool Company, which was owned by John Calandra.[2] Although the warrant was specifically restricted to a search and seizure of bookmaking records and paraphernalia, the premises were subjected to a thorough, four-hour search.[3] While no gambling paraphernalia was found, papers believed to be loansharking records were discovered and seized.[4]

On March 1, 1971, a special federal grand jury was convened to investigate loansharking activities in the Cleveland area.[5] Calandra was

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1 United States v. Calandra, 465 F.2d 1218, 1220 (6th Cir. 1972).

2 *Id.* Three warrants were issued. One was for Calandra's home, another for his business, and another for an automobile. However, only the search of the business premises is relevant to this case. *In re* Calandra, 332 F. Supp. 737, 742 n.3 (N.D. Ohio 1971). The information which served as the basis for the warrants did not appear to be substantial. Two phone conversations between Joseph Lanese and John Calandra were overheard by the agents. The calls, which concerned football bets, were made to and from Calandra's home. *Id.* at 742-43. Lanese's car was observed parked outside the building of the Royal Machine and Tool Company, and a car registered to the company was seen parked in front of Lanese's home. *Id.* at 743. On December 4, 1970, an informant told agents that Calandra took bets at his home and office. *Id.* at 744. Five other informants gave information to agents concerning the gambling enterprise. United States v. Calandra, 465 F.2d 1218, 1220 (6th Cir. 1972).

3 United States v. Calandra, 465 F.2d 1218, 1220 (6th Cir. 1972). The agents carefully examined every paper in Calandra's office. *Id.*

4 *Id.* at 1221. In the course of the search, one agent found a card with the name of Dr. Walter Loveland written on it which appeared to be a record of money payments made to Calandra. The agent remembered that the United States Attorney's Office was investigating loansharking activity in which Dr. Loveland was a victim. The items seized were thought to be connected with the loansharking violations already under investigation. *Id.*

5 *Id.* FED. R. CRIM. P. 6(a) empowers the district court to create grand juries whenever necessary. The function of the grand jury is

> to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States for the presentation of evidence.

18 U.S.C. § 3332(a) (1970). For further discussion of the grand jury see notes 100-10 *infra* and accompanying text.

summoned to appear before the grand jury on August 17, 1971[6] to answer questions which were later conceded by the Government to be based upon the evidence seized from the search of Calandra's company.[7] Invoking his fifth amendment privilege against self-incrimination, Calandra refused to answer any questions.[8] Consequently, the United States Attorney asked that Calandra be given transactional immunity.[9] Prior to the grant of this immunity, Calandra requested and received a postponement of the immunity hearing in order to prepare and file a motion for suppression and return of the evidence seized.[10] The motion was premised upon an alleged violation of fourth amendment rights, and was filed pursuant to Federal Rule of Criminal Procedure 41(e) on the ground that Calandra was a " 'person aggrieved.' "[11]

In response, the Government contended that a witness before a grand jury who has been granted immunity is not a potential defendant, and therefore has no standing under Rule 41(e) to raise a search and

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6 United States v. Calandra, 465 F.2d 1218, 1221 (6th Cir. 1972). FED. R. CRIM. P. 17(a) provides the manner in which the grand jury may summon witnesses through the subpoena power of the court. A case which discussed the relationship between the court and the grand jury is *In re* National Window Glass Workers, 287 F. 219 (N.D. Ohio 1922). The court clearly stated that the grand jury is not a self-functioning agency, but gains its powers from the court and therefore the court's process is necessary to compel attendance of witnesses at grand jury. *Id.* at 225.

7 *In re* Calandra, 332 F. Supp. 737, 738 (N.D. Ohio 1971).

8 United States v. Calandra, 465 F.2d 1218, 1221 (6th Cir. 1972). U.S. CONST. amend. V provides in pertinent part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

9 *In re* Calandra, 332 F. Supp. 737, 738 (N.D. Ohio 1971). Transactional immunity, which was requested pursuant to 18 U.S.C. § 2514 (1970), grants total immunity to the witness, except in instances of perjury or contempt. This statute was provisionally enacted and will be replaced in December, 1974 by 18 U.S.C. §§ 6001-03 (1970), which confers only use immunity upon the witness. This action is a result of the decision of Kastigar v. United States, 406 U.S. 441 (1972), where the Court held that transactional immunity was broader than necessary and that use immunity as provided in 18 U.S.C. § 6002 (1970) was sufficiently co-extensive with the self-incrimination privilege. 406 U.S. at 453, 462.

10 United States v. Calandra, 465 F.2d 1218, 1221 (6th Cir. 1972).

11 *See id.* at 1222 (quoting from FED. R. CRIM. P. 41(e)). FED. R. CRIM. P. 41(e), *as amended*, FED. R. CRIM. P. 41(e),(f), provides in pertinent part:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial.

seizure question.[12] The district court disagreed with the Government's position and held that due process

> allows a witness to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure.[13]

Having granted Calandra standing, the court held that the warrant was not based on probable cause[14] and that the search went beyond the scope of the warrant.[15] Consequently, the material was suppressed and ordered returned to Calandra, and he was not required to answer any question posed to him before the grand jury resulting from this evidence.[16]

The Government then appealed the decision to the United States Court of Appeals for the Sixth Circuit and Calandra moved to dismiss the appeal.[17] The court examined the issues and concluded that "[i]mportant questions of law" were involved for which the right to review by an appellate court should be granted.[18] In a separate decision, it turned to the merits and viewed the main issue as whether

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12 *In re* Calandra, 332 F. Supp. 737, 739 (N.D. Ohio 1971). For an analysis of the standing issue involved in the case see notes 111-23 *infra* and accompanying text.

13 *In re* Calandra, 332 F. Supp. 737, 742 (N.D. Ohio 1971).

14 *Id.* at 746. The court stated:

> No fact taken independently nor their sum total establish that the United States had probable cause to search Royal Machine and Tool for gambling paraphernalia.

Id. at 744. For a summary of the information upon which the warrant was based see note 2 *supra*.

15 *In re* Calandra, 332 F. Supp. 737, 746 (N.D. Ohio 1971). The court also noted that the search warrant, in effect, authorized an invalid general search: "This type of operation is closer to ransacking than a careful search for particularly described items." *Id.* at 745-46.

16 *Id.* at 746. For an analysis of the lower court opinions see Note, *Federal Grand Jury Witness Who Has Been Granted Transactional Immunity Can Move to Suppress Evidence Seized from Him in Violation of the Fourth Amendment*, 34 OHIO S.L.J. 450 (1973).

17 United States v. Calandra, 455 F.2d 750, 751 (6th Cir. 1972). The appeal was based on 18 U.S.C. § 3731 (1970), which allows appeals by the Government from orders granting the suppression or exclusion of evidence in a criminal proceeding prior to return of an indictment. Calandra argued that a witness before a grand jury was not part of a "criminal proceeding" and, therefore, the order of the district court was non-appealable. *See* 455 F.2d at 751-52. The court noted, however, that the statute had been amended in 1971 to liberalize the appeal procedure for orders granting suppression or exclusion of evidence. *Id.* at 752. *See* 18 U.S.C. § 3731 (1970), where paragraph five explicitly states: "The provisions of this section shall be liberally construed to effectuate its purposes."

18 United States v. Calandra, 455 F.2d 750, 753 (6th Cir. 1972). The court felt that appeal lay not only under 18 U.S.C. § 3731 (1970), but also under 28 U.S.C. § 1291 (1970). The court stated:

> a district court may consider in a proceeding ancillary to a grand jury investigation a motion to suppress on Fourth Amendment grounds on behalf of a witness for whom the Government has requested immunity . . . .[19]

The Sixth Circuit concluded that it is the status of the individual as an "aggrieved person" under Rule 41(e) at the time he files his motion to suppress that will determine whether he has standing.[20] The fact that he might be granted immunity at a later date was considered irrelevant since the invasion of his fundamental right to privacy was found to be of greater importance than the expeditious administration of justice.[21] Therefore, the order of the district court was affirmed.[22]

After granting the Government's petition for certiorari,[23] the United States Supreme Court, in *United States v. Calandra*,[24] reversed the decisions of the lower courts. Rather than confining itself to the question of whether an immunized witness could assert fourth amendment rights, the Court dealt with the broader issue of whether *any* witness before a grand jury could institute a motion to suppress on the ground that the questions asked were based upon illegally obtained evidence.[25] The Court held that the application of the exclusionary rule to grand jury proceedings was not warranted:

> In the context of a grand jury proceeding, we believe that the damage to that institution from the unprecedented extension of

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If, as Calandra contends, his motion to suppress was not filed in a criminal case, then it must have been filed in an independent plenary proceeding in which a final order is appealable under Section 1291.

455 F.2d at 752.

19 United States v. Calandra, 465 F.2d 1218, 1220 (6th Cir. 1972). The court of appeals also considered the ruling by the district court that the search warrant was without probable cause and that the search extended beyond the scope of the warrant. The court upheld the district court's findings. *Id.* at 1226 n.5.

20 *Id.* at 1223. For a discussion of standing under Rule 41(e) see notes 111-23 *infra* and accompanying text.

21 United States v. Calandra, 465 F.2d 1218, 1223-27 (6th Cir. 1972). The court concluded:

> While we do not in any way minimize the importance of the . . . interests of orderly and efficient judicial administration, it is our view that . . . these interests are outweighed by the very substantial interests of citizens to have access to the motion to suppress in circumstances such as these.

Id. at 1227.

22 *Id.* at 1227.

23 410 U.S. 925 (1973).

24 94 S. Ct. 613, 624 (1974).

25 *Id.* at 615-16. Although the Government disagreed with the findings of both the district court and the court of appeals regarding the search warrant and the scope of the search, the Government did not challenge these holdings at the Supreme Court level. Likewise, the Government did not seek review of the district court order that the property seized from Calandra be returned to him. *Id.* at 617 n.2.

the exclusionary rule urged by respondent outweighs the benefit of any possible incremental deterrent effect.[26]

The history of the fourth amendment[27] can be traced from *Boyd v. United States*,[28] which held that a Revenue Act passed in 1874 was violative of both the fourth and fifth amendments.[29] The Act required a defendant either to produce his private books and papers in court or have the allegations against him admitted as true.[30] In arriving at its holding, the Court found that the compulsory production of incriminating private books and papers, in effect, forced a person to be a witness against himself.[31] Additionally, the violation of the self-incrimination clause of the fifth amendment was deemed in this situation to constitute an unreasonable search and seizure under the fourth amendment.[32] Thus, the admission into evidence of one of the defendant's invoices was found to be unconstitutional.[33]

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26 *Id.* at 623.

27 U.S. CONST. amend. IV states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

At common law, all reliable probative evidence was admissible. *See* Adams v. New York, 192 U.S. 585, 594-99 (1904). The American colonists, fearing the unreasonable exercise of power by the Government, adopted the fourth amendment. However, it was not until almost a hundred years after its adoption that the Supreme Court carefully examined its scope and application. W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 481 (2d ed. 1930). Two causes for the Supreme Court's reluctance to deal with the fourth amendment were Congress' lack of desire to exercise its criminal jurisdiction and the inability to appeal criminal cases to the Supreme Court. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 49 (1966). For cases which superficially deal with the fourth amendment during the nineteenth century see *Ex parte* Jackson, 96 U.S. 727, 733 (1877) (Congress may not authorize the invasion into "the secrecy of letters and such sealed packages in the mail"); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 285 (1855) (the fourth amendment does not apply to a civil proceeding for recovery of a debt); Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855) (fourth amendment requirements for issuance of a search warrant do not apply to state process); *Ex parte* Burford, 7 U.S. (3 Cranch) 448, 451 (1806) (habeas corpus was granted to a prisoner who was confined by a warrant not based on "some good cause certain, supported by oath"). For further history see Stengel, *The Background of the Fourth Amendment to the Constitution of the United States* (pt. 1), 3 U. RICHMOND L. REV. 278 (1969) and (pt. 2), 4 U. RICHMOND L. REV. 60 (1969); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970).

28 116 U.S. 616 (1886).

29 *Id.* at 632.

30 *Id.* at 619-20. An exception to this provision was an explanation "to the satisfaction of the court." *Id.* at 620.

31 *Id.* at 633.

32 *Id.* The Court explained the relationship between the fourth and fifth amendments as follows:

Although *Boyd* recognized the right to be protected from unreasonable searches and seizures, for many years the Supreme Court was inconsistent in its treatment of fourth amendment violations.[34] It was not until 1914 in *Weeks v. United States*[35] that the Court adopted the exclusionary rule, which declared that evidence illegally seized by federal officials was inadmissible in federal criminal trials.[36] In *Weeks*, police officers and a United States marshal entered the defendant's home in his absence and seized many personal articles, including books, letters, stocks, bonds and deeds.[37] After finding that the authorities acted improperly under color of law, the Court concluded that the property should have been returned to the defendant and that its admission at trial was prejudicial.[38]

For many years, however, the right to be free from unreasonable searches and seizures by state officials was not protected by the exclusionary rule. Although in 1949 the Court held in *Wolf v. Colorado*[39] that the fourteenth amendment prohibited unreasonable searches and seizures by state officials,[40] it refused to apply the exclusionary rule as a remedy.[41] The effect of that decision was the maintenance of the "silver

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> They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment . . . .

Id. The Court held that an unreasonable type of discovery method was "contrary to the principles of a free government" and would not be tolerated in the courts. *Id.* at 631-32. For further discussion of *Boyd* see Comment, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis*, 20 KAN. L. REV. 768, 769-70 (1972); Note, *United States v. Dionisio: The Grand Jury and the Fourth Amendment*, 73 COLUM. L. REV. 1145, 1148-49 (1973).

33 116 U.S. at 638.

34 *Compare* Adams v. New York, 192 U.S. 585, 594-96 (1904) (proceedings will not be stopped to inquire into the source of competent evidence and all evidence will be admissible even if illegally procured) *with* Hale v. Henkel, 201 U.S. 43, 76-77 (1906) (a subpoena duces tecum cannot stand if it is too broad to be considered reasonable).

35 232 U.S. 383 (1914).

36 *See id.* at 398. The Court reasoned that the adoption of the rule was necessary to control official misconduct and give weight to the fourth amendment:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value . . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Id. at 393-94. For a comprehensive discussion of the exclusionary rule see Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

37 232 U.S. at 386-87.

38 *Id.* at 398.

39 338 U.S. 25 (1949).

40 *Id.* at 28.

41 *Id.* at 33.

platter" doctrine, under which evidence resulting from unconstitutional searches and seizures by state officers was given on a "silver platter" to federal officials and was admissible in the federal courts. Only when federal officers illegally seized property and attempted to have it admitted into evidence could the exclusionary rule be invoked.[42] In 1960, the Court in *Elkins v. United States*[43] eliminated the "silver platter" doctrine by holding that all illegally seized evidence was inadmissible in federal courts. The *Elkins* decision set the stage for *Mapp v. Ohio*,[44] decided one year later, which held that the full effects of the exclusionary rule were applicable to state actions through the due process clause of the fourteenth amendment.[45]

The birth of the exclusionary rule in *Weeks* concerned only those items which were the original subjects of an illegal search and seizure. A substantial lessening of this restriction and a corresponding expansion of the exclusionary rule began with the decision of *Silverthorne Lumber Co. v. United States*.[46] In *Silverthorne*, Frederick Silverthorne and his father were indicted and arrested. While they were in custody, agents of the Department of Justice and a United States marshal illegally searched the office of Silverthorne Lumber Company and seized "books, papers and documents," of which copies were later made.[47] The district court ordered the return of the documents and impounded the copies. Subsequently, however, a new indictment against the Silverthornes was returned based upon the items seized, and subpoenas were issued requesting that the original materials be produced before a grand jury.[48] The Silverthornes refused to produce the documents, arguing that because an illegal search and seizure had occurred the use of the papers and documents should be prohibited.[49] In response, the Government contended that fourth amendment protections extended only to the "physical possession" of the items seized, and not to any other "advantages" that the Government might achieve from the use of the objects.[50] In rejecting the Government's argument, the Supreme Court, in an oft-quoted passage, reasoned that the admission of the documents as evidence

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42 *See* Lustig v. United States, 338 U.S. 74, 78-79 (1949); Byars v. United States, 273 U.S. 28, 33 (1927).

43 364 U.S. 206, 223 (1960).

44 367 U.S. 643 (1961).

45 *Id.* at 660.

46 251 U.S. 385 (1920).

47 *Id.* at 390-91.

48 *Id.* at 391.

49 *Id.* at 390-91.

50 *Id.* at 391.

> reduces the Fourth Amendment to a form of words. . . . The essence of a provision forbidding the acquisition of evidence in a certain way is that *not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.*[51]

Thus, evidence secondarily obtained from materials originally the subject of an illegal search and seizure was declared to be inadmissible in a legal proceeding. As a caveat, however, the Court went on to state that "this does not mean that the facts thus obtained become sacred and inaccessible." Rather, if an "independent source" could be proved, the information was admissible.[52]

Because the evidence in *Silverthorne* was to be presented before a grand jury, the case has been cited as supporting the proposition that the exclusionary rule is applicable to pre-indictment proceedings.[53] However, prior to *Calandra*, the appropriateness of the application of the exclusionary rule in the grand jury context had not been clearly resolved. For example, in *Centracchio v. Garrity*,[54] an individual was led to believe by Internal Revenue agents that if he voluntarily provided certain of his back tax records to the Commissioner of Internal Revenue, he would not be prosecuted. Despite the "promises of immunity," the information elicited was to be presented to a grand jury which had been called to investigate Centracchio's alleged filing of fraudulent tax returns. Centracchio then moved to suppress the evidence.[55] Upon appeal from the denial of the petition by the district court, the First Circuit indicated that a pre-indictment motion to sup-

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51 *Id.* at 392 (emphasis added) (citation omitted).

52 *Id.* This is considered the first pronouncement of the "fruit of the poisonous tree" doctrine. Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 589 (1968). The concept that even the indirect use of items seized in an illegal search was prohibited was given further attention in two subsequent decisions by the Supreme Court. In Nardone v. United States, 308 U.S. 338 (1939), the Court held that the use of derivative evidence was prohibited unless the connection between the illegal seizure and the "fruits" sought to be used was "so attenuated as to dissipate the taint." *Id.* at 341. Attenuation has been described as an insubstantial, negligible, or remote causal connection between the illegally seized evidence and the evidence sought to be admitted. Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A.L. REV. 32, 33 (1967). In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court appeared to affirm the standards for admissibility of evidence that were established in *Nardone* and *Silverthorne*. *Id.* at 487-88. For further discussion of *Wong Sun* see Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483 (1963).

53 *See, e.g.*, Gelbard v. United States, 408 U.S. 41, 62 (1972) (Douglas, J., concurring); *In re* Evans, 452 F.2d 1239, 1246 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972); *In re* Egan, 450 F.2d 199, 211 (3d Cir. 1971), *aff'd sub nom.* Gelbard v. United States, 408 U.S. 41 (1972).

54 198 F.2d 382 (1st Cir.), *cert. denied*, 344 U.S. 866 (1952).

55 198 F.2d at 383-84.

press would be proper.[56] The court concluded, however, that since Centracchio had voluntarily turned over the evidence to the Internal Revenue agents, no fourth amendment violation had occurred.[57] Thus, the case was remanded with an order to dismiss the petition.[58]

In *United States ex rel. Rosado v. Flood*,[59] Rosado appealed from an order of the district court which had denied his application for a writ of habeas corpus.[60] Rosado had been granted immunity and was asked to testify before a grand jury. He refused, however, to answer questions dealing with certain of his telephone conversations which had been wiretapped.[61] Although the Second Circuit recognized questions concerning statutory interpretation[62] and the scope of the fourth amendment,[63] it failed to decide the case on those grounds. Rather, the court held that a *mere witness* before a grand jury could not hinder its operations in the investigation of criminal activity even though the issue of fourth amendment violations could be raised at a later date by an indicted defendant.[64]

The Ninth Circuit, in *Carter v. United States*,[65] was faced with an

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56 *Id.* at 385-86. The court stated:

> [I]t has long been accepted that where evidence, obtained by an unconstitutional search and seizure in violation of the Fourth Amendment, is in the hands of a United States attorney, a federal district court may entertain and grant relief on a petition, filed even prior to any indictment, seeking a return of the papers or property unconstitutionally seized and the suppression of the same as evidence.

Id.

57 *Id.* at 388.

58 *Id.* at 389.

59 394 F.2d 139 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968).

60 394 F.2d at 139.

61 *Id.* at 140. Rosado relied on United States v. Tane, 329 F.2d 848 (2d Cir. 1964). 394 F.2d at 141. In *Tane*, the defendant successfully moved to suppress evidence and dismiss his indictment which was based almost exclusively on the testimony of a grand jury witness who had been discovered as a result of an illegal wiretap. 329 F.2d at 853-54.

62 *See* 394 F.2d at 140-41. The statute involved was 47 U.S.C. § 605 (1970), which prohibits the release of any information obtained through unauthorized electronic surveillance, even to the courts in response to a subpoena.

63 394 F.2d at 141. The court cited Katz v. United States, 389 U.S. 347, 353 (1967) for the proposition that unauthorized electronic surveillance, even without actual physical intrusion, is a fourth amendment violation. However, the court then declined to deal with the effects of *Katz* or the constitutional questions arising therefrom. 394 F.2d at 141.

64 394 F.2d at 141. The reasoning for the conclusion was based upon Blair v. United States, 250 U.S. 273 (1919). 394 F.2d at 141. *Blair* held that witnesses did not have a right to object to the broad investigatory power of the grand jury. 250 U.S. at 281-82. For further analysis of the grand jury see notes 100-10 *infra* and accompanying text.

65 417 F.2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970).

analogous situation and arrived at a similar result.[66] Citing *Rosado*, the court stated that

> witnesses . . . have no standing to question the source of the government's information. It will be time enough to do that if any of them should ever become a defendant . . . .[67]

Thus, although *Silverthorne* has been recently affirmed[68] and contains language which appears to be sufficiently inclusive to control in the situations mentioned above, the courts have failed to adopt its interpretation and resolve the issues on fourth amendment grounds. In the en banc decision of *In re Egan*,[69] however, Judge Adams of the Third Circuit, joined by only one other judge in his reasoning of the issues,[70] deliberately analyzed the scope of *Silverthorne's* application. In *Egan*, a grand jury witness who had been immunized refused to testify when asked questions which were based on evidence obtained by an illegal wiretap.[71] After first deciding that section 2518(10)(a) of the Omnibus Crime Control and Safe Streets Act of 1968[72] permitted an immunized witness before a grand jury to make a motion to suppress,[73] Judge Adams proceeded to hold in the alternative that the

66 In this case, witnesses refused to answer incriminating questions even after immunity had been granted. 417 F.2d at 386. Each witness was held in contempt and appealed on the ground that the immunity statute, 18 U.S.C. § 2514 (1970), was unconstitutional. Additionally, they contended that witnesses could object to the statute which was the basis of the investigation and to the source of the Government's information which formed the questioning. 417 F.2d at 386-88. The court disagreed with these contentions and affirmed the judgment of contempt. *Id.* at 388.

67 417 F.2d at 388.

68 In Harrison v. United States, 392 U.S. 219 (1968), the defendant's conviction was reversed after the determination that his confessions were wrongfully obtained and thus inadmissible. *Id.* at 220. On remand, the defendant's prior testimony, which had been given to counteract the effects of admitting the illegally obtained confessions, was admitted and defendant was again convicted. *Id.* at 221. The Supreme Court, relying on *Silverthorne*, held that the testimony was a "fruit" of the confessions and inadmissible at trial. The conviction was reversed. *Id.* at 222, 226.

69 450 F.2d 199 (3d Cir. 1971), *aff'd sub nom.* Gelbard v. United States, 408 U.S. 41 (1972).

70 Only Chief Judge Hastie joined fully in the opinion of Judge Adams. 450 F.2d at 221.

71 *Id.* at 200-01.

72 18 U.S.C. § 2515 (1970) provides that evidence obtained by unauthorized wiretapping is inadmissible before a grand jury. However, in 18 U.S.C. § 2518(10)(a) (1970), which provides the remedy of a motion to suppress for violation of section 2515, there is no explicit mention of the grand jury. Thus, it is questionable whether a motion to suppress is available to a grand jury witness to object to unlawful electronic surveillance and the "fruits" thereof.

73 450 F.2d at 203. In *In re* Evans, 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972), the court agreed with *Egan's* interpretation that sections 2518(10)(a) and 2515 are available as defenses to grand jury witnesses. 452 F.2d at 1245. For a case which

fourth amendment would also be a sufficient basis for arriving at the same conclusion.[74] He explicitly declared that *Silverthorne* controlled situations of this type, since the purpose of the fourth amendment was to prevent official use of illegally seized evidence against "aggrieved parties before a grand jury."[75] In so holding, he declined to apply the language of *Carter* or *Rosado* to the extent that it conflicted with *Silverthorne*.[76] Expressing the view that the fourth amendment insures an individual's right to privacy,[77] Judge Adams deemed the possible delay to grand jury operations resulting from suppression hearings insufficient to curtail the rights guaranteed by the fourth amendment.[78]

In *Gelbard v. United States*,[79] the Supreme Court affirmed *Egan* on its statutory interpretation,[80] but left open the fourth amendment issue.[81] The reluctance of the Court to deal with the constitutional problem was underscored by the concurring opinions. Justice Douglas argued strenuously for the direct application of *Silverthorne*. He stated that under that holding, which had been followed without serious challenge, grand jury witnesses have the opportunity to object to and litigate the illegality of the source of the Government's information. Thus, he concluded that *Egan* should be affirmed solely on this basis.[82]

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disagreed with the reasoning and result in *Egan* see United States v. Dudley, 427 F.2d 1140 (5th Cir. 1970). There the court held that section 2518(10)(a) does not allow a grand jury witness to make a motion to suppress. *Id.* at 1141-42.

74 450 F.2d at 210.

75 *Id.* at 211 (footnote omitted).

76 *Id.* at 213, 215.

77 *Id.* at 213.

78 *Id.* at 216. Judge Gibbons wrote a vigorous dissent in which he objected to the expansion of "a limited exclusionary rule of evidence into a witness privilege or a flat prohibition." *Id.* at 222. He stated further that the duty to testify publicly is fundamental

> despite the fact that it always involves a sacrifice not only of time and convenience but also of the privacy to which so much of the majority opinion is devoted. The witness' privacy yields to a paramount public interest even though his testimony may subject him to enmity, ridicule, danger or disgrace. That paramount public interest outweighs considerations of witness privacy because the whole life of the community depends upon how well the institutions of justice perform their role of social lubricator.

Id. Additionally, Judge Gibbons stated that *Silverthorne* does not mean that the exclusionary rule is available to anyone but a party and that the words used by Justice Holmes in *Silverthorne* have had "the juice of their context . . . squeezed from them, and the husks used as a premise for a syllogism he never contemplated." *Id.* at 230.

79 408 U.S. 41 (1972).

80 *Id.* at 52, 61.

81 *See id.* at 61 n.22. The Court reversed and remanded United States v. Gelbard, 443 F.2d 837 (9th Cir. 1971), for a first impression decision on the constitutional issue. The Ninth Circuit had previously decided that section 2518(10)(a) did not allow a grand jury witness to resort to a court for determination of a motion to suppress. 443 F.2d at 838-39.

82 408 U.S. at 63, 69.

Justice White's concurring opinion, however, implied that the *Gelbard* holding was a narrow one, and that the Court would probably reach a different result when faced with the fourth amendment problem:

> This unquestionably works a change in the law with respect to the rights of grand jury witnesses, but it is a change rooted in a complex statute . . . .[83]

Justice White's comments proved to be accurate when the Court was directly confronted with the fourth amendment problem in *Calandra*. The Court found that *Silverthorne* was not controlling in such circumstances,[84] and thus concerned itself with the validity and purpose of the exclusionary rule. The majority adopted the position that the main purpose of the rule was the deterrence of "future unlawful police conduct."[85] Similar reasoning had been used by the Court in previous cases of import which have dealt with the rule.[86] Perhaps the best example of this philosophy was enunciated in *Elkins v. United States*,[87] in which the Court stated:

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.[88]

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83 *Id.* at 70.

84 94 S. Ct. at 622 n.8. The Court distinguished *Silverthorne* on three grounds. First, the individuals involved had already been indicted. Second, the documents were not absolutely necessary to the grand jury for fulfillment of its investigatory function. The evidence was basically for the prosecutor's use at trial. Finally, the pre-indictment motion to suppress made at the grand jury stage was not the first time the issue of a fourth amendment violation had been raised. A district court had already ruled that there had been an illegal search and seizure when it ordered return of the papers. *Id.* Thus, there was no disruption to the grand jury proceeding by raising the issue again. A similar analysis was presented in Note, *Immunized Witness Before a Grand Jury is Entitled to a Judicial Determination Whether the Government's Questions are Improper Because Derived from an Illegal Wiretap*, 85 HARV. L. REV. 1060, 1072 (1972). For discussion of *Silverthorne* see notes 46-53 *supra* and accompanying text.

85 94 S. Ct. at 619.

86 *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 12 (1968); Mapp v. Ohio, 367 U.S. 643, 648 (1961); Weeks v. United States, 232 U.S. 383, 391-92 (1914).

87 364 U.S. 206 (1960).

88 *Id.* at 217. Although the *Elkins* language was quoted with favor in Mapp v. Ohio, 367 U.S. 643, 656 (1961), the *Mapp* Court left unclear the primary rationale of the exclusionary rule. The Court stated that the rule was an essential part of both the "substantive protections of due process" of the fourteenth amendment and the "right to privacy" of the fourth amendment. *Id.* at 655-56. In addition, the Court adopted deterrence as a major purpose of the rule. *Id.* at 656. Thus, the decision did not explicitly state whether deterrence, privacy, or due process should be the basis for future cases concerning the application of the exclusionary rule. In Linkletter v. Walker, 381 U.S. 618 (1965), the Court assuaged some of these doubts by stating that the purpose of the rule

It therefore appears that the majority in *Calandra* had adequate precedent for its conclusion that the purpose of the exclusionary rule was to deter unlawful official conduct. The dissent, however, authored by Justice Brennan, reasoned that the intention of the rule should not be so singularly limited. Rather, the preservation of both individual privacy and judicial integrity was thought to be within the aim of both the rule and the fourth amendment itself.[89] The decision by the majority to ignore "[f]or the first time" the preservation of judicial integrity as a primary objective of the rule was criticized.[90] This criticism would appear to be well-founded, for in cases such as *Mapp* and *Elkins* both this "normative" rationale and the deterrence theory were discussed by the Court.[91] The famous dissent of Justice Brandeis in *Olmstead v. United States*[92] was quoted by Justice Brennan as being indicative of the argument that in order to maintain trust in official action, the Government should not avail itself of evidence illegally obtained:

> "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[93]

With regard to the issue of privacy, Justice Brennan noted that the rule is " 'part and parcel' " of the prohibition against the invasion of personal privacy which is protected by the fourth amendment.[94]

Further dispute focused upon the origin of the exclusionary rule. The majority, having viewed the purpose of the rule to be one of deterrence, concluded that the rule was "a judicially-created remedy designed to safeguard Fourth Amendment rights."[95] The dissent again

was deterrence of the lawless actions of the police. *Id.* at 636-37. Even more recently, in Terry v. Ohio, 392 U.S. 1 (1968), the exclusionary rule was viewed as the principal mode to discourage "lawless police conduct." *Id.* at 12.

89 94 S. Ct. at 624, 627.

90 *Id.* at 626.

91 *See* Mapp v. Ohio, 367 U.S. 643, 659-60 (1961); Elkins v. United States, 364 U.S. 206, 222-23 (1960).

92 277 U.S. 438 (1928).

93 94 S. Ct. at 625 (quoting from Olmstead v. United States, 277 U.S. at 485) (Brandeis, J., dissenting)). Justice Holmes, in a separate dissent in *Olmstead*, voiced similar thoughts: "I think it a less evil that some criminals should escape than that the Government should play an ignoble part." 277 U.S. at 470.

94 94 S. Ct. at 626 (quoting from Mapp v. Ohio, 367 U.S. 643, 651 (1961)).

95 94 S. Ct. at 620. *See also* Wolf v. Colorado, 338 U.S. 25, 28 (1949) (the exclusionary

took issue with the majority reasoning, arguing that the rule was constitutionally guaranteed.[96] This difference of opinion was important to the outcome in *Calandra*, for the source of the rule was one of the determining factors in deciding whether the rule should be applied to proceedings other than the criminal trial—specifically, whether it is appropriate at the grand jury. If the rule is considered to be constitutionally required, then it may be advocated that courts should not have discretion to decide the scope of its application. If, on the other hand, it is viewed as a judicially created remedy, then restrictions on its application by the courts can be justified.[97] Consequently, the majority's characterization of the rule as a judicially created remedy aimed at deterrence established the foundation for the *Calandra* Court to restrict the scope of its use.

In the determination of whether the rule should be limited, the Court balanced the incremental gain in deterrence that would be obtained by extending the rule to the grand jury proceedings against the harm such an extension could cause to the proper functioning of that institution.[98] In balancing the competing factors, the Court placed particular weight on the "special nature" of the grand jury.[99] It accepted the view that the major purposes of the grand jury[100] are to investigate

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rule is "a matter of judicial implication" and is "not derived from the explicit requirements of the Fourth Amendment").

96 94 S. Ct. at 626. The dissent stated:

> The exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera.

Id. See note 88 *supra.*

97 *See* Comment, *Unconstitutionally Obtained Evidence Before the Grand Jury as a Basis for Dismissing the Indictment*, 27 MD. L. REV. 168, 179 (1967). There was much controversy over the origin of the rule prior to *Calandra. See generally* Wolf, *A Survey of the Expanded Exclusionary Rule*, 32 GEO. WASH. L. REV. 193 (1963); Note, *Standing of a Witness Before a Grand Jury to Challenge Evidence Procured Through Illegal Wiretapping—Applicability of Omnibus Crime Control and Safe Streets Act of 1968 and of Fourth Amendment*, 33 OHIO S.L.J. 181 (1972).

98 94 S. Ct. at 620. One author wrote that the exclusionary rule serves no purpose once "its deterrent efficacy . . . reaches a point of diminishing returns." Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964).

99 94 S. Ct. at 617-20.

100 The concept of the grand jury is embodied in U.S. CONST. amend. V, which provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .

The due process clause and the fifth amendment provision requiring grand jury indictment are not obligatory upon the states. *See* Alexander v. Louisiana, 405 U.S. 625, 633 (1972); Hurtado v. California, 110 U.S. 516, 538 (1884).

alleged criminal activity to determine whether a crime has been committed and to ascertain whether there is probable cause against an individual to justify bringing him to trial.[101]

To accomplish these ends, grand juries traditionally have been granted broad inquisitorial power without the restraints of procedural rights or evidentiary rules.[102] The duty to appear and testify before a grand jury is well-established.[103] Once before the grand jury, witnesses are afforded few constitutional safeguards in order to insure the success of the intended broad investigatory function.[104] For example, a witness

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For material covering the origin and development of the grand jury see Costello v. United States, 350 U.S. 359, 362 (1956); Blair v. United States, 250 U.S. 273, 279-82 (1919); Hale v. Henkel, 201 U.S. 43, 59 (1906); United States v. Smyth, 104 F. Supp. 283, 287-304 (N.D. Cal. 1952); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 321-23 (3d ed. rev. 1922); 8 J. MOORE, FEDERAL PRACTICE ¶ 6.01-6.07 (2d ed. 1973); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 151 (2d ed. 1898); Morse, *A Survey of the Grand Jury System* (pts. 1-2), 10 ORE. L. REV. 101, 217 (1931); Orfield, *The Federal Grand Jury*, 22 F.R.D. 343 (1958); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701 (1972). For criticism of the grand jury see Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965).

101 *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972); Costello v. United States, 350 U.S. 359, 362 (1956); *Ex parte* Bain, 121 U.S. 1, 11 (1887); Morse, *supra* note 107, at 321; Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 592-93 (1961). One writer interestingly questions whether probable cause at grand jury means that the accused is probably guilty or will probably be convicted, and concludes that the latter "seems more consistent with the history of the grand jury." Comment, *supra* note 97, at 178-79.

102 *See, e.g.*, United States v. Dionisio, 410 U.S. 1, 17-18 (1973) (a grand jury cannot be expected to hold "minitrials and preliminary showings" as to the reasonableness of its subpoenas); Wood v. Georgia, 370 U.S. 375, 392 (1962) (society's best interests are "served by a thorough and extensive investigation"); Hannah v. Larche, 363 U.S. 420, 449 (1960) (procedural rights are not available at grand jury because of their "disruptive influence" and because a grand jury "merely investigates and reports. It does not try."); Costello v. United States, 350 U.S. 359, 362 (1956) (the grand jury is not to be hampered by technical procedural or evidential rules); Blair v. United States, 250 U.S. 273, 282-83 (1919) (the scope of grand jury inquiry is broad, subject to only a few special exceptions). *But see* Beck v. Washington, 369 U.S. 541, 579-87 (1962) (Douglas, J., dissenting) (even in a grand jury proceeding, all requirements of due process should be applied to ensure fairness); Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807, 828 (1972) (procedural rights inherent in criminal justice system should not be abridged at grand jury).

103 *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 688 (1972); Kastigar v. United States, 406 U.S. 441, 443 (1972); Blair v. United States, 250 U.S. 273, 281 (1919).

104 Since the rights afforded to a grand jury witness are so limited, one commentator contends that the fifth amendment privilege against self-incrimination should be employed to protect the "interests represented in the first, fourth, and fifth amendments and in the constitutional function and purpose of the grand jury." Rief, *The Grand Jury Witness and Compulsory Testimony Legislation*, 10 AM. CRIM. L. REV. 829, 851 (1972). For further discussion on the rights of a grand jury witness see notes 105-10 *infra* and accompanying text.

before a grand jury has no right to counsel[105] or to confront and cross-examine witnesses.[106] Moreover, recently the Supreme Court has been particularly reluctant to expand the rights granted to a witness when it involves a need for ancillary hearings.[107]

In *Calandra*, the Court was cognizant of the problems that would be raised by permitting additional hearings at the grand jury level:

> Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective.[108]

Because it also found that the increase in deterrent effect would be minimal, it refused to extend the application of the exclusionary rule.[109] The only fourth amendment question still allowed to be litigated would be one where the subpoena duces tecum was too broad and " 'sweeping in its terms to be regarded as reasonable.' "[110]

One of the major issues discussed in depth by both the district

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105 *In re* Groban, 352 U.S. 330, 333 (1957); United States v. Scully, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955).

106 United States v. Scully, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955).

107 *See* United States v. Dionisio, 410 U.S. 1, 17-18 (1973); United States v. Mara, 410 U.S. 19, 22 (1973); Note, *supra* note 32, at 1166. *But see In re* Grand Jury Proceedings (Jacqueline Schofield), 486 F.2d 85, 93-94 (3d Cir. 1973) (relevancy of subpoena must be proved by the Government before the district court will enforce it by the use of civil contempt). For further analysis in this area see Note, *Government Must Demonstrate Relevancy Prior to Seeking Enforcement of Grand Jury Subpoenas Through Civil Contempt*, 5 SETON HALL L. REV. 378 (1974).

108 94 S. Ct. at 621 (footnote omitted).

109 *Id.* at 623.

110 *Id.* at 619 (quoting from Hale v. Henkel, 201 U.S. 43, 76 (1906)). The Court in *Henkel* also stated that "some necessity should be shown . . . or some evidence of their materiality produced, to justify" compelling production of large masses of papers, documents and records. 201 U.S. at 77. *Accord*, Schwimmer v. United States, 232 F.2d 855, 861-62 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956). For cases applying the *Henkel* criteria see Brown v. United States, 276 U.S. 134, 142-45 (1928); Wilson v. United States, 221 U.S. 361, 376 (1911).

A witness may also refuse to answer questions on grounds unrelated to the fourth amendment, such as the fifth amendment privilege. *See, e.g.*, Murphy v. Waterfront Comm'n, 318 U.S. 52, 77-78 (1964); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

Common law and statutory privileges have also been recognized as a basis for refusal to testify. For examples of common law privileges see Blau v. United States, 340 U.S. 332 (1951) (husband-wife privilege); *In re* Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973) ("work product" of attorney privilege); United States v. Judson, 322 F.2d 460 (9th Cir. 1963) (attorney-client privilege); *In re* Verplank, 329 F. Supp. 433 (C.D. Cal. 1971) (priest-penitent privilege); Comment, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97.

For examples of statutory privileges *see, e.g.*, N.J. STAT. ANN. §§ 2A:84A-17 to 28 (Supp. 1973-74).

court and the court of appeals, yet ignored by the Supreme Court, was the question of whether an immunized witness has standing to object to fourth amendment violations. The lower courts granted standing to Calandra based on his status as a party aggrieved under Rule 41(e).[111] This Rule was interpreted in *Jones v. United States*,[112] where the Supreme Court held that a "person aggrieved" included victims of illegal searches and those against whom the searches and/or seizures were directed.[113] The Court added that a "person aggrieved" did not include one who claimed prejudice through the use of illegally obtained evidence where the search and seizure was "directed at someone else."[114] Further discussion concerning standing was provided by the Court in *Alderman v. United States*.[115] There the expansion of the standing requirement was rejected by the Court when it denied standing to a co-defendant who had moved to suppress the fruits of an illegal search and seizure that was directed against another defendant.[116] In so doing, it was resolved that the deterrent factor was the primary purpose of the exclusionary rule and that extending its application would provide no "additional benefits."[117] The opinion, however, appeared to leave undecided the question of whether standing might be available to non-defendants when it stated that "[t]he victim can and very probably will object for himself when and if it becomes important for him to do so."[118]

Despite the relatively conservative attitude of the Supreme Court in *Jones* and *Alderman*, the lower courts in *Calandra* attempted to broaden the scope of standing by acknowledging that an immunized grand jury witness was a "person aggrieved" under Rule 41(e).[119] The basis for affording standing was posited on the recognition of a fourth amendment right to privacy for which the remedy for violation was an application of the exclusionary rule.[120] The court of appeals rejected

111 *See* 465 F.2d at 1222-24. For text of Rule 41(e) see note 11 *supra*.

112 362 U.S. 257 (1960).

113 *Id.* at 261.

114 *Id.*

115 394 U.S. 165 (1969).

116 *Id.* at 174.

117 *Id.* at 174-75.

118 *Id.* at 174.

119 *See* note 111 *supra*.

120 465 F.2d at 1222, 1224; 332 F. Supp. at 740. The lower courts accepted the proposition that standing could be granted to a person if his claim fell " 'within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " 465 F.2d at 1222; 332 F. Supp. at 739 (quoting from Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 153 (1970)). *See generally* White & Greenspan, *supra* note 27.

any arguments proclaiming that the extension of standing for a motion to suppress at a grand jury proceeding would be a burden to the administration of justice.[121] The major concern was to rectify the fact that "Calandra's right to privacy ha[d] been violated."[122]

The Supreme Court, however, failed to squarely confront the issue of standing because it chose to decide the case on the traditional fourth amendment grounds without serious consideration of the right to privacy argument. By eliminating the substantive foundation upon which an immunized witness might make a motion to suppress at the grand jury level, the Court, in effect, obviated the need to decide the standing issue. Additionally, the Court rejected Calandra's alternative argument that a witness privilege existed whereby each question that was asked concerning the illegal search worked a new fourth amendment wrong and therefore did not have to be answered.[123] This theory of a fourth amendment privilege may be considered analogous to the fifth amendment witness privilege against self-incrimination. The Court reasoned, however, that the use of illegally obtained evidence as a basis for questions asked of a grand jury witness does not create a new constitutional violation, but rather was "a derivative use of the product of a past unlawful search and seizure."[124] Thus, because Calandra was immunized from prosecution and therefore without recourse at trial, and not permitted to make a motion to suppress or invoke a fourth amendment witness privilege at the grand jury level, he was totally without a remedy which would protect his privacy.[125]

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121 465 F.2d at 1225-27.

122 *Id.* at 1226 (footnote omitted). When the court of appeals balanced the "interest of unencumbered inquiry and the efficient administration of justice" against "the importance which society attaches to the protection of the Fourth Amendment guarantee of privacy," it concluded that the right of privacy shall not succumb to expediency in the prosecution of crime. *Id.* at 1225-26. For opposition to this position see note 78 *supra.*

123 94 S. Ct. at 622-23. The right to a witness privilege based on a fourth amendment right to privacy was also recognized by Judge Adams in *Egan* and Justice Douglas in *Gelbard. See In re* Egan, 450 F.2d at 210-17; Gelbard v. United States, 408 U.S. at 62 (Douglas, J., concurring).

Other witness privileges based upon constitutional guarantees have been argued for, but not accepted. *See* Gravel v. United States, 408 U.S. 606 (1972) (claim by Senator that speech and debate clause is a privilege for his aides); Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972) (first amendment urged as a newsman's privilege). For further discussion concerning witness privilege see note 110 *supra* and accompanying text.

124 94 S. Ct. at 623.

125 Of course, the victim of an unlawful search may be able to maintain a cause of action for damages against the offending officers for the violation of the individual's fourth amendment rights. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395-97 (1971). However, the efficacy of using civil remedies to redress violations of constitutional rights was soundly criticized by Judge Battisti:

[N]either the motion to return nor a suit for damages can be held to be an

The effect of the *Calandra* holding will be felt by all witnesses before a grand jury—not solely by those in a position similar to Calandra's. Those witnesses who have been the subject of an illegal search but have not been immunized will have recourse through a motion to suppress only at trial or through a civil suit against the offending officials.[126] Therefore, a witness in that position could be subjected to the harassment of an appearance at the grand jury, unfavorable publicity, and indictment, all based upon evidence that would be inadmissible at trial.

Additional consequences of the decision extend to an individual who is the object of the testimony elicited from a grand jury witness who was the subject of an illegal search and seizure. Because the individual is neither the victim of the search nor the one against whom the search was directed, arguably, under the holding of *Alderman*, he would be without standing to make a motion to suppress at his own trial.[127] Thus, because *Calandra* requires testimony from a grand jury witness, based on the illegally seized evidence, both of which may subsequently be admissible against the subject of the testimony at trial, it may give further incentive to Government officials to conduct unreasonable searches.

Although some parties may be left without recourse under the *Calandra* holding, the decision still appears to be well-founded. If one acknowledges that each individual is responsible for the proper maintenance of the criminal justice scheme, compelling a grand jury witness

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adequate protection of one's Fourth Amendment rights. It is just as inadequate to be informed that one will not be prosecuted for governmental misconduct as it is to say that years later the United States may monetarily reimburse one for its violations of his privacy. Money damages do not constitute complete restitution for the infringement of constitutional rights.

332 F. Supp. at 741. For further discussion of this area see Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

126 Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395-97 (1971). *See* note 125 *supra*.

127 The petitioners in *Alderman* requested a retrial if any evidence used for their conviction was obtained through an unlawful electronic surveillance, "regardless of whose Fourth Amendment rights the surveillance violated." 394 U.S. at 171. In denying the petitioners' arguments, the Court stated:

> This expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it is admittedly inconsistent with prior cases, and we reject it. The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.

Id. at 171-72. Therefore, if physical incriminating evidence can be produced at trial, it follows that testimony based on an illegal search and seizure would also be admissible at trial against the subject of the testimony, who is now the defendant. Thus, it appears that the *Calandra* holding is not as drastic as the dissent proclaims. For further discussion of *Alderman* see notes 115-18 *supra* and accompanying text.

to verbally communicate what he knows concerning criminal activity hardly seems a sufficient violation of a witness' right to privacy to warrant protection. Additionally, by conferring upon every witness at the grand jury the right to stop proceedings and litigate each alleged search and seizure violation, the grand jury's viability and very existence may be seriously impaired. The dissenting Justices in *Calandra* looked pessimistically upon the majority holding, fearing that it is a large step towards the total abandonment of the exclusionary rule.[128] This harsh view seems unjustified, however, since the *Calandra* decision is primarily concerned with retaining the more circumscribed approach that has been followed when according rights and privileges to grand jury witnesses. Viewed in this way, the decision can be considered to be the attainment of a workable balance between the maintenance of individual rights and the preservation of the grand jury for the investigation and detection of crime.

Nathanya F. Guritzky

128 94 S. Ct. at 628. Only one Justice, to date, has outwardly advocated total abandonment. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 414-24 (1971) (Burger, C.J., dissenting); Killough v. United States, 315 F.2d 241, 259-60 (D.C. Cir. 1962) (Burger, J., dissenting).